

NO. 04-1144

In the Supreme Court of Texas

**SHIRLEY NEELEY, IN HER OFFICIAL CAPACITY AS
THE COMMISSIONER OF EDUCATION, ET AL.,**

Appellants,

v.

WEST ORANGE-COVE CONSOLIDATED I.S.D., ET AL.,

Appellees.

WEST ORANGE-COVE APPELLEES' BRIEF ON THE MERITS

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References to the Appendix	App. (<u>letter</u>) at (<u>page</u>)
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State Exhibits	DX(<u>number</u>):(<u>page</u>)
Edgewood Intervenors' Exhibits	EX(<u>number</u>):(<u>page</u>)
Alvarado Plaintiffs/Intervenors' Exhibits	AX(<u>number</u>):(<u>page</u>)

ABBREVIATIONS

The West Orange-Cove Plaintiffs will use the following abbreviations:

West Orange-Cove Plaintiffs	WOC Plaintiffs
Shirley Neeley in her official capacity as the Commissioner of Education, the Texas Education Agency, Carol Keeton Strayhorn in her official capacity as Texas Comptroller of Public Accounts, and the Texas State Board of Education	State
Alvarado Plaintiff/Intervenors and the Edgewood Cross-Plaintiff/Intervenors	Intervenors
Texas Education Agency	TEA
Texas State Board of Education	SBOE
Texas Essential Knowledge and Skills (state curriculum)	TEKS
Texas Assessment of Knowledge and Skills (state assessment test)	TAKS
Recommended High School Program (default high school graduation program)	RHSP
Limited English Proficient	LEP
Foundation School Program	FSP
No Child Left Behind Act	NCLB
Texas Higher Education Coordinating Board	THECB
State Defined Alternative Assessment (state assessment test for disabled students)	SDAA

STATEMENT OF THE CASE

Nature of the case:

The WOC Plaintiffs and the Intervenors (collectively representing a geographically and economically diverse group of 329 school districts that educate more than two million Texas schoolchildren) presented a three-fold challenge to the constitutionality of the Texas school finance system:

- The WOC Plaintiffs sought a declaration that the school finance system has evolved into an unconstitutional state property tax in violation of Article VIII, § 1-e of the Texas Constitution because the districts lack “meaningful discretion” in setting their tax rates.
- The WOC Plaintiffs, joined by the Intervenors, asserted a violation of Article VII, § 1 of the Texas Constitution, because the State has substantially defaulted on its obligation to suitably provide for a “general diffusion of knowledge.”
- The Intervenors asserted that the system is inequitable, both in the financing of maintenance and operations and in the financing of facilities, and that it thus violates the efficiency and suitability provisions of Article VII, § 1 of the Texas Constitution.

Trial court from which this appeal is taken:

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

Disposition in trial court:

Judge Scott McCown dismissed the original lawsuit (brought by four of the WOC Plaintiffs) at the pleading stage. The court of appeals affirmed the trial court’s decision, but on a different rationale. *West-Orange Cove Consol. Indep. Sch. Dist. v. Alanis*, 78 S.W.3d 529, 542 (Tex. App.—Austin 2002). This Court rejected the reasoning of both lower courts and reinstated the lawsuit. *See West Orange-Cove Consol. Indep. Sch. Dist. v. Alanis*, 107 S.W.3d 558 (Tex. 2003) (*West Orange-Cove I*). In doing so, this Court

provided significant guidance for the prosecution of the state property tax claim. Among other things, this Court:

- held that a single district could state a claim for a constitutional violation under Article VIII, § 1-e if it is denied “meaningful discretion” in setting its M&O tax rate as a result of (i) the imposition of the \$1.50 cap and (ii) its obligation to provide its students either an accredited education or the constitutionally mandated “general diffusion of knowledge” (i.e., an adequate education), *id.* at 581;
- rejected the argument that the “general diffusion of knowledge” standard and “accreditation standards” are necessarily linked, *id.*; and
- acknowledged that the Legislature, through the school districts, has a constitutional obligation to provide students with an “adequate” education, *id.* at 563, 581.

Upon remand, forty-three additional school districts, including Austin ISD, Dallas ISD, and Houston ISD, joined the original four WOC Plaintiffs in seeking a declaration that the school finance system is unconstitutional, both under the state property tax claim and a newly-added adequacy claim. CR1:87-114. The Alvarado and Edgewood Intervenors, who originally had sided with the State, switched sides and asserted adequacy and efficiency claims, as noted above. CR1:136-56; 162-85.

After a nearly six-week trial, the trial court entered judgment on December 1, 2004, declaring that the Texas school finance system is unconstitutional in that it violates (1) the state property tax prohibition in Article VIII, § 1-e of the Texas Constitution; (2) Article VII, § 1 of the Texas Constitution because the State has substantially defaulted on its obligation to suitably provide for a “general diffusion of knowledge” (i.e., an adequate education); and (3) the “efficiency” and “suitability” clauses of Article VII, § 1 because

property-poor districts do not have substantially equal access to funding for facilities. CR3:842-49.

The trial court enjoined the State from distributing any money under the current Texas school financing system until the constitutional violations are remedied, and stayed the effect of this injunction until October 1, 2005, in order to give the Legislature an opportunity to cure the constitutional deficiencies identified by the trial court. CR3:844-45; CR4:977-78. The trial court simultaneously entered comprehensive findings of fact and conclusions of law in support of its judgment. CR4:851-980.

