

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

TEXAS TAXPAYER & STUDENT
FAIRNESS COALITION, *ET AL.*,

Plaintiffs,

EDGEWOOD INDEPENDENT SCHOOL
DISTRICT, *ET AL.*, (consolidated)

Plaintiffs

v.

ROBERT SCOTT, in his official capacity
as Commissioner of Education, *et al.*,

Defendants,

IN THE DISTRICT COURT

TRAVIS COUNTY, TEXAS

SOUTH JUDICIAL DISTRICT

**EDGEWOOD AND TEXAS TAXPAYER & STUDENT FAIRNESS COALITION
PLAINTIFFS' PLEA TO THE JURISDICTION AND MOTION TO
DISMISS AS TO INTERVENORS' THIRD AMENDED PLEA IN INTERVENTION
AND CHARTER SCHOOL PLAINTIFFS' CHARTER CAP CLAIM**

TO THE HONORABLE COURT:

Plaintiffs Edgewood I.S.D., McAllen I.S.D., San Benito C.I.S.D., Harlingen C.I.S.D., La Feria I.S.D., Yolanda Canales, Arturo Robles, Araceli Vasquez, and Jessica Romero, individually and on behalf of their minor children (collectively, "Edgewood Plaintiffs"), and the Texas Taxpayer Student Fairness Coalition, *et al.* (collectively with the Edgewood Plaintiffs, "Plaintiffs"), file this plea to the jurisdiction and motion to dismiss the Third Amended Plea in Intervention ("Plea") filed by Joyce Coleman, *et al.*, Intervenors;¹ and the charter cap claim of Mario Flores, the Texas Charter School Association, *et al.*, ("Charter Plaintiffs").² Edgewood

¹ Intervenors are Joyce Coleman, Danessa Bolling, Lee and Allena Beall, Joel and Andrea Smedshammer, Darlene Menn, individually and on behalf of their minor children; Texans for Real Efficiency and Equity in Education; and the Texas Association of Business.

² For the Charter Plaintiffs' First Amended Petition, Edgewood Plaintiffs limit this Plea to the Jurisdiction as to the charter school cap claim. They do not challenge, here, the standing or the justiciability of the Charter Plaintiffs' facilities-related claim.

Plaintiffs renew their challenge to Intervenor's standing raised, but not ruled upon, in their First Amended Plea to the Jurisdiction and Motion to Dismiss as to Intervenor's Second Amended Petition. Plaintiffs respectfully request that the Court carry its ruling until it issues its final ruling on all parties' claims.

Intervenor has not carried their burden in pleading or proving the essential elements to establish standing³ and, therefore, this Court lacks jurisdiction to hear their claims. Plaintiffs assert the same against the Charter Plaintiffs. Because the respective pleadings cannot be cured by amendment, and they had an opportunity to present evidence of their standing but failed to do so, Intervenor's Plea should be dismissed with prejudice for lack of jurisdiction in its entirety and so, too, should Charter Plaintiffs' charter cap claim. In support, Plaintiffs show as follows:

Background

Yolanda Canales, *et al.*, Edgewood Individual Plaintiffs,⁴ filed their First Amended Plea to the Jurisdiction and Motion to Dismiss as to Intervenor's Second Amended Petition on July 27, 2012. Plaintiffs challenged Intervenor's standing to bring their article VII claims, as well as the claims, themselves, as nonjusticiable questions. Intervenor filed their response on August 17, 2012, and the Court held a hearing on August 21, 2012. Following argument, the Court rendered its ruling denying, in part, the plea to the jurisdiction on the challenge based on political question grounds but reserved its ruling on standing pending a trial on the merits. The Court later signed an Order on September 19, 2012. Regarding the standing issue, the Court ordered as follows:

³ Because Intervenor amended their plea in intervention a third time, Edgewood Plaintiffs also renew their challenge to Intervenor's plea on political question grounds to preserve their argument on appeal.

⁴ Edgewood Individual Plaintiffs are joined here by the Edgewood school districts as well as the Texas Taxpayer & Student Fairness Coalition Plaintiffs.

The Court GRANTS LEAVE to the Efficiency Intervenors and ORDERS the Efficiency Intervenors to amend their pleadings to state a particularized injury, and the Court EXERCISES ITS DISCRETION TO CARRY the question of standing to the trial on the merits.

Order on Edgewood Individual Plaintiffs' Plea to the Jurisdiction at 2.

Following this Court's Order directing Intervenors to re-plead, Intervenors added no facts detailing their particularized injury. Instead, they summarily stated:

The particularized harm suffered by each of the above-listed Efficiency Intervenors is that the current system of public free schools is not efficient as guaranteed by article VII, sec. 1 of the Texas Constitution. That is, the inefficient system is itself the particularized injury and complaints about the structure of the system outlined in this Plea in Interventions are causes that contribute to the system's inefficiency. The addition of more money over the years has not been productive of results, to the harm of *all* Texas school children, parents, and businesses, including those that are Efficiency Intervenors in this lawsuit.

Plea at 3, ¶ 3 (emphasis added).

Intervenors went on to aver in one other paragraph that they had similar contentions like the plaintiffs that the system is not producing results but provided no specifics. *Id.* at 16 ¶ 21. They then repeated their allegations that "the particularized harm suffered by the Efficiency Intervenors is that the school system is not efficient and not productive of results, as required by article VII, sec. 1 of the Texas Constitution, and the Efficiency Intervenors' complaints about the structure of the system outlined in this Plea in Intervention are causes that contribute to the system's inefficiency." *See id.* However, as further stated below, such bare allegations do not satisfy their burden of proving each element of standing. Furthermore, the evidence presented in this case on facts related to the issue of standing, likewise, demonstrates that Intervenors do not have standing to assert their claims under article VII, section 1 of the Texas Constitution.

Charter Plaintiffs likewise plead no particularized harm caused to them by the Texas Legislature's decision to cap the number of charters issued at 215. They "ask the Court to

declare that the artificial limitation on the number of open-enrollment charter schools violates Article VII, Section 1 of the Texas Constitution, in that it is arbitrary and serves as a deterrent to constitutionally required efficiency in the public schools system.” Flores Am. Pet. at 12, ¶ 38.

They allege further that:

By denying charter schools facility support, and in placing an arbitrary cap on the proliferation of open-enrollment charter schools, the Texas Legislature has failed to make suitable provision for the support and maintenance of an efficient system of public free schools, and has denied open-enrollment charter schools and their parents and students equal protection of the law under the Texas Constitution, Article I, Section 3 without rational basis.

