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CAUSE NO. D-1-GN-11-003130

THE TEXAS TAXPAYER & STUDENT FAIRNESS COALITION, et al.; CALHOUN COUNTY ISD, et al.; EDGEWOOD ISD, et al. FORT BEND ISD, et al. TEXAS CHARTER SCHOOL ASSOCIATION, et al. Plaintiffs	§	IN THE DISTRICT COURT
JOYCE COLEMAN, et al. Intervenors	§	
vs.	§	200th JUDICIAL DISTRICT
MICHAEL WILLIAMS, COMMISSIONER OF EDUCATION, IN HIS OFFICIAL CAPACITY; SUSAN COMBS, TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, IN HER OFFICIAL CAPACITY; TEXAS STATE BOARD OF EDUCATION, et al. Defendants.	§	TRAVIS COUNTY, TEXAS

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DEFENDANTS' PLEA TO THE JURISDICTION

TO THE HONORABLE JOHN K. DIETZ, DISTRICT COURT JUDGE:

Defendants, Michael Williams, Commissioner of Education, Susan Combs, Texas Comptroller of Public Accounts, Greg Abbott, Attorney General of Texas, in their official capacities, the Texas State Board of Education, and the Texas Education Agency file this plea to the jurisdiction, respectfully requesting the Court to dismiss Plaintiffs' and Intervenors' claims for the reasons that follow.

I. INTRODUCTION

1. Plaintiffs and Intervenors, who include school districts, parents, children, and associations, all contend that the Texas school finance system violates Article VII, Section I of the Texas Constitution. They each request from the Court declarations that the system is unconstitutional and an injunction preventing Texas officials from funding or otherwise implementing the system.

2. The parties have fully litigated many of the issues present in the case. Based on the Plaintiffs' and Intervernors' pleadings, as well as facts developed during the course of trial, Defendants contend that the Court lacks jurisdiction over certain claims in this suit because (1) the Plaintiffs and Intervenors lack standing to bring claims under Article VII, Section 1 of the Texas Constitution; (2) claims under Article VII, Section 1 of the Texas Constitution are barred by the Political-Question Doctrine; (3) the Charter Plaintiffs' challenge to the manner in which charter schools receive funding is barred by sovereign immunity; and (4) Plaintiffs and Intervenors suing solely as taxpayers lack taxpayer standing to assert their claims.

II. PLEA TO THE JURISDICTION STANDARD

3. A plea to the jurisdiction is a jurisdictional argument made in any responsive pleading. *See Thomas v. Long*, 207 S.W.3d 334, 338-39 (Tex. 2006) (concluding that the denial of a motion for summary judgment raising jurisdictional issues operated as a "plea to the jurisdiction" for purposes of section 51.014 of the Civil Practice and Remedies Code); *see also* TEX. R. CIV. P. 85 (a plea to the jurisdiction is a component of an answer). It may address jurisdiction over particular claims without challenging jurisdiction over all claims. *Thomas*, 207 S.W.3d at 338 (applying *Am. Motorists Ins. Co. v. Fodge*, 63 S.W.3d 801, 805 (Tex. 2001)).

4. Whether a trial court has jurisdiction is a question of law. *Westbrook v. Penley*, 231 S.W.3d 389, 394 (Tex. 2007). The plaintiff bears the burden of establishing the trial court's

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jurisdiction. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). If the pleadings do not affirmatively demonstrate the trial court's jurisdiction but do not demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiffs should be afforded the opportunity to amend. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-27 (Tex. 2004). But if the pleadings affirmatively negate jurisdiction, then a plea to the jurisdiction may be granted without allowing an opportunity to amend. *Id.* at 227. In reviewing a plea to the jurisdiction, the court may consider the pleadings and any relevant evidence submitted by the parties when doing so is necessary to resolve the jurisdictional issues raised. *Id.* This standard applies to challenges to plaintiffs' standing based either on the text of plaintiffs' petition or on facts attached to dispositive motions or developed in front of a factfinder. *E.g.*, *Stop the Ordinances Please v. City of New Braunfels*, 306 S.W.3d 919, 924 (Tex. App.—Austin 2010, no pet.) (discussing pleas to challenge standing and plaintiffs' right to replead if standing defect is based on absence of allegation rather than allegation that affirmatively negates standing).