The State filed this direct appeal. CR4:997-1000. The Edgewood Intervenors and the Alvarado Intervenors also appealed from the trial court's ruling that any disparity in maintenance and operations funding available to property-poor and property-rich districts did not violate the "efficiency" clause of Article VII, § 1 at this time. CR4:1119A, B. This Court noted probable jurisdiction over the State's appeal on February 18, 2005 and over the Intervenors' appeals on March 16, 2005 and consolidated all three appeals on April 22, 2005.

ISSUES PRESENTED

1. Tax Claim Issue (*responsive to State issue 7 and State argument V*):

With nearly two-thirds of the state’s districts taxing at or within five cents of the \$1.50 cap, did the trial court properly hold that the districts lack meaningful discretion in setting their tax rates – because of the convergence of the floor (the cost of providing a general diffusion of knowledge or satisfying accreditation requirements) and the ceiling (the \$1.50 cap) – resulting in a violation of Article VIII, § 1-e?

2. Justiciability Issue (*responsive to State issues 1 – 3 and State argument I*):

This Court has concluded on multiple occasions since 1989 that school districts’ claims under Article VII, § 1 and Article VIII, § 1-e of the Texas Constitution are justiciable. Should the Court reverse 16 years of precedent and hold that plaintiffs’ claims are nonjusticiable?

3. Adequacy Issues (*responsive to State issue 4 and State argument II*):

- a. The State relies upon a rational-basis review, but does that standard apply to the analysis of a violation of an affirmative constitutional duty?
- b. Does the State satisfy its duty to provide a general diffusion of knowledge simply by adopting academic standards and implementing an accountability system, regardless of whether students are given an opportunity to meet state standards?
- c. Has the State substantially defaulted on its obligation to provide a “general diffusion of knowledge”?

4. Suitability Issues (*responsive to State issue 6 and State argument IV*):

- a. The State relies upon a rational-basis review, but does that standard apply to the analysis of a violation of an affirmative constitutional duty?
- b. Does the State satisfy its duty to provide a suitable school system simply by adopting academic standards and implementing an accountability system, regardless of whether students are given an opportunity to meet state standards?
- c. Has the State substantially defaulted on its obligation to provide a suitable school system?¹

¹ The WOC Plaintiffs are not responding to State issue 5 or State argument III because those relate solely to claims asserted by the Intervenors.

PRELIMINARY STATEMENT

In *Edgewood IV*, this Court declared the public school system of Texas constitutional, but just barely. The Court found the school system only “minimally acceptable” and concluded: “Surely Texas can and must do better.” 917 S.W.2d at 726. Ten years later, Texas’s school system has run out of money and is near collapse.

Over the last decade, there has been a growing disconnect between rising academic standards and the funds available to achieve those standards. The state has passed the cost of meeting heightened requirements onto local districts and onto the local property tax, reducing the state’s share of education spending to 38%, the lowest level since World War II. The local property tax can no longer bear this heavy burden. In fiscal year 2003-04, nearly half of the state’s school districts (representing 60% of the state’s public school students) were taxing at the \$1.50 statutory cap. Roughly two-thirds of the districts (with more than 80% of the student population) were taxing at or within five cents of the \$1.50 cap. School districts are slashing teaching positions and programs despite burgeoning enrollments and challenging demographic trends. They are left unable to meet the Legislature’s stated objective of ensuring that all Texas children have access to a quality education. TEX. EDUC. CODE § 4.001(a).

Tellingly, the State never describes the functioning of the school *finance* system or acknowledges that Texas is in the midst of a school finance crisis – a crisis that countless state leaders have recognized. The State never mentions that nearly half of the school districts in Texas cannot access any additional revenues. Instead, the State touts an educational system (curriculum and accountability standards *not* challenged in this suit)

while failing to acknowledge that that system is at peril because of the collapsing school finance system (which *is* the subject of this suit).

What the State overlooks is that an excellent blueprint for an educational system is meaningless if there are insufficient resources to support it. The promise of the TEKS curriculum will go unfulfilled unless Texas schoolchildren are given a meaningful opportunity to learn it – which can be accomplished only if schools can afford to put qualified teachers in the classroom, provide reasonable class sizes, and offer remediation to students who are now failing the TAKS assessment tests in substantial numbers.

The trial court, which heard nearly six weeks of testimony and examined thousands of exhibits, issued comprehensive findings that are virtually ignored by the State. The State attempts to brush the findings aside, claiming that the trial court failed to give proper deference to the Legislature. But the court's findings accord great deference to the Legislature and, in fact, incorporate the Legislature's policy choices and objectives. In any event, this Court has long recognized that it is ultimately the Court's responsibility to determine whether the actions of the Legislature comport with the requirements of the Texas Constitution.

For authority, the State invokes solo dissenting opinions in *Edgewood IV* and *West Orange-Cove I* and goes so far as to invite the Court to turn back the clock to 1989 and overturn its *Edgewood* precedents – precedents that directly led to much of the academic improvement in the 1990s that the State touts in its brief. The Court should decline the State's invitation to turn back the clock, which would be a recipe for disaster for Texas's students and the state as a whole. The Court should instead affirm the trial court's

judgment, thereby ensuring the schoolchildren of Texas a school system that satisfies the standards that the people of Texas have themselves set in the Texas Constitution.

STATEMENT OF FACTS

A. The parties.

The WOC Plaintiffs, a geographically and economically diverse coalition of 47 school districts, collectively educate more than one million Texas schoolchildren, over a quarter of the state's total student enrollment.² The Edgewood Intervenors and the Alvarado Intervenors represent an additional 282 districts and more than one million schoolchildren. The State defendants (collectively, "the State") are charged with providing for a public school system that complies with the standards set forth in the Texas Constitution. FOF 1-4.