Id. at 7, ¶ 22. Charter Plaintiffs allege that the cap “presents an arbitrary obstacle to the State’s ability to achieve constitutional efficiency and stymies the very efficiency charter schools were intended to promote. Over 96,000 students are now on waiting lists for limited charter school seats.” *See id.* at 10, ¶ 30. They end by alleging “[t]he educational reform mission of charter schools is far too important to the current public school system’s success than any justification for a cap on charter school growth.” *See id.* at 10, ¶ 31. Like Intervenors, however, they plead no particular injury to the Charter Plaintiffs caused by the cap on charters and the evidence presented in this case establishes no proof of standing for their charter cap claim.

Argument

I. Standard of Review for Plea to the Jurisdiction

A plea to the jurisdiction challenges the court’s subject-matter jurisdiction. *See Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004); *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000); *State v. Holland*, 221 S.W.3d 639, 642-43 (Tex. 2007). Whether a court has subject-matter jurisdiction is a question of law. *See Miranda*, 133 S.W.3d at 226. The determination of whether a trial court has subject-matter jurisdiction begins with the pleadings. *Id.* The pleader has the initial burden of alleging facts that affirmatively

demonstrate the trial court's jurisdiction to hear the cause. *Id.* The purpose of a plea to the jurisdiction is to "defeat a cause of action without regard to whether the claims asserted have merit." *Bland Indep. Sch. Dist.*, 34 S.W.3d at 554.

Subject-matter jurisdiction requires, among other things, that the case be justiciable. *See State Bd. of Tex. v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994). Thus, a plea to the jurisdiction is proper to challenge subject-matter jurisdiction for lack of a justiciable issue. An issue is nonjusticiable if there is no real controversy that will be resolved by the judicial relief sought. *Id.*

If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend. *See Hendee v. Dewhurst*, 228 S.W.3d 354, 366 (Tex. App. Austin 2007, pet. denied); *Miranda*, 133 S.W.3d at 227. A court may also consider any evidence presented by either party when necessary to resolve a fact issue related to the jurisdictional challenge. *Miranda*, 133 S.W.3d at 227.

II. Intervenor and Charter Plaintiffs do not have Standing Under the UDJA

Intervenor and Charter Plaintiffs do not have standing; therefore, this Court lacks subject-matter jurisdiction over their Plea and charter cap claim, respectively. *See Tex. Ass'n of Bus. v. Tex. Air Cntl. Bd.*, 852 S.W.2d 440, 443–45 (Tex. 1993); *see also Farmers Tex. Cnty. Mut. Ins. Co. v. Rento*, 250 S.W.3d 527, 532 (Tex. App. Austin 2008, no pet.) ("A plaintiff must have standing for the court to have jurisdiction and decide the merits of the claims"). The requirement that a plaintiff have standing to assert a claim derives from the Texas Constitution's separation of powers among the three branches of government, which denies the judiciary authority to decide issues in the abstract, and from the Open Courts provision, which provides

courts access only to a “person for an injury done him.” *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304 (Tex. 2008).

A. Standard of Review for UDJA Claims Challenging Government Action

The general test for standing is whether there is a real controversy between the parties that will be actually determined by the judicial declaration sought. *See Tex. Ass'n of Bus.*, 852 S.W.2d at 446. Intervenor and Charter Plaintiffs must satisfy three elements: (i) they must have suffered an injury-in-fact; (ii) there must be a causal connection between the injury and the conduct complained of; and (iii) it must be likely, as opposed to speculative, that the injury will be “redressed by a favorable decision.” *Heckman v. Williams Co.*, 369 S.W.3d 137, 155 (Tex. 2012). Injury-in-fact is conceptually different from the question of whether the plaintiff has a viable cause of action on the merits--a legal injury. *See Stop the Ordinances Please v. City of New Braunfels*, 306 S.W.3d 919, 926-27 (Tex. App. Austin 2010).

For a party to have standing to challenge a governmental action under the Uniform Declaratory Judgments Act as Intervenor do here (*see* Plea, ¶ 22, citing Tex. Civ. Prac. & Rem. Code § 37.001 *et seq.*, “UDJA”), it “must demonstrate a particularized interest in a conflict distinct from that sustained by the public at large.” *Id.* at 926 (quoting *S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 307 (Tex. 2007)); *see also West Orange-Cove II*, 176 S.W.3d at 774 (holding that standing to assert a constitutional violation depends on whether the claimant asserts a particularized, concrete injury). When a private citizen asserts a public (as distinguished from a private) right and fails to show that the matters in dispute affect her differently than other citizens, she does not establish a justiciable interest. *See Stop the Ordinances Please*, 306 S.W.3d at 926 (internal citation omitted).

In short, Intervenor and Charter Plaintiffs challenging the constitutionality of education laws must demonstrate that: (i) they suffered a concrete, particularized injury distinct from the public; (ii) the injury is causally connected to the education laws complained of; and (iii) that harm will likely be redressed by a favorable decision. Intervenor's challenge to the public school system as a whole, to the individual education laws identified in their plea, and both their and the Charter Plaintiffs' challenge to the cap on charter schools fail under each of the factors.

B. Intervenor and Charter Plaintiffs Fail to Allege and Prove any Concrete, Particularized Harm Distinct from the Public

Intervenor's Plea defeats their own standing because they readily concede that Intervenor's harm is like the harm caused to "all Texas school children, parents, and businesses, including those that are Efficiency Intervenor in this lawsuit." Plea at 3 (emphasis added). Charter Plaintiffs' petition also fails for the same reason, claiming that the cap "presents an arbitrary obstacle to the State's ability to achieve constitutional efficiency." Flores First Am. Pet. at 10, ¶ 30. Neither party has pled any specific facts demonstrating how they, personally, were injured and how that injury is concrete. As the Supreme Court has stated:

The plaintiff must be *personally* injured—he must plead facts demonstrating that he, himself (rather than a third party or the public at large), suffered the injury. After all, our Constitution opens the courthouse doors only to those who have or are suffering an injury. As for the injury itself, it must be concrete and particularized, actual or imminent, not hypothetical.