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III. PLAINTIFFS AND INTERVENORS LACK STANDING TO BRING CLAIMS UNDER ARTICLE VII, SECTION 1 OF THE TEXAS CONSTITUTION BECAUSE THEIR REQUESTED RELIEF WILL NOT REDRESS THEIR ALLEGED INJURIES

5. As noted above, Plaintiffs and Intervenors complain that the current school finance system does not satisfy one or more mandates in article VII, section 1 of the Texas Constitution, which makes it "the duty of the Legislature" to establish and make "suitable" provision for the support and maintenance of a public school system that is "efficient" and achieves a "general diffusion of knowledge." TEX. CONST. art. VII, § 1. Those alleged constitutional violations, they contend, cause harm to the interests of school districts, charter schools, parents, children, taxpayers, and businesses.

6. But the common relief sought by these parties is only a half measure, and one that would actually hurt them rather than help them. They request declarations that the current system is unconstitutional and an injunction preventing state education officials from distributing any school funding or otherwise implementing that system. In other words, they "again ask the Texas courts to close the Texas public schools." *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 800 (Tex. 2005) (Brister, J., dissenting) (*WOC II*). Of course, that remedy would prove infinitely more harmful to these parties than the status quo, as even an allegedly deficient public school system is better than no system at all.

7. To obtain complete relief, then, Plaintiffs and Intervenors must count on the Texas Legislature to react to that order shuttering the public schools by creating a new school finance system that comports with the Court's view of article VII's standards. But the Legislature is not a party here. And even if it were, the Court could not enjoin it to pass laws to fulfill its constitutional duties. Any order directing the Legislature to engage in lawmaking would amount to an attempt at legislating by the judicial branch, which would clearly violate the Texas Constitution's separation-of-powers mandate. TEX. CONST. art. II, § 1.

8. Because full relief for Plaintiffs and Intervenors depends on the future actions of another branch of Texas government that cannot be brought before this Court, their alleged injuries are not redressable. That is fatal to their standing to bring their claims under article VII, section 1.

A. To Establish Standing, Plaintiffs And Intervenors Must Show That Their Injuries Are Likely To Be Redressed By Their Requested Relief

9. "Standing is a constitutional prerequisite to suit." *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 150 (Tex. 2012). If a plaintiff lacks standing to assert a claim, a court must dismiss that claim for lack of jurisdiction. *Id.*

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10. The test for standing under Texas law "parallels" the federal test. *Id.* at 154. The Texas standard "requires a concrete injury to the plaintiff and a real controversy between the parties that will be resolved by the court." *Id.* Similarly, under federal law, "'[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Because of the similarities between Texas and federal law in this regard, the Texas Supreme Court has looked to federal precedent for "guidance" in evaluating standing. *Id.*

11. The Supreme Court has specifically held that federal law is "consonant" with Texas law with respect to the "redressability" prong of standing. *Id.* at 155. Under Texas law, then, that element "requires that the plaintiff's alleged injury be 'likely to be redressed by the requested relief.'" *Id.* (quoting *Allen*, 468 U.S. at 751). As a result, if "a plaintiff suing in a Texas court requests injunctive relief as well as damages, but the injunction could not possibly remedy his situation, then he lacks standing to bring that claim." *Id.* (citing *Williams v. Lara*, 52 S.W.3d 171, 184-85 (Tex. 2001)).

B. Plaintiffs' And Intervenors' Requested Relief Cannot Remedy Their Alleged Injuries

12. Plaintiffs and Intervenors all claim to suffer injury from deficiencies in the current public school system that rise to the level of violations of article VII, section 1 of the Texas Constitution. But the declaratory and injunctive relief that they seek would only prevent executive-branch officials from implementing or funding that system. That "remedy," by itself, would not redress Plaintiffs' and Intervenors' claimed injuries; to the contrary, it would inflict far greater injury upon Plaintiffs and Intervenors by depriving them of any public school system at all.

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13. Courts have found the redressability prong of standing to be lacking under similar circumstances—that is, where the plaintiff is allegedly injured because he receives insufficient benefit from a government program, but his requested relief is to invalidate the program itself.

14. For example, in *Henderson v. Stalder*, 287 F.3d 374, 376-77 (5th Cir. 2002), Planned Parenthood of Louisiana ("PPL") challenged the constitutionality of a state statute creating a "Choose Life" specialty-license-plate program, the proceeds of which would fund grants to organizations that promote adoption over abortion. PPL's alleged injury was that its abortion-related activity rendered it ineligible for the statutory grants, but the relief it sought was a declaration that the program was unconstitutional and an injunction against the statute's enforcement. *Id.* at 381-82. The court held that PPL lacked standing because invalidating the program would not redress its injury, as "there would then be no fund from which PPL could seek grants." *Id.* at 382.