B. The Court has considered prior challenges to the school finance system.

1. Overview of the *Edgewood* cases.

Between 1987 and 1995, Texas courts, including this Court on four occasions, grappled with challenges to the constitutionality of the state's school finance system.³

² Because of the large number of districts involved in this lawsuit, the parties agreed to present proof of their claims through the use of a smaller group of "focus" or "representative" districts. FOF 5. The WOC Focus Districts are: Austin ISD, Carrollton Farmers Branch ISD, Dallas ISD, Humble ISD, Kaufman ISD, Lubbock ISD, North East ISD, Northside ISD, and Spring ISD. FOF 5. The WOC Focus Districts are typical of many Texas school districts in the system. They are located in the key metropolitan areas of the State, including Dallas, Houston, Austin and San Antonio, and serve both urban and suburban constituencies. They include small, mid-size and large school districts, both property-poor and property-rich. Collectively, they educate approximately 480,000 students, over 11% of the State's student population. FOF 270.

³ See *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989) (*Edgewood I*); *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991) (*Edgewood II*); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489 (Tex. 1992) (*Edgewood III*); *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717 (Tex. 1995) (*Edgewood IV*).

The *Edgewood* cases (with the exception of *Edgewood III*) turned on the Texas Constitution's education clause: "A *general diffusion of knowledge* being essential to the preservation of liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make *suitable* provision for the support and maintenance of an *efficient* system of public free schools." TEX. CONST. art. VII, § 1 (emphasis added). These cases dealt primarily with whether the finance system was constitutionally equitable among districts, a debate driven by the *Edgewood I* court's conclusion that the word "efficient" in Article VII, § 1 required districts to have "substantially equal access to similar revenues per pupil at similar levels of tax effort." 777 S.W.2d at 397.

In *Edgewood III* and *IV*, the Court considered claims that the finance system relied on state ad valorem taxes in violation of Article VIII, § 1-e, of the Texas Constitution, which provides that "[n]o State ad valorem taxes shall be levied upon any property within this State." TEX. CONST. art. VIII, § 1-e. The school finance system in *Edgewood III* involved tax base consolidation: all of the school districts in a particular county relinquished their authority to raise and distribute local property taxes to a single taxing entity called a County Education District ("CED"). See *Edgewood III*, 826 S.W.2d at 498-99. The Court held that this finance system violated Article VIII, § 1-e because the state set the tax rates of the CEDs by statute. *Id.* at 500.

2. After *Edgewood III*, the Legislature passed Senate Bill 7, which instituted the current system.

In response to *Edgewood III*, the Legislature in 1993 passed Senate Bill 7, which instituted the basic architecture of the current school finance system. The school finance

system relies primarily on the local property tax to finance public education. Taxes are levied against locally-assessed property rolls. School districts may set two tax rates each year: (i) a maintenance and operating rate for regular operating expenses (“M&O” rate) and (ii) an interest and sinking fund rate for servicing debt (“I&S” rate). Under provisions of Chapter 45 of the Texas Education Code, locally adopted M&O tax rates are generally subject to a statutory maximum of \$1.50 per \$100 of assessed valuation (the “\$1.50 cap”). In addition, subject to limited exceptions, a district may not adopt an I&S tax rate greater than \$0.50 for debt issued after September 1, 1992. The \$1.50 M&O cap is at the heart of this case.

This system relies on a two-tiered finance structure known as the Foundation School Program (“FSP”).⁴ A visual depiction of the system is available at App. D. Under Tier 1, school districts taxing at a rate of \$0.86 per \$100 of assessed property valuation are entitled to a “Basic Allotment” of \$2,537 for each student in average daily attendance (an amount that has not changed since 1999), subject to various adjustments and special allotments to reflect variations in actual cost. *See* TEX. EDUC. CODE §§ 42.101, 42.252. The Basic Allotment is adjusted by weighting average daily attendance for factors that impact the cost of school district operations; this results in an “Adjusted Allotment.” To the extent that an \$0.86 effective tax rate fails to produce the Adjusted Allotment from the district’s own tax base, the state makes up the difference.

⁴ Legislative action in 1997 and 1999 resulted in the creation of a third tier of state financing, which works in connection with a district’s I&S rate and is designed to assist districts with certain debt service payments associated with school facilities.

Tier 2 is often referred to as the “Guaranteed Yield Program.” For every cent of additional tax effort beyond the \$0.86 required for Tier 1, up to the \$1.50 cap on the “maintenance and operations” (“M&O”) tax rate, the state guarantees a yield of \$27.14 per weighted student.⁵ *See* TEX. EDUC. CODE §§ 42.301-.303. As with Tier 1, to the extent that an additional cent of tax effort fails to yield the guaranteed amount from the district’s own tax base, the state makes up the difference. *See id.* § 42.302.