Heckman, 369 S.W.3d at 155. Intervenor parents, the Texas Association of Business ("TAB"), and Texans for Real Efficiency and Equity in Education ("TREEE")—a non-profit organization—plead no facts supporting any personal injury suffered that was caused by, or is

fairly traceable to, the challenged statutes, nor have they pleaded any injury that is distinct from the harm suffered by the public at large.⁵

The evidence presented in this case likewise demonstrates no harm to Intervenor and is based on speculation, at best:

- a. Five of the plaintiffs, Joyce Coleman, individually and as next friend of her minor children, Lee and Allena Beall, individually and as next friend of their minor children, Darlene Menn, individually and as next friend of her minor child, and TREEE, did not testify in this case and, thus, there is no evidence of any harm or injury suffered by them, much less evidence of any relationship between the harm and the challenged statutes, or how a ruling by this Court might remedy their injury.
- b. Plaintiff Andrea Smedshammer and her son testified that the harm they suffered was from being wait-listed at a charter school. Smedshammer, Tr. Vol. 36, 15:12-17:24 (Jan. 15, 2013).⁶ However, since the beginning of the 2012-13 school year, Mrs. Smedshammer's child has been admitted to the family's preferred charter school, and Mrs. Smedshammer currently is content with her child's placement there. There is no evidence that the child will be pulled from the charter school. *Id.* at 17:25-18:13. Thus, the Smedshammer Plaintiffs are not presently harmed, and their claims are moot.
- c. Plaintiff Danessa Bolling testified on behalf of herself and her minor child, who attends Reagan High School in Houston I.S.D. Ms. Bolling resides in the North Forest I.S.D. Bolling, Tr. Vol. 40, 2:9-16, 3:1-3 (Jan. 23, 2013). She sent her child to live with the child's adult sister so that she could attend Reagan High School instead of the local high school located in North Forest I.S.D., because of Ms. Bolling's concern for her child's education. *Id.* at 3:4-19. Ms. Bolling testified that her daughter is in a safe environment living with her daughter's adult sister and enjoys attending Reagan High School. *Id.* at 5:9-18, 8:20-23.

Ms. Bolling presented no evidence of how the failings of her child's neighborhood school in North Forest I.S.D. were related or fairly traceable to the various statutes in the Education Code challenged by Intervenor or whether any of those issues actually affected the education being offered in North Forest I.S.D. schools (such as teacher certifications, teacher evaluations and merit pay, teacher appeal procedures under Chapter 21, etc.). Ms. Bolling also did not state whether there were other local options, such as a

⁵ An association has standing to sue on behalf of its members if: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Tex. Ass'n of Bus.*, 852 S.W.2d at 447. TREEE and TAB have failed to plead or prove any facts to any of these elements, much less the other elements required to establish associational standing.

⁶ All citations to Volumes 36, 38, and 40 are to the unedited rough transcripts.

charter school, that she could have enrolled her child. *See generally* Tr. Vol. 40, 2:4-9:20. Accordingly, not only is there evidence lacking of any harm that is fairly traceable to the challenged statutes, but there is also no evidence of how the declaratory and injunctive relief sought by Intervenors would remedy her injury.

Indeed, Ms. Bolling agreed that it would be unfair to fund her district with \$1,000 dollars less than other districts when taxing at similar rates.⁷ Tr, Vol. 40, 8:9-19. She further testified that her preferred remedy to her situation would be that the State fully fund North Forest I.S.D. with the funds they need to provide high-quality schools so that her daughter could attend the neighborhood school in North Forest I.S.D. *Id.* at 8:24-9:2.

- d. Mr. Bill Hammond testified on behalf of Plaintiff TAB as its president. He admitted that he does not have firsthand personal knowledge of the harm caused to TAB's members from the statutes complained of in this lawsuit. Hammond, Tr. Vol. 38, 142:24-143:2 (Jan. 17, 2013); Ex. 4250 at 36:19-21.

TAB suffered no harm itself as an association and is bringing this lawsuit on behalf of its members. Tr. Vol. 38, 143:3-6; Ex. 4250 at 73:20-22.

Although the greater economy of Texas and the Texas public undoubtedly have been affected by the lack of sustained achievement in the public educational system, TAB could not quantify any harm suffered by any of its identifiable members in trial or in deposition, except anecdotally. Tr. Vol. 38, 145:4-18; Ex. 4250 at 74:24-75:1, 183:7-16.

TAB's only claim in this lawsuit is that the schools are inefficient because they do not produce enough college- or career-ready students. Tr. Vol. 38, 128:14-129:11, 144:2-13, 145:4-18; Ex. 4250 at 35:15-20. This harm is no different than that of the greater public and business community.

There is also no evidence of TAB's members' purported harm that is fairly traceable to the challenged statutes. Indeed, as noted directly below, TAB could not identify any harm it has suffered resulting from the statutes identified in Intervenors' Plea and, certainly, not any harm that is distinct from the public at large.

⁷ The record indicates that in 2011-12, North Forest I.S.D. received only \$5,500 while taxing at \$1.04. Ex. 11333, Tab- 2012, Column DB. The property value per WADA was \$186,145, placing it among the fourth poorest decile in the State. Ex. 4151 at 4. The fourth poorest decile's weighted average is less than \$1,400 per WADA than the wealthiest decile at \$7,097/WADA, taxing on average at \$1.00. *Id.* at 11.

- TAB is not complaining about any specific regulations on charter schools, and TAB could not identify any harm from the statutory or regulatory restrictions on charter schools. Tr. Vol. 38, 150:18-21; Ex. 4250 at 88:25-89:3, 89:19-25; 103:8-24. Mr. Hammond acknowledged that there are reasonable arguments against raising the cap on charters, including the fact that existing charter schools can open new campuses, and the fact that TEA may not have the capacity to oversee more than 215 charters. Tr. Vol. 38, 150:22-151:21; Ex. 4250 at 58:12-59:8.
- Neither TAB nor TAB's members are harmed distinctly from any other taxpayer by restrictions on class size. Tr. Vol. 38, 151:25-152:5; Ex. 4250, 107:13-20.
- TAB is not alleging any harm to itself or its members caused by Chapter 21 of the Education Code. Tr. Vol. 38, 152:6-11. Specifically, TAB and TAB's members are not uniquely harmed by the laws requiring 10-days' notice of nonrenewal in teacher contracts, the minimum salary schedule, teacher certification laws, the teacher evaluation process, the 10-month contract, or appeal provisions for nonrenewal of teacher contracts. *Id.* at 152:12-153:24; Ex. 4250 at 93:18-21, 95:9-13, 100:11-15, 101:6-23, 107:1-3.
- TAB is not complaining about, nor would TAB want to change, the ability of receiving districts to turn students away under the Public Education Grant system. Tr. Vol. 38, 149:12-25; Ex. 4250 at 104:24-105:3; 110:19-24. TAB cannot identify any unique harm caused by this law. Tr. Vol. 38, 150:1-4.
- TAB supported the nomination of Commissioner Williams. Tr. Vol. 38, 145:19-21; Ex. 4250 at 45:14-19. TAB believes that Commissioner Williams will ensure that the system is more efficient and that the dollars in the system are well spent. Tr. Vol. 38, 145:22-25; Ex. 4250, 45:25-46:1; 46:7-17; 47:25-48:10. TAB trusts Commissioner Williams to audit the Texas public school system and is supportive of the legislative delegation of authority to the Education Commissioner to rate schools' financial accountability. Tr. Vol. 38, 146:1-12; Ex. 4250, 48:14-16; 91:23-92:1.
- TAB cannot identify any specific harm to it caused by the Legislature's failure to update the CEI. Tr. Vol. 146:23-147:1; Ex. 4250 at 92:21-23.
- Neither TAB nor TAB's members are harmed distinctly from any other taxpayer by the State's alleged failures to allow for a consumer-driven supply side chain or the top-down bureaucratic nature of the Texas public school system. Tr. Vol. 38, 147:2-148:7; Ex. 4250, 105:7-18; 106:1-6.