15. In *Biszko v. RIHT Financial Corp.*, 758 F.2d 769, 770-71 (1st Cir. 1985), shareholders of a Rhode Island bank holding company challenged the constitutionality of a Rhode Island statute that authorized the acquisition of such companies by buyers located in other New England States. The shareholders' alleged injury was that this geographic limitation on potential acquirors stifled competition to buy their company, which in turn depressed the price offered for their shares. *Id.* at 771. But the relief the shareholders sought was invalidation of the statute that authorized this limited range of interstate acquisition of bank holding companies, which would return state law to the point where only in-state buyers could acquire such companies. *Id.* at 772. Because that result would constrict, rather than widen, the market for the shareholders' stock, thereby further depressing that stock's value, the court held that declaring the statute unconstitutional would not redress the shareholders' injury. *Id.*

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16. The Second Circuit reached a similar conclusion in *Albanese v. Federal Election Commission*, 78 F.3d 66 (2d Cir. 1996) (per curiam). There, potential congressional candidates and their supporters challenged the constitutionality of the Federal Election Campaign Act of 1971, claiming that the Act established a campaign-finance system that improperly favored candidates backed by wealthy supporters and incumbents with access to mail franking privileges. *Id.* at 67. The relief sought included a declaration that the entire Act was unconstitutional. *Id.* at 68. The court held that this remedy flunked the redressability prong of standing, reasoning that, because the Act limited the permissible amount of campaign contributions, elimination of those limits along with the rest of the Act would actually place the plaintiffs "at an even greater disadvantage." *Id.* at 68-69.

17. The lesson of these decisions is that the remedy of burning down the barn to get rid of the rats will never satisfy the redressability prong of standing. Consistent with this authority, the Court should hold that Plaintiffs and Intervenors lack standing to pursue their claims under article VII, section 1 of the Texas Constitution. Because their asserted injury is that the Texas public school system fails to satisfy their educational needs, an injunction that shuts down the school system will hardly redress that injury; it will only make it far worse.

C. Plaintiffs And Intervenors Cannot Rely On The Legislature's Presumed Reaction To A Court Order To Satisfy Redressability

18. Of course, Plaintiffs and Intervenors do not really want to shut down the Texas public school system, even though that is exactly what they are asking this Court to do. To get complete relief, they can only *hope* that the Texas Legislature will react to an injunction closing the schools by creating a new school finance system that meets their asserted needs. Indeed, some of them have made that hope explicit by asking the Court to enjoin implementation of the current system "until an efficient adequate and equitable system is created." Tex. Taxpayer & Student Coal. Fifth Am.

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Original Pet. ¶ 70. But hopes and assumptions about what the Legislature might do in the future cannot fill the gap in the redressability showing that Plaintiffs and Intervenors must make here.

19. "Courts have been loath to find standing when redress depends largely on policy decisions yet to be made by government officials." *US Ecology, Inc. v. U.S. Dep't of the Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000). Thus, courts have routinely rejected the standing of plaintiffs whose requested remedies would not fully redress their injuries, but instead were sought as catalysts for legislative or executive action that the plaintiffs actually needed to obtain complete relief.

20. For example, in the *Biszko* decision discussed above, the plaintiffs argued that "although striking down the statute might cause a temporary decline in the value of their stock, the Rhode Island legislature would soon be moved, *sua sponte* or by the persuasive efforts of non-New England banks, to pass a statute permitting full interstate acquisitions of Rhode Island banks." 758 F.2d at 772-73. The court rejected this "speculative" argument for standing, predicated as it was on "a benefit that [the plaintiffs] might gain were the Rhode Island legislature to react in a certain way to a decision by this court." *Id.* at 773.

21. Likewise, in the *Albanese* case discussed above, the plaintiffs contended that invalidation of the Federal Election Campaign Act would pave the way for individual States to enact campaign-finance laws more favorable to their position. 78 F.3d at 69. The court held that the plaintiffs could not rely on that surmise to establish redressability, as there was "no basis" for inferring that the plaintiffs' State would actually pass such legislation. *Id.*

22. Other courts have reached similar conclusions when a plaintiff's redressability showing turned on future legislative or executive response to a court order. *E.g.*, *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d. 1220, 1226-27 (9th Cir. 2008) (holding that plaintiffs lacked standing to challenge the validity of an agency's biological opinion that was a prerequisite

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to the United States' entry into an international treaty that was allegedly causing salmon over-harvesting, because complete relief ultimately depended on the Executive Branch deciding to withdraw from the treaty); *Wilderness Soc'y v. Norton*, 434 F.3d 584, 590-91 (D.C. Cir. 2006) (holding that plaintiffs lacked standing to seek an injunction compelling an agency to forward its wilderness recommendations to the President because "it would still be up to Congress to decide whether to designate the cited lands as wilderness").