The current system also establishes an equalized wealth level among districts and requires districts above this level to reduce their wealth. School districts are limited to \$305,000 of property wealth per weighted student, subject to transition guidelines for districts with excess wealth. *See* TEX. EDUC. CODE § 41.002. The state recaptures funds raised by school districts considered property-wealthy (“Chapter 41 districts”) above this level pursuant to wealth-reducing mechanisms defined by statute. *See* TEX. EDUC. CODE §§ 41.003; 41.091-.099; 41.121-.124. The state then distributes the funds recaptured from the property-wealthy districts to districts considered property-poor (“Chapter 42 districts”). The state’s overreliance on the local property tax and its failure to sufficiently adjust the funding formulas have resulted in a vast increase in the amounts of money “recaptured” from Chapter 41 districts. The total amount of funds recaptured from Chapter 41 districts in 1993-94 school year was \$433 million. FOF 103. That number

⁵ Student counts are “weighted” to reflect the varying cost of education by pupil characteristic (e.g., special education student), instructional arrangement (e.g., bilingual education) or community characteristic (e.g., small size) enabling the state to direct more aid to districts whose students are more expensive to educate. *See* TEX. EDUC. CODE §§ 42.151-.158; *see also Edgewood II*, 804 S.W.2d at 495 n.9. The trial court found that many of these weights are set too low, meaning that the state’s funding formulas fail to fully compensate districts for the additional costs of educating students with special needs. FOFs 74-88, 437, 459, 540-45.

grew to \$1.094 billion in the 2003-04 school year and is expected to reach \$1.2 billion in 2004-05, becoming the fourth-largest source of “state” revenue. *Id.*⁶ App. E at 3.

3. In *Edgewood IV*, this Court upheld the constitutionality of Senate Bill 7, but warned that the system could become unconstitutional if the \$1.50 cap became both a floor and a ceiling for school districts.

In *Edgewood IV*, this Court upheld the constitutionality of Senate Bill 7. The Court recognized that districts’ discretion in setting tax rates was constrained from above by the \$1.50 cap (the “ceiling”) and from below by their constitutional obligation to provide a “general diffusion of knowledge” (the “floor”). But because the Court found that the districts still had sufficient and meaningful discretion in setting their local property tax rates between the floor and the ceiling, the Court concluded that Senate Bill 7 did not result in a state ad valorem tax in violation of Article VIII, § 1-e of the Texas Constitution.⁷ *Edgewood IV*, 917 S.W.2d at 737-38. However, the Court issued the following warning:

[I]f the cost of providing for a general diffusion of knowledge continues to rise, as it surely will, the minimum rate at which a district must tax will also rise. Eventually, some districts may be forced to tax at the maximum allowable rate just to provide a general diffusion of knowledge. *If a cap on tax rates were to become in effect a floor as well as a ceiling, the conclusion that the Legislature had set a statewide ad valorem tax would appear to be unavoidable because the districts would then have lost all meaningful discretion in setting the tax rate.*

Id. at 738 (emphasis added). This warning was prophetic.

⁶ Both WOC Plaintiffs’ expert Lynn Moak and State expert and TEA Associate Commissioner Joe Wisnoski, eloquently describe the functioning of the school finance system in greater detail. RR8:18-40; PX705:29-37; DX16060.

⁷ According to the Court, at the time of *Edgewood IV*, the property-rich districts had the discretion to tax between \$1.22 and \$1.50 and the property-poor districts had the discretion to tax between \$1.31 and \$1.50. *See Edgewood IV*, 917 S.W.2d at 731.

C. Developments since *Edgewood IV* have created a “perfect storm.”

1. Virtually all financial capacity in the finance system has been exhausted.

The condition of Texas’s educational system and its school finance system in particular have changed dramatically since the days of *Edgewood IV*. In 1993-94, there was still significant financial capacity in the system. FOF 105. Only 25 out of 1040 districts were taxing at the \$1.50 cap, and 930 districts were taxing below \$1.40. FOF 105. The majority of school districts had tax rates of less than \$1.20. *Id.* Now, almost all districts have tax rates of \$1.40 or higher and virtually no districts are at the \$1.20 or less level.⁸ *Id.*; App. E at 4 (PX705:59); *see also* PX539. Furthermore, 494 out of 1031 school districts in Texas (or roughly 48%) taxed at the \$1.50 M&O statutory cap in 2003-04. These 494 districts educated 2,332,465 students, or approximately 59% of the state’s public school student population. FOF 105; App. E at 4. A total of 691 districts (roughly 67%) taxed at or within five cents of the \$1.50 cap in 2003-04; these districts educated approximately 3,203,474 students, or roughly 81% of Texas’s public school student population. FOF 105; App. E at 4.⁹

Over 97 percent of the funds available in the current system (through the Foundation School Program) are being utilized by school districts, a huge leap from the 83.3% figure that was in effect at the time of *Edgewood IV*. FOF 106; PX538:35. During the 2003-04 school year, major urban school districts in Texas tapped 98.2% of

⁸ The change in districts’ tax rates from 1993-2003 is dramatic when depicted visually, as it is at App. C.

⁹ A district taxing at the \$1.50 cap cannot simply maintain the *status quo* because the real value of the dollars it raises diminishes every year as a result of inflation (teacher salaries, the cost of utilities, etc.) The only way to accommodate these inflationary costs is to cut programs or personnel. PX627:11.

the maximum amount of state and local money available to them under the current school financing formulas, compared to just 82.5% in 1994-95. FOF 106; App. E at 5. Major suburban districts tapped 98.4%, compared to 88.4% in 1994-95. FOF 106; App. E at 5. Furthermore, any remaining capacity is not realistically available.¹⁰

Finally, the vast majority of new money coming into the system over the last decade is attributable to local property taxes, rather than state aid, and the percentage of education funds coming from the state has fallen to the lowest level since World War II. FOF 102; RR13:17; RR23:157; PX627:9. Key legislative leaders and even State expert witnesses have acknowledged the school finance system is flawed and in crisis, because more rigorous standards have been imposed on districts, the state's share has declined to "irresponsibly low levels," and the capacity in the system has been exhausted. PX658, PX646; PX647; PX824; RR24:168-70; 235-38; PX627:4-9,11; App. K at 4.