Charter Plaintiffs likewise presented no evidence of harm resulting from the cap.

- Plaintiff Mario Flores testified that his son currently attends Eden Park, a charter school, and that he is content with his placement there. Flores, Tr. Vol. 43, (Jan. 29, 2013).

- Plaintiff Brooks Flemister similarly testified that his son attends a charter school in the Houston area, SER Niños, and that he is content with his placement there. Flemister, Tr. Vol. 42 (Jan. 28, 2013).
- Texas Charter School Association (“TCSA”) member Wayside Schools testified through its CEO Matt Abbott. Mr. Abbott testified that Wayside’s charter was modified recently to allow the opening of a new campus in Austin, and therefore, could not be harmed by the cap. Abbott, Tr. Vol. 43 (Jan. 29, 2013).
- TCSA member YES Prep testified through its Vice President of Operations Mark DiBella. He testified that YES Prep has opened up numerous schools under its charter because of the demand. DiBella, Tr. Vol. 42, (Jan. 28, 2013); Ex. 9030, 126:9-21. This evidences no harm from the cap.
- TCSA CEO David Dunn testified that a charter could be denied in the fall of 2014 by the State, but he failed to identify any member of the Charter School Association that was harmed by the cap. Dunn, Tr. Vol. 44, (Jan. 30, 2013). Such a claim is not ripe and is subject to a plea to the jurisdiction. *See Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851-52 (Tex. 2000).
- TCSA General Counsel Denise Pierce also testified in this case but failed to identify any member who was denied a charter as a result of the case or who was otherwise specifically harmed by the cap. Pierce, Tr. Vol. 42, (Jan. 28, 2013). She does not know how many of TCSA’s non-charter members intend to apply under Generation 18, only that TCSA has more non-charter members than there are available spots. She did not provide testimony on whether TCSA’s non-charter members were qualified or likely to succeed with any application. *Id.*
- Ms. Pierce also testified that despite the cap, the number of charter schools continues to grow each year, and that she does not know whether charters are operating at their maximum number of schools. Tr. Vol. 42. Ms. Pierce also acknowledged that there is no statutory limit on the number of schools charters can operate. *Id.*

To satisfy standing, the injury must not only be concrete and particularized but also “actual or imminent, not hypothetical.” *See Heckman*, 369 S.W.3d at 155. Charter Plaintiffs can identify no individual who has been harmed by the cap; TCSA’s allegations are based merely on the possibility of its purportedly highly qualified non-charter members applying for and being denied a charter at a future time as a result of the cap-- an event that, at this time, is only hypothetical.

C. Intervenor’s and Charter Plaintiffs’ Allegations Demonstrate only Dissatisfaction with, and Not Harm Caused by, the State’s Education Laws

Intervenors list various statutes of which they disapprove, but fail to state what harm, if any, they have suffered from the statutes. Intervenor and Charter Plaintiffs plainly lack standing, and they have not carried their burden of establishing that this Court has jurisdiction over their claims.

For example, Intervenor state that the current cap on the number of charter schools breeds inefficiency in the system. Plea ¶ 13. However, they do not allege suffering any harm caused by the cap to Intervenor from this perceived “inefficiency,” instead choosing to fabricate hypotheses like, “it is more probable that even more students would apply if they thought that they had a chance to win the attendance lottery for charter schools.” *Id.*

Simply calling the cap “inefficient” does not identify any specific harm caused to Intervenor from the cap. They have not identified any plaintiff who has been harmed by the cap or how the cap is fairly traceable to any of their alleged injuries, nor have they elicited testimony of the same from any Intervenor who have testified in this case. *See supra* pp. 8-10. Indeed, they cannot plead or prove such because the cap does not prohibit the creation of new charter schools, but merely the issuance of new charters. *See* Texas Education Agency, Charter Schools--Charter Amendments, <http://www.tea.state.tx.us/index2.aspx?id=3507> (last visited July 17, 2012). Despite Intervenor’s complaint that the “liberties and rights of the people” are being restricted by this cap, they fail to mention how they are actually being restricted, or why they suffer any specific harm as a result. Plea ¶ 13.

Intervenors must show an actual harm, not a hypothetical one. *See Save Our Springs Alliance, Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 882 (Tex. App. Austin 2010, pet.

denied). They have failed to do so, and instead, submitted a laundry list of statutes with which they are dissatisfied under the current Texas educational system. Because Intervenor demonstrate no harm that is fairly traceable to the challenged statutes, their Plea should be dismissed. *See Heckman*, 369 S.W.3d at 155.

As another example, Intervenor aver, without stating any factual basis, that “[l]ittle expertise is available within the Texas Education Agency to carry out” the duty of rating financial accountability. Plea ¶ 15. Their Plea makes further sweeping statements, such as “efficiency requires that such evaluation be conducted by an independent third party,” *id.*, yet fails to state how Intervenor are harmed any differently than all other residents of Texas, if at all.

Intervenor find particular dissatisfaction with Chapter 21 of the Texas Education Code, stating that the Chapter “in its entirety drives millions of dollars in waste every year.” Plea ¶ 17. Intervenor state that they perceive many flaws with the system, for example, that teacher evaluations are confidential. *Id.* Yet, they make no statement regarding the effect of this rule on any Intervenor. Once again, they fail to allege any “concrete and particularized” injury from the alleged violation to any of the intervenors. The same applies to Intervenor’s allegations that “[i]t is inefficient to notify a teacher during the school year that the teacher’s contract will not be renewed,” or that “a school district has little flexibility in the length of teacher contracts.” *Id.* Intervenor allege no facts explaining how they are harmed by any of these measures; they only repeat several times that the measures are inefficient. The testimony of Intervenor, likewise, details no facts of the harm or how the harm is related to Chapter 21. *See supra* pp. 8-10.