23. That the Texas Legislature has a constitutional duty to establish and maintain a public school system does not change the redressability analysis. It is "well settled" in American jurisprudence "that the courts have no power to enforce the mandates of the Constitution which are directed at the legislative branch of the government or to coerce the legislature to obey its duty, no matter how clearly or mandatorily imposed on it, with respect to its legislative function." Annotation, *Power and Duty of Court Where Legislature Renders Constitutional Mandate Ineffectual by Failing to Enact Statute Necessary to Make It Effective or by Repealing or Amending Statute Previously Passed for That Purpose*, 153 A.L.R. 522 (1944). Consistent with our Constitution's separation-of-powers mandate, TEX. CONST. art. II, § 1, Texas adheres to that principle. *See City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798, 803 (Tex. 1955) (noting that the courts could not compel the Legislature to pass conservation laws, even though it is required to do so by article XVI, section 59 of the Texas Constitution). As a result, Plaintiffs and Intervenors can never obtain complete relief for their injuries from the courts; they can only destroy the current system and hope for the Legislature to create a new one that passes constitutional muster.

24. Because the Plaintiffs' and Intervenors' claims under article VII, section 1 are inherently not judicially redressable, they should be dismissed for lack of standing.

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IV. PLAINTIFFS' AND INTERVENORS' CLAIMS UNDER ARTICLE VII, SECTION 1 OF THE TEXAS CONSTITUTION ARE BARRED, IN WHOLE OR IN PART, BY THE POLITICAL-QUESTION DOCTRINE

25. Plaintiffs' and Intervenors' claims under article VII, section 1 of the Texas Constitution should be dismissed as nonjusticiable political questions. Although the Texas Supreme Court has ruled that such claims are not categorically barred, *WOC II*, 176 S.W.3d at 776-81, Defendants intend to urge the Court to reconsider on appeal. Regardless, some of Plaintiffs' and Intervenors' more specific claims are barred by the political-question doctrine as it is currently interpreted by the Texas Supreme Court.

A. All Claims Under Article VII, Section 1, Are Nonjusticiable Political Questions

26. In *West Orange-Cove II*, the Texas Supreme Court erroneously rejected Defendants' argument that claims based on article VII, section 1 present nonjusticiable political questions. *Id.* at 776-77 (citing *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 394 (Tex. 1989) (*Edgewood I*)). Defendants recognize that this Court is bound by that holding, but seek to preserve their arguments to the contrary.

27. The political-question doctrine defies a succinct definition. As stated by a plurality of the United States Supreme Court, "[s]ometimes . . . the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights." *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (plurality op.). Thus, rather than provide a simple test, the Supreme Court has identified six factors that a court should look at to decide whether a question is nonjusticiable:

> [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due

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> coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962).

28. As both the Texas Supreme Court and the United States Supreme Court have noted, the political-question doctrine is a function of separation of powers. *Id.* at 210-11; *WOC II*, 176 S.W.3d at 778. Texans have made the separation of the powers of the three branches of government an explicit part of their Constitution. TEX. CONST. art. II, §1. Thus, the political-question doctrine should have just as much, if not more, force in Texas courts as it does in federal courts. *Cf. WOC II*, 176 S.W.3d at 779-80 (questioning whether the *Baker* analysis applied in Texas).

29. As to the first factor described in *Baker*, there has been a textually demonstrable commitment of the school finance system to the Legislature, as the Texas Constitution specifically makes it the Legislature's duty to establish and support a public school system. TEX. CONST. art. VII, § 1; *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 523 (Tex. 1992) (*Edgewood III*) ("The duty to establish and provide for such a system is committed by the Constitution to the Legislature."). And, as described above, *see supra* Part III.B-C, the courts are powerless to order an effective solution. Given the commitment to the Legislature in the Constitution and the inability of the courts to provide redress, alleged violations of article VII, section 1 present nonjusticiable political questions.

30. In addition, despite the Supreme Court's attempts, there are still no judicially manageable standards for judging the efficiency, adequacy, and suitability of the school finance system. In *West Orange-Cove II*, the Court concluded that the standards were manageable because it was obvious that requiring only a first-grade reading level was inadequate, but requiring nuclear biophysics was not necessary. 176 S.W.3d at 778. But the ability to identify the ridiculous is a far

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cry from being able to set forth a clear standard that can be applied to any and all aspects of the Texas school finance system. Indeed, the current trial demonstrates that there are no easy solutions when courts begin to second-guess the Legislature's policy choices in creating the school finance system.[1]