2. Texas has significantly increased academic standards, resulting in much higher costs for districts.

In the decade since *Edgewood IV*, the Legislature made several significant changes to the curriculum requirements and the accountability regime without providing districts with sufficient state funding to meet these higher standards. While the WOC Plaintiffs support these standards, it is undeniable that these changes have vastly increased school districts' budgetary pressures, as they now must prepare their students for a more rigorous assessment on a broader curriculum.

¹⁰ Accessing the remaining capacity would require (1) a virtually 100% tax collection rate (practically impossible); (2) the repeal of any property tax exemptions (politically improbable); and (3) a district to have stable or increasing property values. FOF 106; RR9:9-10.

The Adoption of the TEKS Curriculum. In 1996 and 1997, the State Board adopted a new curriculum – the Texas Essential Knowledge and Skills (TEKS), which was taught for the first time in the 1998-99 school year. See TEX. EDUC. CODE § 28.002; 19 TEX. ADMIN. CODE §§ 110-128. The TEKS is a comprehensive description of what Texas students are expected to learn, and includes a mandatory foundation and enrichment curriculum.¹¹ See, e.g., RR6:215-18; RR25:8-10, 58-59; TEX. EDUC. CODE § 28.002. National organizations have concluded that TEKS is “clear and rigorous” and “represent[s] a high level of expectation and sophistication.” PX639:18. Experts from the TEA testified that the TEKS represents the knowledge that Texas schools are supposed to “generally diffuse” to their students. R6:217-18; PX748:30, 69.

The Recommended High School Program. In July 2000, at the Legislature’s direction, the State Board of Education adopted changes to the curriculum and imposed more rigorous high school graduation requirements, adding course requirements in science, math and foreign language. 19 TEX. ADMIN. CODE § 74. The three graduation programs — the Minimum Program, the Recommended High School Program (“RHSP”), and the Distinguished Achievement Program — were revised to reflect the necessary opportunities to learn content and skills that will be required for the TAKS exit-level assessment exam. The State acknowledges that these revisions “significantly increased the difficulty of the three available high school programs.” State Br. at 7.

¹¹ In Senate Bill 817 (eff. Sept. 1, 2003) the Legislature amended Section 28.002 of the Education Code to make clear that the enrichment curriculum was mandatory. This curriculum includes courses in: (1) foreign languages, (2) health; (3) physical education; (4) fine arts; (5) economics; (6) career and technology education; and (7) technology applications. See TEX. EDUC. CODE § 28.002(a)(1)-(2).

In 2001, the Legislature, through adoption of HB 1174, mandated that, beginning in the 2004-05 school year, all ninth grade students enter high school on the RHSP or the Distinguished Achievement Program, unless the student's parent and school counselor or administrator agree that the student should enroll in the Minimum Program. *See* TEX. EDUC. CODE § 28.025(b). According to TEA officials and numerous superintendents, the RHSP is now the minimum bar for the "general diffusion of knowledge." PX748:68-69; *see, e.g.*, RR6:66-67, RR7:44; 19 TEX. ADMIN. CODE § 74.53.

The Shift from TAAS to TAKS. In spring 2003, the Legislature implemented a new assessment test called the TAKS (Texas Assessment of Knowledge and Skills) test, which the State acknowledges "is significantly more difficult than its predecessor," the TAAS test. State Br. at 58. Indeed, both Plaintiff and State witnesses testified that, as a result of the transition from TAAS to TAKS, the bar had been raised considerably. RR9:141-42; RR25:22-29 DX16425:8. The State's brief accurately recounts the dramatic changes that were made to the accountability system with the advent of the TAKS exam, acknowledging that (1) the TAKS tests "higher-level knowledge and skills than the former test"; (2) the state "increase[d] the number of grades and subjects tested," DX 16425:7; (3) "[e]ach TAKS subject-area test is also more difficult than its TAAS predecessor, corresponding with the more rigorous high school graduation requirements"; and (4) "the increase in difficulty is also evident from a comparison of test questions over the years." State Br. at 8.

Graduation and Grade Promotion Requirements. Beginning in 2003-04, no student can graduate from a Texas public school without passing four TAKS exit

examinations in English/Language arts (including English III and writing), social studies (including early American and United States history), science (including biology, chemistry and integrated physics), and mathematics (including algebra and geometry). *See* TEX. EDUC. CODE § 39.025(a); FOF 28. The Legislature also implemented “promotion gates” at other grade levels. With certain limited exceptions, (1) a student may not be promoted to the fourth grade without passing the third grade reading assessment instrument, (2) a student may not be promoted to the sixth grade without passing the fifth grade reading and mathematics assessment instruments, and (3) a student may not be promoted to the ninth grade without passing the eighth grade reading and mathematics assessment instruments. *See* TEX. EDUC. CODE § 28.0211.¹²

Increased Expectations = Increased Costs. These increased expectations placed on students and schools have resulted in significant increased costs for districts. FOF 49. For example, because many more students are failing the TAKS test than the TAAS test, districts must spend a great deal more on preventing and remediating these failures through a variety of costly strategies, including summer school, extended day programming, remedial classes, the use of curriculum specialists, credit recovery courses, and reduced class sizes. *Id.* Districts have to focus particular attention on those students who have not passed the various “promotion gate” tests (3rd grade reading, 5th and 8th grade reading and math), as well as those that have failed one or more exit level TAKS exams. *Id.* Districts also have had to invest in professional and staff development to

¹² The third grade promotion gate was phased in during the 2002-03 school year. The fifth grade promotion gate is being phased in during the current school year (2004-05). The eighth grade promotion gate is effective beginning in the 2007-08 school year. *See* TEX. EDUC. CODE §§ 28.0211(n).

ensure that teachers are familiar with the new curriculum and assessment instruments, can tailor their instruction to student needs and the standards being assessed, and are aware of the latest techniques for instruction of special education, limited English proficient, and at-risk students. *Id.* In addition, the shift to the RHSP means that more students will need to take higher level math and science classes in order to graduate, which required the hiring of thousands of new teachers statewide that are capable of teaching these courses. *Id.*; RR6:45. Furthermore, because there is an undersupply of secondary math and science teachers, districts have had to pay stipends to attract these teachers or make due with teachers teaching out-of-field. FOF 49. App. J at 3-4.