The point of requiring standing is to ensure that the plaintiff has a “sufficient *personal* stake in the controversy so that the lawsuit would not yield a mere advisory opinion or draw the

judiciary into generalized policy disputes that are the province of the other branches.” *Stop the Ordinances Please*, 306 S.W.3d at 927 (emphasis added). Intervenors have not carried their burden of establishing that this Court has jurisdiction over their claims; they have asserted only a vague, broad dissatisfaction with the education system currently in place and have failed to plead affirmatively the necessary allegations under the UDJA.

III. Intervenors’ Article VII Claims and Charter Plaintiff’s Claim Against the Cap Seek to Usurp the Texas Legislature’s Authority on the Design of the Public School System and is thus, Nonjusticiable

A. Legal standard under article VII section 1 of the Texas Constitution

A system of public free schools must be efficient in order to survive a constitutional challenge. *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 729 (Tex. 1995) (*Edgewood IV*). As applied to school finance, constitutional efficiency requires that “[c]hildren who live in poor districts and children who live in rich districts . . . be afforded a substantially equal opportunity to have access to educational funds.” *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 753 (Tex. 2005) (1) (quoting *Edgewood I*, 777 S.W.2d at 397). The Court has “referred to efficiency in the broader sense as ‘qualitative’ and in the context of funding as ‘financial.’” *Id.* Financial efficiency focuses on the “direct and close correlation between a district’s tax effort and the educational resources available to it; in other words, districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort.” *Edgewood IV*, 917 S.W.2d at 729.

The qualitative component of the efficiency clause requires the State to provide an “efficient” system, not one that is “cheap,” “inexpensive,” or even “economical.” *Edgewood I*, 777 S.W.2d at 395. “Qualitative” efficiency in the broader sense requires that “public education accomplish a general diffusion of knowledge,” (*West Orange-Cove II*, 176 S.W.3d at 753), by

providing the resources necessary for school districts to provide a general diffusion of knowledge to all Texas public school children. See *Edgewood IV*, 917 S.W.2d at 736. The qualitative component is not a separate requirement under article VII, section 1 of the Texas Constitution and certainly does not grant Intervenor *carte blanche* authority to cherry-pick statutes with which they find disfavor and then sue for a constitutional violation.

Under the Education Clause, the Supreme Court of Texas has maintained that the Legislature has the right to determine the “methods, restrictions, and regulations” of the educational system. *Edgewood IV*, 917 S.W.2d at 736 (quoting *Mumme v. Marrs*, 40 S.W.2d 31, 36 (Tex. 1931)). The means adopted by the Legislature must be “a suitable regime that provides for a general diffusion of knowledge” *W. Orange-Cove Consol. I.S.D. v. Alanis*, 107 S.W.3d 558 (Tex. 2003) (*West Orange-Cove I*). The Supreme Court of Texas has stated unequivocally that in discharging its review of article VII claims, it will “not dictate to the Legislature how to discharge its duty. . . [nor will it] judge the wisdom of the policy choices of the Legislature, or to impose a different policy of our own choosing” (*West Orange Cove I*, 107 S.W. 3d at 563-64 (citation omitted), “though that discretion is not without bounds.”⁸ *Edgewood IV*, 917 S.W.2d at 730, n.8 (citation omitted).

B. Legal Standard for Non-Justiciable Political Questions

A political question is one involving “a lack of judicially discoverable and manageable standards for resolving it,” or (2) “a textually demonstrable constitutional commitment of the

⁸ While Intervenor’s claims are appropriately left to the Legislature because they seek to prescribe the components of the Texas educational system by striking down those statutes they find unappealing, the courts have repeatedly found that other article VII claims challenging the financial efficiency, adequacy and suitability of the system by parents and school districts are actionable. See *West Orange Cove II*, 176 S.W.3d at 777; *West Orange-Cove I*, 107 S.W.3d at 563; *Edgewood I*, 777 S.W.2d at 394; accord *Edgewood IV*, 917 S.W.2d at 736.

issue to a coordinate political department.” *Baker v. Carr*, 369 U.S. 186, 217 (1962). This standard has been used by Texas courts as well. See *Hendee*, 228 S.W.3d at 369; *West Orange-Cove II*, 176 S.W.3d at 777-78. In the area of public education, deficiencies and disparities that fall short of a constitutional violation find remedy not through the judicial process, but through the political processes of legislation and elections. See *West Orange-Cove II*, 176 S.W.3d at 753.

Seventeen years ago, in *Edgewood IV*, the Supreme Court of Texas reviewed a similar intervention, where the Gutierrez Intervenors urged the court to prescribe a system that would permit their children to receive vouchers because the State’s system denied them an efficient education guaranteed by the Education Clause. Having failed to persuade the Texas Legislature to allow private vouchers, which the Gutierrez Intervenors believed to be the better course of action than public schools, Gutierrez turned to the courts.⁹ In granting the State’s special exceptions to the petition in intervention, the Court stated that the petition “prays for a political remedy rather than alleging a statutory or constitutional right.” *Edgewood IV*, 917 S.W.2d at 747. The Court went on to hold:

In *Edgewood I*, we held that article VII, section 1 provides “a standard by which this court must, when called upon to do so, measure the constitutionality of the legislature’s actions.” 777 S.W.2d at 394. The Constitution gives to the Legislature, however, the “primary responsibility to decide how best to achieve an efficient system.” *Id.* at 399. Since then, we have consistently refrained from prescribing “the means which the Legislature must employ in fulfilling its duty.” *Edgewood I*, 804 S.W.2d at 498. Most recently, we explained our role as follows: We do not prescribe the structure for “an efficient system of public free schools.” The duty to establish and provide for such a system is committed by the Constitution to the Legislature. Tex. Const. art. VII, § 1. Our role is only to determine whether the Legislature has complied with the Constitution. *Edgewood III*, 826 S.W.2d at 523. The Gutierrez appellants now ask the Court to go beyond

⁹ Although counsel for Intervenors has represented that Intervenors do not intend to have this Court order the Legislature to provide vouchers, that representation is contradicted by the very testimony of one of the Intervenors, TAB. See, e.g., Tr. Vol. 38, 146:13-22 (Mr. Hammond testifying that through this lawsuit, TAB intends to increase competition among schools, which would include vouchers).

this role, and to prescribe the structure of this state's public school system. For the reasons stated in our prior opinions, we decline to do so.