31. The Supreme Court failed to address any of the other *Baker* factors, such as "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government." *Baker*, 369 U.S. at 217. But those apply, as well. In setting the budget, including education spending, the Legislature is limited by current economic circumstances (such as the recent recession), limits on spending, TEX. CONST. art. III, § 49a, limits on the ability to raise funds, *e.g.*, *id.* art. VIII, § 24, and the needs of every other state agency, service, and program. The decision of how much funding is available for public education is inherently a policy determination for the Legislature. That decision is due respect, and courts should not second-guess it. The system was intended to be left in the hands of the Legislature, and the claims under article VII, section 1 should be dismissed as political questions.[2]

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1. For example, Plaintiffs' experts' presentations in adequacy and efficiency result in discussions of multiple regressions, endogeneity, the stochastic frontier, F statistics, dummy variables, and Hansen J statistics. *See, e.g.*, 12.RR.96, 131, 171, 13.RR.36-39, 67, 16.RR.119, 131. Surely, the Texas Constitution did not contemplate such an analysis when it simply required that suitable provision be made for an efficient school system.

2. Although courts in some other States have rejected this argument, several state courts have ruled that lawsuits regarding the education system are political questions. *See, e.g.*, *Ex parte James*, 836 So. 2d 813, 819 (Ala. 2002) (per curiam); *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 408 (Fla. 1996) (per curiam); *Okla. Educ. Ass'n v. State*, 158 P.3d 1058, 1065-66 (Okla. 2007); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 58 (R.I. 1995).

B. Plaintiffs' and Intervenors' More Specific Claims Are Political Questions

32. Although holding that it can reach questions raised under article VII, section 1, the Supreme Court has been adamant that it cannot "prescribe *how* the [article VII] standards should be met." *WOC II*, 176 S.W.3d at 753; *see also id.* at 779. In *Edgewood I*, the Court was clear that it would not "instruct the legislature as to the specifics of the legislation it should enact" and that "[t]he legislature has primary responsibility to decide how best to achieve an efficient system." 777 S.W.2d at 399. This sentiment has been repeated in every school-finance case that has followed.[3]

33. Most pertinent to this case, the Court in *West Orange-Cove I* declared that "it is outside the scope of judicial authority to review the Legislature's policy choices in determining what constitutes an adequate education, and we emphasize that the courts cannot undertake to review those choices one by one or attempt to define in detail an adequate education." *West Orange-Cove Consol. I.S.D. v. Alanis*, 107 S.W.3d 558, 582 (Tex. 2003) (*WOC I*). Thus, in *Edgewood IV*, when one group of plaintiffs sought a ruling that the lack of vouchers denied them a constitutionally efficient and suitable education, the Court affirmed the trial court's dismissal of the claims. 917 S.W.2d at 747. The Court stated that such claims went beyond the role of the Court and into the province of the Legislature. *Id.* at 748. The same should hold true here.

34. Although each group of plaintiffs here has sought to strike the school finance system in its entirety, their reasons for doing so require the Court to evaluate the Legislature's policy choices

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3. *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 747 (Tex. 1995) (*Edgewood IV*) ("Since then, we have consistently refrained from prescribing 'the means which the Legislature must employ in fulfilling its duty.'"); *Edgewood III*, 826 S.W.2d at 523 ("We have not, and we do not now, suggest that one way of school funding is better than another, or that any way is past challenge, or that any member of this Court prefers a particular course of action . . . or that one measure or another is clearly constitutional."); *id.* ("[W]e do not prescribe the structure for 'an efficient system of public free schools.'"); *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491, 498 (Tex. 1991) (*Edgewood II*) ("We do not prescribe the means which the Legislature must employ in fulfilling its duty.").

one by one. Challenges have been made to a variety of the Legislature's individual decisions, from the weights used to calculate funding, to preschool funding, to the cap on charter schools, to the evaluation of teachers, to class sizes—to name only a few. And every Plaintiff and Intervenor has asked that the Court retain continuing jurisdiction "until the Court has determined that the Defendants have fully and properly complied with its orders," suggesting that they seek some form of continual monitoring of the Legislature's choices.[4]

35. The Court should not rule on pieces of the school finance system, as such a ruling would effectively violate the Supreme Court's admonition to refrain from prescribing how the system must look. *See WOC II*, 176 S.W.3d at 753. Take the charter-school cap, for example. To hold that the cap renders the entire system unconstitutionally inefficient will enshrine unlimited charter schools into the Texas Constitution. This not only violates the instructions of the Supreme Court, it will also hamstring future Legislatures who will have to seek a constitutional amendment to put any limits on charter schools in the future. The Court cannot engage in a piecemeal analysis of the system, but must consider—at most—the system as a whole. Anything less is a political question.