3. Other developments have increased the financial pressure on districts.

Other recent developments have driven up school districts' operating costs and contributed to the "perfect storm" threatening Texas school districts.

Demographic Trends. Texas school districts must meet the higher standards referenced above while educating a sizable and growing population of "special need" students, including students with limited English proficiency ("LEP"), with disabilities, or from an economically disadvantaged background. FOF 74; App. E at 1. Between 1993-94 to 2003-04, virtually all of the net growth in student enrollment has been from minority and low-income populations. FOF 68; PX529:3; App. E at 1. During the 2002-03 school year, for the first time, *more than half* of Texas public school students qualified for the federal free and reduced-price lunch program, and *15 percent* of students were limited-English proficient ("LEP"). FOF 68.

Economically disadvantaged students, LEP students, and students with other special needs generally cost significantly more to educate. FOF 74. The state’s funding formulas fail to fully compensate districts for the additional costs of educating these special needs students, requiring districts to pay these additional costs out of their local tax revenues. FOFs 74-88, 437, 459, 540-45. Accordingly, as these student populations have grown, greater and greater pressure has been placed onto the local property tax.

The No Child Left Behind Act. In 2002, the federal No Child Left Behind Act (“NCLB”) went into effect. The State of Texas chose to comply with NCLB to receive federal funds. FOF 54. By opting to comply with NCLB, the state obligated school districts to meet a wide range of new and unfunded federal mandates, as described in detail in the trial court’s findings of fact. FOFs 54-64.¹³

The Undersupply of Teachers. There is a severe undersupply of qualified teachers in Texas, particularly in the areas of science, computer science, mathematics, foreign language, special education, and bilingual education. FOFs 92-93; App. J. The number of uncertified teachers hired each year in Texas has been steadily increasing over the past seven years. FOF 92. App. J at 2. In 1996, 14.1% of the newly hired teachers in Texas were not certified. *Id.* By 2002, that figure had increased to 52.8%. *Id.* As more and more uncertified teachers are hired, the number and share of teachers in the overall teaching force who are uncertified has been increasing as well – from 3.6% in 1996 to 13% in 2003. In 2003, 37,467 teachers in Texas were not certified. Moreover, high

¹³ Additional information about the requirements of NCLB is available in the TEA’s “2004 Adequate Yearly Progress Guide,” which was released after trial and which is available at <http://www.tea.state.tx.us/ayp/2004/guide.pdf>.

attrition and turnover rates result in both financial costs to the school districts and educational costs to students. FOF 96. These problems of an undersupply of teachers, turnover and attrition are exacerbated by the tremendous growth in student enrollment, which has been increasing at an average rate of 72,500 students a year (between 1990-2003) and which shows no signs of abating. RR7:153-54, PX 705:2-4.

In December 2004, after final judgment issued below, named defendant Carol Keeton Strayhorn, Comptroller of Public Accounts, issued a report that mirrored the findings of the trial court with respect to the undersupply of teachers and the costs of high attrition and teacher turnover rates. *See generally* Carole Keeton Strayhorn, *The Cost of Underpaying Texas Teachers* (Dec. 2004), available at <http://www.window.state.tx.us/specialrpt/teachersalary04> (visited Dec. 15, 2004). This report explicitly recognized the role that low teacher salaries play in causing these problems:

Teacher salaries in Texas are low, and have contributed to significant and continuing shortages of high-quality seasoned teachers. In their absence, student performance suffers and the likelihood of students dropping out increases. Student dropouts and poorly educated workers have a tremendous detrimental impact on the state's economy and the cumulative effect on the economy over time could be catastrophic. . . .

Id.

Unfunded or Partially Funded Mandates. The Legislature has imposed a wide variety of mandates on school districts, including mandates relating to curriculum requirements, special education instruction, district and school governance, information collecting and reporting, and employee relations, among others. FOF 51; PX522. These

mandates – some partially funded, but many wholly unfunded – are exhaustively documented in PX522 (attached at App. I). *See also* FOF 52; PX641.

4. The “perfect storm” has created enormous challenges for Texas schools.

It is noteworthy that the State cites a 1999 newspaper article as evidence of the success of the Texas’s educational system and that the State’s discussion of improvements in student performance stops at 2002. State Br. at 2, 19. Much has changed since then.

The shift from TAAS to TAKS has resulted in a precipitous decline in the percentage of students deemed “passing” under the system. *Compare* PX705:22 with PX705:27. Moreover, gaps between white students and minority students that had narrowed significantly under the TAAS regime have reappeared with a vengeance, particularly at the later grades, as indicated in the following chart, which sets forth student passing rates on 2004 TAKS tests at the panel-recommended cut scores (which will be used for ratings purposes for grades 3-10 in the 2005-06 school year):¹⁴

¹⁴ The panel-recommended cut scores were determined by advisory panels of educators and experts and adopted by the SBOE. State Br. 10-11. They constitute the level of achievement that Texas expects students to meet on these particular tests. FOF 33; RR9:152-53; RR7:32-33.