Edgewood IV, 917 S.W.2d at 747-48.

In *West Orange-Cove II*, the Supreme Court expressly addressed the judicial limitation doctrine when courts are asked to dictate educational policy beyond its constitutional authority:

The judiciary is well-accustomed to applying substantive standards the crux of which is reasonableness. This is not to say that the standards in article VII, section 1 involve no political considerations beyond the judiciary's power to determine. We have acknowledged that much of the design of an adequate public education system cannot be judicially prescribed. Litigation over the adequacy of public education may well invite judicial policy-making, but the invitation need not be accepted. The judiciary's choice is not between complete abstinence from VII, section 1 issues, and being, in the State defendants' words, "the arbiter of education and policy, overseeing such issues as curriculum and testing development, textbook approval, and teacher certification". Rather, the judiciary's duty is to decide the legal issues properly before it without dictating policy matters. The constitutional standards provide an appropriate basis for judicial review and determination. . . . [T]he standards of article VII, section 1—adequacy, efficiency, and suitability—do not dictate a particular structure that a system of free public schools must have. We have stressed this repeatedly. In *Edgewood I* we wrote: "Although we have ruled the school financing system to be unconstitutional, we do not now instruct the legislature as to the specifics of the legislation it should enact; nor do we order it to raise taxes." In *Edgewood II*, we said: "We do not prescribe the means which the Legislature must employ in fulfilling its duty." In *Edgewood III*, we reiterated: "As before, we do not prescribe the structure for 'an efficient system of public free schools.' . . . 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."

West Orange Cove II, 176 S.W.3d at 778-83 (footnote citations omitted, final two omissions in original).

C. Application of Political Question Doctrine to Intervenor's and Charter Plaintiffs' Claims

The point of requiring standing is to ensure that the plaintiff has a "sufficient *personal* stake in the controversy so that the lawsuit would not yield a mere advisory opinion or draw the judiciary into generalized policy disputes that are the province of the other branches." *Stop the*

Ordinances Please, 306 S.W.3d at 927 (emphasis added). Throughout their plea and in their evidence presented to this Court, Intervenors clearly and unequivocally ask this Court to direct the Texas Legislature to implement a particular system of public education through the prism of their own views of how the system should work by declaring specific policies void and unconstitutional. See Plea at 17, ¶ 25 (seeking independent declarations of unconstitutionality of at least *forty-two* provisions of the Education Code, as well as all corresponding regulations). Not one substantial constitutional claim has been made by Intervenors, nor have they presented a proper case for this Court to adjudicate. “Whether public education is achieving all that it *should* . . . involves political and policy considerations properly directed to the Legislature.” *West Orange-Cove II*, 176 S.W.2d at 753 (emphasis in original).

Intervenors have singled out statutes and regulations that they disfavor and have asked this Court to declare *both* independently and collectively that the statutes violate their right to an efficient system of public schools. See Plea at 17, ¶¶ 24-25 (first asking for declaration that current system of public free schools violates “qualitative efficiency” test, then asking for judgment that “Chapter 21 is not efficient under article VII, sec. 1 . . . and therefore unconstitutional” and continuing with same request for a series of statutes, as well as their accompanying regulations).¹⁰ But they have no constitutional right (certainly not under article VII, section 1) to: unlimited charters, the right to attend a specific charter school, unregulated schools, uncertified teachers, unrestricted home-rule charter schools, and automatic transfers from low-performing schools in a given year. By asking this Court to declare various, independent provisions of the Texas Education Code unconstitutional, Intervenors essentially ask

¹⁰ These statutes include Tex. Educ. Code Ann. §§ 12.101(b), 12.013(b)(3)(F)-(S), 21.402, 21.031, 21.401, 21.207, 21.209, 21.251, 21.252, 21.253, 21.254, 21.255, 21.256, 21.257, 21.258, 21.259, 21.301, 21.302, 21.304, 21.3041, and 21.307, 21.206, 21.057, 21.355, 21.351, 25.111-112, 29.203(d), 39.082, and 42.102. *Id.*

this Court to dictate to the Texas Legislature the policy choices they prefer and such is not allowed under the political question doctrine.

1. Charter school provisions. Intervenors' strong preference for charter schools over traditional public schools is evident with the call for the removal of the statutory cap on the number of charter schools, as well as the rules and regulations imposed on traditional public schools, to which charter schools are not subjected. *See* Plea ¶¶ 13, 14 (*see also* Charter Plaintiffs' First Am. Pet. at 12, ¶ 38). Intervenors certainly are free to draft proposed legislation and have it vetted publicly at the Capitol and indeed, some intend to do so. *See, e.g.,* Tr. Vol. 38, 154:13-14 (Mr. Hammond acknowledging lifting the cap on charters as one of TAB's priorities). However, asking this Court to do the same in the name of "efficiency" would violate the separation of powers. In addition, the request ignores the Legislature's consideration of risks associated with charter schools, which have been deemed largely as experimental, have been criticized for their racially segregative effect¹¹ and have been found to be no more effective than public schools.¹² *See also* Rule 11 Agreement (January 28, 2013) (Stipulation numbers 8-14, acknowledging variation in performance of charter schools and traditional public school

¹¹ *See, e.g.,* Frankenberg, E., Siegel-Hawley, G., Wang, J. *Choice without Equity: Charter School Segregation and the Need for Civil Rights Standard*, The Civil Rights Project/Proyecto Derechos Civiles at UCLA 1 (Jan. 2010) available at

<http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report/frankenber-choices-without-equity-2010.pdf> (finding that charter schools are even more segregated than traditional public schools). (last visited June 21, 2012).

¹² *See, e.g.,* Press Release, Charter Schools in Texas Perform Significantly Below Their Traditional Public School Peers (June 15, 2009) available at

<http://credo.stanford.edu/reports/statepressreleases/Texas.pdf> (finding that 17 percent of charter schools reported academic gains that were significantly better than traditional public schools, while 37 percent of charter schools showed gains that were worse than their traditional public school counterparts, with 46 percent of charter schools demonstrating no significant difference), full report available at http://credo.stanford.edu/reports/MULTIPLE_CHOICE_CREDO.pdf. *See also* 2011 Accountability System State Summary (as of Nov. 2, 2011), Texas Education Agency available at: <http://ritter.tea.state.tx.us/perfreport/account/2011/statesummary.html> (last visited June 21, 2012) (showing 17.6% of Texas school schools as "Academically Unacceptable").

districts). This is not to say that all charter schools are failing and that affording students choice is an inappropriate policy decision, but it is just that: a policy decision for the Legislature to consider, not the courts.