36. For similar reasons, the Efficiency Intervenors' entire claim of "qualitative efficiency" must be dismissed as a political question. Although the Efficiency Intervenors seek system-wide relief, their claim of inefficiency requires the Court to evaluate specific decisions of the Legislature—whether the Legislature could have been more financially efficient when it ordered the current financial accountability system, or set teacher standards, or restricted Home-Rule Charters. Third Am. Plea in Intervention of the Efficiency Intervenors ¶¶ 12-20. Each of those decisions is

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4. The Court, however, cannot keep continuing jurisdiction over the case. *See Case v. Walker*, 573 S.W.2d 513, 515 (Tex. 1978). By rule, a trial court's plenary power expires thirty days after it enters a final judgment, absent a timely motion for new trial. *In re Daredia*, 317 S.W.3d 247, 250 (Tex. 2010) (per curiam); *see also* TEX. R. CIV. P. 329b.

committed to the sound discretion of the Legislature. They may not be reviewed on an individual basis without running afoul of Supreme Court precedent.

37. In its political-question analysis in *West-Orange Cove II*, the Court noted that "[l]itigation over the adequacy of public education may well invite judicial policy-making, but the invitation need not be accepted." 176 S.W.3d at 779. Plaintiffs and Intervenors have extended such an invitation to the Court. The Court should decline to address such questions under the political-question doctrine.

V. THE CHARTER SCHOOL PLAINTIFFS' CHALLENGES TO SPECIFIC ASPECTS OF THE CHARTER-SCHOOL SYSTEM ARE BARRED BY SOVEREIGN IMMUNITY

38. The Charter School Plaintiffs (Mario Flores, *et al.*) claim that the current school finance system should be declared invalid under the Texas Constitution. Specifically, they allege that the system is inefficient in violation of article VII, section 1 because: (1) the current funding structure does not provide facilities funding to charter schools, (2) charter-school funding is based on a state-wide average rather than district-specific funding needs, and (3) the statutory cap on charter schools restricts the Commissioner of Education's ability to issue more charters. Flores First Am. Pet.¶¶ 26-31. They also suggest that there is an equal-protection violation because charter schools are treated differently from school districts. *Id.* ¶ 37.

39. The individual Charter School Plaintiffs would have standing only to the extent that they would be able to establish standing to bring their claims as individuals challenging the funding of school districts. *See supra* Part III. Likewise, the Texas Charter Schools Association would have standing to bring these claims only to the extent that a school district would have standing to challenge the entire school finance system. *See supra* Part III.

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40. But the claims of the Charter School Plaintiffs are barred to the extent that they seek to declare the statutory cap on charter schools unconstitutional, change the funding formula for charter schools, or create an entitlement to facilities funding, because they are bringing a suit on contract.

41. Charter schools are part of the public school system of this State. TEX. EDUC. CODE § 12.105; *see LTTS Charter Sch., Inc. v. C2 Constr., Inc.*, 342 S.W.3d 73, 77 (Tex. 2011). They are created to encourage academic innovation and improve student learning in the Texas public school system. *See* TEX. EDUC. CODE § 12.001. Open-enrollment charter schools operate under one of 215 charters available to be granted by the State Board of Education. *Id.* § 12.101.[5] They can be operated "in a facility of a commercial or non profit entity, an eligible entity, or a school district, including a home-rule school district," *id.*, and are considered to be "part of the public school system," *id.* § 12.105.

42. The legal status of open-enrollment charter schools is governed by Chapter 12, subchapter D of the Education Code. That subchapter states that the educational programs provided by open-enrollment charter schools are treated as "public schools" for purposes of the Education Code. *Id.* § 12.103. Subchapter D, then, expressly applies a series of provisions outside the Education Code governing the rights of governmental entities to open-enrollment charter schools. *E.g.*, *id.* § 12.1051 (stating that Chapters 551 and 552 of the Government Code apply to open-

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5. This distinguishes "open enrollment" charter schools from charter schools operated directly by a school district or other educational institution. *See* TEX. EDUC. CODE § 12.002 (creating categories of charter schools). The other types of charter schools function under charters granted by a school district, *see id.* § 12.011 (home-rule school district charters are granted by board of the home-rule school district); *id.* § 12.052 (campus charter schools are granted by either the board of a home-rule school district or a non-home-rule school district), or granted by the State Board of Education under a separate grant of authority to create charters at public institutions of secondary education, *id.* § 12.152 (authorizing Board to grant such charters). Private institutions of secondary education and other private entities are limited to operating open-enrollment charter schools.

enrollment charter schools); *id.* § 12.1052 (same for Title 6 of the Local Government Code and Subchapter J of Chapter 441 of the Government Code).