2004 TAKS Passing Rates at Panel-Recommended Standard for All Tests¹⁵

Grade	State	African-American	Hispanic	White	Econ Disad	LEP
11	52%	32%	37%	67%	34%	11%
10	38%	20%	24%	54%	22%	5%
9	48%	31%	35%	65%	33%	10%
8	53%	35%	41%	69%	39%	14%
7	55%	37%	44%	70%	41%	15%
6	62%	47%	52%	77%	49%	22%
5	48%	30%	37%	66%	34%	17%
4	67%	52%	60%	79%	57%	46%
3	78%	64%	71%	88%	69%	65%

These scores indicate enormous deficiencies among all students – particularly in the latter grades and among minority, economically disadvantaged, and LEP students. With the exception of sixth-grade Hispanic students, there is not a single grade between grades 5-11 in which a simple majority of Hispanic, African-American, economically disadvantaged, or LEP students was able to pass all TAKS tests at the panel-recommended levels.¹⁶

There are enormous deficits in other areas as well. Only 28% of Texas students met the Texas Higher Education Coordinating Board (THECB)’s standard for college readiness on the English exam, including only 18% of African-Americans, 20% for

¹⁵ This statewide data had not been published by the TEA at the time of trial. The raw data is now available at the TEA website at <http://www.tea.state.tx.us/student.assessment/reporting/taksagg/index.html>. The pass rates in the chart were calculated by (i) downloading the number of students at each grade level passing the English-language TAKS by region and summing the totals, (ii) downloading the number of students at each grade level taking the English-language TAKS by region and summing the totals, and (iii) dividing the first number into the second number by grade level. For simplification, the chart reflects the scores of those students that took the TAKS test in English, omitting those students in grades 3-6 that are permitted to take the test in Spanish. Had those students been included, the scores would have been even lower.

¹⁶ TAKS passing rates at “met standard” cut scores (1 SEM for Grades 3-10 and 2 for Grade 11), as well as other statewide data, can be found in the 2003-04 State AEIS report, available for download on the TEA website at <http://www.tea.state.tx.us/perfreport/aeis/2004/state.html>.

Hispanics, and 3% for LEP students. FOF 273. Forty-two percent of Texas students met the THECB's standard for college readiness on the math exam, but only 21% of African Americans, 28% of Hispanics and 13% of LEP students did. FOF 273. State expert Ann Smisko agreed that if one of Texas's goals is to prepare students for post-secondary learning, "there are still a ways to go." RR25:71.

As of 2003, Texas ranks dead last among the 50 states in the percentage of high school graduates in the population, 25 years and older. PX633A:8; RR15:61-62. Texas also has a severe dropout problem. *See, e.g.*, AX9019; RR15:13-73. More than half of the Hispanic ninth-graders and approximately 46% of the African-American ninth graders leave the system (by dropping out or for other reasons) before they reach the twelfth grade. AX9019:12-13; RR15:37-38. This dropout problem also artificially inflates the TAAS and TAKS scores because the students that drop out are the ones least likely to score well on these tests. RR23:192; RR25:135, 200-01.

D. Demographic trends show that Texas faces a bleak future unless it adequately educates all of its schoolchildren.

Dr. Steve Murdock, the official state demographer, gave extensive, uncontroverted testimony regarding demographic trends and their consequences for the State of Texas. App. F; PX760; *see also* RR7:120-32. Dr. Murdock projected that by 2040, Hispanics and African-Americans together will constitute between 62.1% and 67.2% of Texas's population. PX543:41; App. F at 3. Whites will outnumber Hispanics *only* in the 65 and over age bracket. PX 543:31.

Given these demographic trends, and *if existing gaps between whites and other minorities in educational attainment levels and household income remain in place*, Dr. Murdock testified that Texas will “have a population that not only will be poorer, less well educated, and more in need of numerous forms of state services than its present population but also less able to support such services. It is likely to be less competitive in the increasingly international labor and other markets.” PX760:102-03; PX545A:398; FOF 70. Average household income is projected to decline from \$54,441 in 2000 to \$47,883 in 2040 (PX543:59),¹⁷ resulting in a decline in state revenues, even as the costs of state services (welfare, prisons, Medicaid, etc.) rise precipitously. PX545A:385-86.

But demography is not destiny. The one variable Dr. Murdock identified as being able to change Texas’s future is the manner in which the state educates its schoolchildren, particularly minorities. PX545A:398-99. According to Dr. Murdock’s uncontested projections, if Texas is able to close the educational attainment gaps between whites and minorities at the rate it did in the 1990s, it could, by 2040, (1) result in an increase of \$143 billion per year in annual income and more than \$100 billion per year in consumer expenditures in comparison to the baseline scenario (generating a corresponding increase in tax revenues); (2) reduce prison populations by nearly a third of the baseline levels; and (3) save the state nearly \$2.8 billion annually in costs for prisons, welfare, food

¹⁷ All the projections in this discussion are based on Murdock’s “1.0 scenario”, a projection that assumes that the age, sex and race/ethnicity cohort-specific rates of net migration remain in the future at the same levels as those from 1990-2000. Dr. Murdock also provided similar data for the more likely “0.5 scenario,” which assumes that the age, sex and race/ethnicity cohort-specific rates of net migration that are one-half of the levels of the 1990-2000 period. FOFs 72-73 and n.4.

stamps, and Medicaid. FOF 72; PX542:5-6. App. F at 6-7. Even more impressive results could be achieved if Texas were able to completely close the achievement gaps.¹⁸

SUMMARY OF THE ARGUMENT

In seeking reversal of the trial court's judgment, the State asks the Court to reverse 16 years of its own precedent, turn back the clock, and ignore the plight of Texas's schoolchildren as well as the need of Texas to educate its workforce for a knowledge-based and global economy. The State's arguments should be rejected.