2. Teachers. Although the Texas Legislature obviously has balanced the due process rights of teachers against the need to terminate ineffective teachers in its creation of statutes concerning the employability of teachers, in the eyes of Intervenor, the result is a system of arbitrary and inefficient rules and regulations concerning personnel. *See* Plea ¶ 17. Here, Intervenor complains of minimum salary schedules and state-mandated teacher salary grants under Tex. Educ. Code Ann. § 21.402. These statutes take into account important measures, for example, recruiting teachers from other states, paying experienced teachers, and avoiding substantial teacher attrition. Intervenor also complains of the teacher certification process under Tex. Educ. Code Ann. § 21.031, which is meant to ensure students have access to teachers who are properly trained and certified, but in Intervenor's opinion, these measures infringe on local authorities' discretion to hire the people Intervenor believe may be better-suited to teach. Plea ¶ 17.

Intervenor further complains of various other provisions affecting teachers, arguing that each is inefficient: the minimum teacher contract of 10 months under Tex. Educ. Code Ann. § 21.401; the appeal process for non-renewal of teacher contracts set out in various statutes in Chapter 21 and rules in the Texas Administrative Code; the requirement to notify a teacher not later than the tenth day before the last day of instruction under Tex. Educ. Code Ann. § 21.206; the lack of public disclosure of teacher evaluations; and the teacher appraisal process in Tex. Educ. Code Ann. § 21.351, *et seq.*, as well as the failure to provide a meaningful measure of teacher performance that includes a value-added component. Plea ¶ 17.

Each of these provisions certainly is debatable in the public forum but can find no recourse in the courts where such matters will be litigated endlessly without any judicially discoverable and manageable standards for resolving the matters. *See Baker*, 369 U.S. at 217. Indeed, Intervenor's own witnesses testified inconsistently about the merit of each of the proposals. *See generally, e.g., Wolters Dep., Ex. A*, at 118:3-15 (describing "the problems with publishing teacher evaluations"); *Wolters, Tr. Vol. 39* (Jan. 22, 2013) (testifying about the importance of due process rights, the fact that state laws do not affect her school district's compensation decisions, and her disagreement with pay-for-performance); *Hanushek, Tr. Vol. 37* (Jan. 16, 2013) (testifying that small class sizes benefit students like those in the "Edgewood Districts" and that there are problems with designing and implementing "merit pay" systems and identifying characteristics of high-performing teachers).

3. Financial Rating Accountability. Intervenor's state that the financial accountability system currently in place is inefficient, though they cite to no authority when making statements such as "successful enterprises assure efficiency by also conducting unbiased third-party evaluations," or "[l]ittle expertise is available within the Texas Education Agency to carry out this duty." Plea ¶ 15. Intervenor's seek to rewrite the current financial accountability legislation and go so far as to admit that their motives are political, stating that they wish to reform a system that "is a clear constitutional failure of public policy." *Id.* Regardless of whether their proposed policy change has merit, the courthouse is not the place for a debate on which financial accountability system the Legislature must enact.

4. Home-Rule School District Charters. Intervenor's challenge the statutes governing Home-Rule School District Charters as outlined in Tex. Educ. Code §§ 12.011-12.013. *See Plea* ¶ 18. Intervenor's state that § 12.013(b)(3)(F)-(S) are "very restrictive regulations" and that

removing the mandates therein could make the program more efficient. The Supreme Court has previously stated that its role, “though important, is limited to ensuring that the constitutional standards are met. [Courts] do not prescribe *how* the standards should be met.” *West Orange-Cove II*, 176 S.W.3d at 753 (emphasis in original). Because Intervenor explicitly seek to change the regulations detailed below by having those statutes and regulations declared unconstitutional, this Court has not jurisdiction to rubber-stamp their prescription to improve schools.

Among these “restrictive regulations” are items such as subsection (G): elementary class size limits under Tex. Educ. Code Ann. § 25.112. This statute was added over 25 years ago and places a cap of twenty-two students for classes in grade K-4. It is of such importance that notice of class size waivers must be provided to parents of affected children. *See id.* § 25.113. In performing its duties, the Legislature debated increasing class sizes in the most recent legislative session but such legislation failed to pass. *See* Terrence Stutz, *Texas Teachers Urge Senate to Keep Class-Size Limit*, Dallas Morning News, March 08, 2011; Mose Buchele, *Special Session Revives Texas Class-Size Debate*, Texas Tribune, June 7, 2011. Additionally, the Legislature is already aware that the regulation may cause undue hardship on a district, and has enacted a procedure for requesting a waiver from the requirement. Tex. Educ. Code Ann. § 25.112(d). It would be nonsensical to suddenly declare that the courts are responsible for a regulation like this when the Texas Legislature is plainly already considering the issue during its sessions.

Intervenor also complain about subsection (H): high school graduation requirements under Section 28.025. This regulation states: “The State Board of Education by rule shall determine curriculum requirements for . . . high school programs.” Tex. Educ. Code Ann. § 28.025(a). The regulation goes on to list how many math, science, English, foreign language,

etc., courses a student must take to graduate under the minimum, recommended, or advanced high school programs. Tex. Educ. Code Ann. § 28.025(b-1). Asking the courts to debate whether this regulation is “very restrictive” for home-rule charters ignores considerations made by the legislative committees when establishing three different plans to meet the needs of all Texas high school students.

Similarly, Intervenors take issue with subsection (J), which references bilingual education under Subchapter B, Chapter 29. This law was enacted in response to a prior court ruling holding that Latino English language learner (“ELL”) children were being denied educational opportunities under the Equal Educational Opportunities Act of 1974. *See U.S. v. Texas*, 680 F.2d 356, 371-72 (5th Cir. 1982). There, the Fifth Circuit noted that “the 1973 Texas bilingual program was pedagogically unsound, largely unimplemented, and unproductive in its results.” *Id.* The Texas Legislature’s enactment of the 1981 Bilingual and Special Language Programs Act tracked the lower court’s eventual remedial order, compelling bilingual education through the elementary grades in school districts with 20 or more students with limited English-speaking proficiency in the same grade; authorizing the Texas Education agency to adopt “standardized entry-exit criteria”; and compelling the TEA to take certain specific measures, including on-site monitoring, to ensure compliance. Many of these provisions remain in place today in order to ensure ELL students in all types of schooling access equal educational opportunities, but Intervenors still want to this Court to excuse home-rule charter schools from implementing this section of the Education Code.