43. The Education Code provides that a charter school is to be treated as a "public school" for purposes of the Code. *E.g.*, *id.* § 12.103(a) (making open-enrollment charter schools subject to federal and local statutes and zoning regulations governing "schools"). It does not say that a charter school is to be treated as a "school district." Open-enrollment charter schools enjoy specific statutory rights "to the same extent as a school district", *e.g.*, *id.* § 12.1056, but are treated as schools, *not* school districts, by the plain text of the Education Code, *e.g.*, *id.* § 12.103(a) (specifying that open-enrollment charter schools are treated as "public schools" for purposes of laws other than the Education Code).[6] By making open-enrollment charter schools like school districts—but not actually making them into school districts—the Legislature manifested its intent that these "schools" be treated differently from school districts. *See* Tex. Att'y Gen. Op. No. GA-0532 (2007) (distinguishing between the powers granted to schools and those granted to school districts in concluding that a charter school may not operate a police force, even though a school district may).

44. The Code further makes clear that the arrangement by which a charter school becomes entitled to funding, as a school rather than a school district, is in the form of a contract. The distribution of state money to open-enrollment charter schools is limited by the specific provisions

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6. The Education Code makes amply clear that charter schools are, at most, treated as though they were school districts, not *as* school districts for any provision of law. *See* TEX. EDUC. CODE § 12.104(c) (open-enrollment charter school is entitled to the "same level of services provided to school districts"); *id.* § 12.104(d) (commissioner may allow charter schools "to voluntarily participate in any state program available to school districts"); *id.* § 12.1051(b) (an open-government law "that applies to a school district" will also apply to an open-enrollment charter school); *id.* § 12.1052(c) (any provision "that applies to a school district" also applies to open-enrollment charter school); *id.* § 12.1053(c) (same); *id.* § 12.1054(b) (same).

of Subchapter D, and those limitations are memorialized in the school's "charter," which is an agreement in the form of a contract between the chair of the State Board of Education and the chief operating officer of the school. TEX. EDUC. CODE § 12.112. Payment on a contract is a contingent expectation, not a vested interest in funds. The contingent nature of the payments is confirmed by the text of section 42.258 of the Education Code, which makes clear that the Commissioner can recoup overpayments through withholding—if the payments weren't contingent, the Commissioner wouldn't have the power to withhold funds from future payments automatically. *Id.* § 42.258.

45. Sovereign immunity bars suits on contract, including suits to establish a contract's validity or require performance under it. *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855, 858 (Tex. 2002); *W.D. Haden Co. v. Dodgen*, 308 S.W.2d 838, 840-42 (Tex. 1958). Because the charter schools' right to continued funding is in the form of a contract, a suit to change the amount of that funding or change the conditions under which a charter school participates in the public school system, is a suit on a contract.

46. The Legislature is presumed to know the common law when it enacts a statute. *E.g.*, *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990). When it determined that charter-school funding would be treated as a contract, it necessarily intended that immunity from suit apply to lawsuits to require payment under, or modify, existing charters.

47. To the extent that their claims amount to a suit on contract, the Charter School Plaintiffs' requested declarations must be dismissed. The Court does not have jurisdiction, in the absence of a specific legislative waiver of immunity, to change the cap on the number of schools, to change the funding, or to expand the scope of funding agreed to under the charter schools' contracts with the State. Thus, although these plaintiffs can bring a suit challenging the constitutionality of the system to the extent that other individuals and school districts may properly

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do so, *see supra* Part III, they cannot sue to obtain a judgment that changes the terms of the contracts by which they participate in the public school system.

48. This is not only a settled legal principle, it is common sense. A party entering into a contract voluntarily accepts the terms of the contract. These plaintiffs consented to participate in a system where they were funded based on a per-student average and did not receive facilities funding. Their lawsuit is, thus, an attempt to use the judicial process to obtain a better bargain than they agreed to in the first place. Coercing the State into providing superior terms to those set out in an executed contract is a step beyond a mere suit for contract damages. All the policy rationales for immunity from suit on contracts apply doubly to a suit to obtain, and enforce, contract terms more favorable than the government initially negotiated.

VI. PLAINTIFFS AND INTERVENORS SUING SOLELY AS TAXPAYERS LACK STANDING TO CHALLENGE THE TEXAS PUBLIC SCHOOL SYSTEM

49. The Texas Association of Business ("TAB") claims standing as an association of taxpayers. Tr. 147:2-12, Jan. 17, 2013. It does not assert standing only on behalf of persons with children in the public school system. *See id.* Likewise, Plaintiffs Randy Pittenger, Chip Langston, and Brad King claim standing only as taxpayers; they do not have children attending Texas public schools. Tex. Taxpayer & Student Coal. Fifth Am. Original Pet. ¶¶ 4-5, 7.