These statutes include those involving preschool programs for ELL students, evaluation of transferred students, teacher certification, and student enrollment and exiting criteria. *See* Tex. Educ. Code Ann. § 29.051-29.066. The importance of these statutes can be seen in the

policy statement in the subchapter, which states, in part: “Experience has shown that public school classes in which instruction is given only in English are often inadequate” Tex. Educ. Code Ann. § 29.051. Yet, Intervenor seeks to exempt home-rule charters from these provisions under their definition of efficiency.

Another “restrictive regulation” for home-rule charters alleged by Intervenor in § 12.013 is subsection (K), concerning kindergarten and pre-kindergarten programs. Intervenor wishes to remove these statutory mandates for home-rule charters, that require “programs . . . comply with the applicable child-care licensing standards adopted by the Department of Protective and Regulatory Services,” Tex. Educ. Code Ann. § 29.1532(b), or that allow the commissioner to “administer grants . . . in a manner that provides the greatest flexibility allowed under federal law.” Tex. Educ. Code Ann. § 29.1561(b). Whether Intervenor is correctly judging these regulations to be overly restrictive is an issue that should not burden the courts; instead, it is a nonjusticiable question.

Intervenor goes as far as to state that safety provisions relating to the transportation of students are among “special interest pressures” that “in effect, took away the very benefit of converting to a Home-Rule Charter.” Plea ¶ 18. Whether or not requiring that “each school district shall meet or exceed the safety standards for school buses” under Tex. Educ. Code Ann. § 34.002(b) is related to special interest pressures that make the educational system inefficient is also not a question for the court.

Other statutes and regulations governing home-rule charter schools that Intervenor complains about include items such as special education, extracurricular activities, and other day-to-day matters that help make up the structure of the public school system. *See* Plea ¶ 18 (citing Tex. Educ. Code Ann. § 12.013(3)(F)-(S)). The Texas Supreme Court has already declined to

“prescribe the structure of this state’s public school system.” *Edgewood IV*, 917 S.W.2d at 747-48. Because the Legislature makes thousands of decisions that make up the state’s public school system, these issues should be taken to the Legislature’s doorstep.

5. Public Education Grants. Intervenors likewise complain of Tex. Educ. Code § 29.201, which allows students to attend another public school campus, if for example, their present school had 50 percent or more of the students failing to perform satisfactorily on a state standardized test. The subchapter further provides that a district cannot accept or reject a student on the basis of a student’s race, ethnicity, academic achievement, athletic abilities, language proficiency, gender, or socioeconomic status. *Id.* § 29.203(c). The chapter further provides that a receiving school district with excess applications must give priority to students at risk of dropping out and requires the sending school district to provide transportation free of charge. *Id.* Despite these statutory protections, Intervenors complain of these policy decisions, claiming the statute has little or no effect.

Intervenors’ efforts to reform the system to meet their own standards cannot support a constitutional challenge under article VII, section 1.

Conclusion

WHEREFORE Plaintiffs respectfully request that this Court grant this motion and dismiss with prejudice the Plea in Intervention filed by Intervenors and the Charter Plaintiffs’ claim against the cap on charters, and grant any other relief that this Court deems proper.

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Respectfully Submitted,

**Mexican American Legal Defense and
Educational Fund, Inc.**

David G. Hinojosa
State Bar No. 24010689
Marisa Bono
State Bar No. 24052874
Rebecca Couto da Silva
State Bar No. 24082473
110 Broadway, Suite 300
San Antonio, Texas 78205
(210) 224-5476
(210) 224-5382 Fax

By: /s/ David G. Hinojosa
David G. Hinojosa

**Multicultural, Education,
Training and Advocacy, Inc.**

Roger L. Rice*
240A Elm Street, Suite 22
Somerville, MA 02144
Ph: (617) 628-2226
Fax: (617) 628-0322
*Admitted *Pro Hac Vice*

Attorneys for Edgewood Plaintiffs

GRAY & BECKER, P.C.

Richard E. Gray, III
State Bar No. 08328300
Toni Hunter
State Bar No. 10295900
Richard E. Gray, IV
State Bar No. 24074308
900 West Ave.
Austin TX 78701
Telephone: 512-482-0061
Facsimile: 512-482-0924

Attorneys for Texas Taxpayer & Student Coalition

By: Richard E. Gray, III /s/ w/p DH
Richard E. Gray, III

Certificate of Service

I also certify that on February 1, 2013, I served the foregoing document via electronic

mail to the parties listed below:

GREG ABBOTT
Attorney General of Texas
DANIEL T. HODGE
First Assistant Attorney General
DAVID C. MATTAX
Deputy Attorney General for Defense Litigation
ROBERT B. O'KEEFE
Chief, General Litigation Division
SHELLEY N. DAHLBERG
Assistant Attorney General Texas
Texas Attorney General's Office
General Litigation Division
P. O. Box 12548, Capitol Station
Austin, Texas 78711
Fax: (512) 320-0667

Attorneys for Defendants

Mark R. Trachtenberg
Haynes and Boone, LLP
1 Houston Center
1221 McKinney St., Suite 2100
Houston, Texas 77010
Fax: (713) 547-2600

John W. Turner
Hayes and Boone, LLP
2323 Victory Avenue, Suite 700
Dallas, Texas 75219
Fax: (214) 651-5940

Attorneys for Plaintiffs, Calhoun County ISD, et al.

Richard Gray
Toni Hunter
Gray & Becker, P.C.
900 West Ave.
Austin, Texas 78701
Fax: (512) 482-0924

Randall B. Wood
Doug W. Ray
Ray & Wood
2700 Bee Caves Road #200
Austin, Texas 78746
Fax: (512) 328-1156

Attorneys for Plaintiffs, Texas Taxpayer &
Student Fairness Coalition, et al.

J. David Thompson, III
Philip Fraissinet
Thompson & Horton, LLP
Phoenix Tower, Suite 2000
3200 Southwest Freeway
Houston, Texas 77027
Fax: (713) 583- 9668

Attorneys for Plaintiffs, Fort Bend ISD

J. Christopher Diamond
The Diamond Law Firm, P.C.
17484 Northwest Freeway
Ste. 150
Houston, Texas 77040
Fax: (832) 201-9262

Craig T. Enoch
Melissa A. Lorber
Enoch Kever PLLC
600 Congress, Ste. 2800
Austin, Texas 78701
Fax: (512) 615-1198

Attorneys for Intervenors, Joyce Coleman, et al.

By: s/David G. Hinojosa
David G. Hinojosa

Unofficial copy Travis Co. District Clerk Velda L. Price