50. The claims of the taxpayers who do not have children in the public school system, therefore, are based exclusively on taxpayer standing. Because taxpayer standing will not support a constitutional challenge to a policy, but is limited to seeking prospective injunctive relief to foreclose illegal expenditures, TAB's assertion of taxpayer standing demonstrates that it cannot establish associational standing, and the other taxpayers without children in the public education system are likewise barred.

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51. To maintain associational standing, an association's members must otherwise have standing to sue in their own right. *Tex. Ass'n of Bus.*, 852 S.W.2d at 447.

52. "A taxpayer may maintain an action solely to challenge proposed illegal expenditures; a taxpayer may not sue to recover funds previously expended or challenge expenditures that are merely 'unwise or indiscreet.'" *Williams*, 52 S.W.3d at 180 (citing *Hoffman v. Davis*, 100 S.W.2d 94, 96 (Tex. 1937)); *see also Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 556 (Tex. 2000) ("[A] taxpayer has standing to sue in equity to enjoin the *illegal expenditure* of public funds, even without showing a distinct injury." (emphasis added)).

53. The necessary corollary of this limitation on taxpayer standing, that it be directed at enjoining an illegal expenditure, is that taxpayer standing may not be used to challenge policy decisions underpinning a valid expenditure of money. *Bland Indep. School Dist.*, 34 S.W.3d at 556-58 (citing *Osborne v. Keith*, 177 S.W.2d 198, 200 (Tex. 1944)); *see also Dewhurst v. Hendee*, 253 S.W.3d 320, 332 (Tex. App.—Austin 2008, pet. denied).

54. The money disbursed by Defendants is lawfully expended, because it is authorized by the Education Code and the Texas Constitution. These parties are limited to seeking an injunction of *illegal* expenditures. Because they must prevail on the substance of their arguments for the expenditures in question to become illegal, the plaintiffs who assert pure taxpayer standing have failed to demonstrate jurisdiction over their claims.

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PRAYER

For the foregoing reasons, Defendants respectfully request the Court to grant this plea in whole or in part, and dismiss the Plaintiffs' and Intervenors' claims for lack of jurisdiction.

Respectfully submitted,

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CAUSE NO. D-1-GN-11-003130

THE TEXAS TAXPAYER & STUDENT FAIRNESS COALITION, et al; CALHOUN COUNTY ISD, et al; EDGEWOOD ISD, et al; FORT BEND ISD, et al; TEXAS CHARTER SCHOOL ASSOCIATION, et al. Plaintiffs	§	IN THE DISTRICT COURT
JOYCE COLEMAN, et al Intervenors	§	
vs.	§	200th JUDICIAL DISTRICT
MICHAEL WILLIAMS, COMMISSIONER OF EDUCATION, IN HIS OFFICIAL CAPACITY; SUSAN COMBS, TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, IN HER OFFICIAL CAPACITY; TEXAS STATE BOARD OF EDUCATION, Defendants.	§	TRAVIS COUNTY, TEXAS

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ORDER ON DEFENDANTS' PLEA TO THE JURISDICTION

Before the Court is the Defendants' Plea to the Jurisdiction. Based on the plea, the Plaintiffs' and Intervenors' responses, and any argument by Counsel, the Court is of the following opinion:

Defendants' plea to the jurisdiction asserting that Plaintiffs and Intervenors lack standing under Article VII, Section 1 of the Texas Constitution because their requested relief will not redress their alleged injuries is

GRANTED _____ DENIED _____

Defendants' plea to the jurisdiction asserting that Plaintiffs' and Intervenors' claims under Article VII, Section 1 of the Texas Constitution are barred, in whole or in part, by the political-question doctrine is

GRANTED _____ DENIED _____

Defendants' plea to the jurisdiction asserting that Plaintiffs' and Intervenors' challenges to the Legislature's individual decisions regarding weights used to calculate funding, preschool funding, the charter school cap and others such individual policy choices are barred by the political –question doctrine is

GRANTED _____ DENIED _____

Defendants' plea to the jurisdiction asserting that the Charter School Plaintiffs' challenges to specific aspects of the charter-school system are barred by sovereign immunity is

GRANTED _____ DENIED _____

Defendants' plea to the jurisdiction asserting that the Plaintiffs and Intervenors suing solely as taxpayers lack standing to challenge the Texas public school system is

GRANTED _____ DENIED _____

It is so ORDERED on this the _____ day of February, 2013.

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_____

The Honorable John K. Dietz
250th District Court
Travis County, Texas