The tax claim under Article VIII, § 1-e. The first issue for the Court is whether it should affirm the trial court's declaration that the public school finance system is unconstitutional on the ground that it imposes an unlawful state property tax in violation of Article VIII, § 1-e of the Texas Constitution, which provides: "No State ad valorem taxes shall be levied upon any property within this State." It should be initially observed that, while the State challenges the justiciability of the adequacy and suitability claims on political question grounds, the State does *not* assert that challenge with respect to the tax claim.

In *Edgewood III*, the Court explained that an ad valorem tax is an unlawful state tax when "the State so completely controls the levy, assessment and disbursement of revenue, either directly or indirectly, that the authority employed is without meaningful discretion." *Edgewood III*, 917 S.W.2d at 737. Under the State's construction, that

¹⁸ Completely closing the gap between whites and minorities could, by 2040, (1) result in an increase of \$317 billion per year in annual income and more than \$224 billion per year in consumer expenditures in comparison to the baseline scenario, (2) reduce prison populations to less than one half of the baseline levels, and (3) save the state nearly \$5.5 billion annually in costs for prisons, welfare, food stamps, and Medicaid. FOF 73; PX542:5-6.

standard can be met only when a district is taxing at the \$1.50 cap for the sole purpose of paying the cost of mandates expressly required by state law; the State attributes all remaining district spending to “local preferences.” But as found by the trial court, the State’s position improperly defines the tax floor and strips the term “meaningful” from the phrase “meaningful discretion.”

Hundreds of districts across the state have hit the \$1.50 cap not because of local community preferences but because of the state’s decision to adopt the TEKS curriculum, shift from the TAAS to the TAKS test, adopt the RHSP as the default high school graduation program, and because of other factors outside the control of districts, such as a teacher shortage and more challenging demographics. While the state affords districts discretion in how they achieve the performance targets it sets, there can be no doubt that the more rigorous state standards have pushed districts to the \$1.50 cap and denied them meaningful discretion in setting their tax rates. Accordingly, the Court should affirm the trial court’s declaration that the public school finance system is unconstitutional under Article VIII, § 1-e.

Justiciability. The Court must also determine whether the public school system is constitutionally inadequate or unsuitable under Article VII, § 1, which provides:

A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

In *West Orange-Cove I*, the Court, echoing prior decisions, held that this provision imposes three standards: (1) “the education provided must be *adequate*; that is, the

public school system must accomplish that ‘general diffusion of knowledge . . . essential to the preservation of the liberties and rights of the people’; (2) “the means adopted must be ‘*suitable*’”; and (3) “the system itself must be ‘*efficient*’.” 107 S.W.3d at 563 (emphasis added).

The State’s first challenge to the Article VII, § 1 claims is that they are nonjusticiable because they present a political question and the constitutional provision is not self-executing (i.e., does not have sufficient standards). These arguments ignore and are refuted by 16 years of the Court’s precedent. This Court has consistently held that while, under Article VII, § 1, deference is to be afforded the Legislature on policy choices, the Court retains the “final authority to determine adherence to the Constitution.” *West Orange-Cove I*, 107 S.W.3d at 563. As to the terminology of Article VII, § 1, the Court has acknowledged that the terms may not be “precise,” but they nevertheless provide “a standard by which this court must, when called upon to do so, measure the constitutionality of the legislature’s actions.” *Id.* Thus, the State is not entitled to a constitutional bye on the ground that this case presents a political question or because Article VII, § 1 is not self-executing.

The State also argues (as to both the Article VII, § 1 and Article VIII, § 1-e claims) that the districts lack standing. That argument should also be rejected. Until *West Orange-Cove I*, standing of the districts was never challenged and, in *West Orange-Cove I*, the Court properly rejected the dissent’s finding of no standing and held that, because the districts are charged with implementing an unconstitutional statute, they have an interest in the controversy sufficient to confer standing.

The adequacy and suitability claims under Article VII, § 1. The State's argument relies heavily upon the false premise that a rational-basis review applies and requires deference to the Legislature for non-arbitrary acts. But that standard does not apply where (as here) the issue is whether there is a violation of a constitutional duty (the duty to provide an adequate and suitable education), not whether there is a rational basis for the Legislature's actions. With the rejection of the State's proposed standard of review, much of its argument collapses.

As to the definition of adequacy, the State urges that the Court look solely to the architecture of the system (curriculum standards, assessment and accountability), but this architecture is meaningless without sufficient resources that ensure results in the classroom. And accreditation standards are set too low to be a meaningful measure of adequacy. The trial court's definition, which echoes legislative pronouncements and holdings of this Court, represents the proper approach. That definition speaks in terms of providing all Texas schoolchildren with a meaningful opportunity to acquire the essential knowledge and skills identified by the Legislature and is in accord with this Court's directive that "the State's provision for a general diffusion of knowledge must reflect changing times, needs, and public expectations." *West Orange-Cove I*, 107 S.W.3d at 572 (quoting *Edgewood IV*, 917 S.W.2d at 732 n.14).

Because the State has substantially defaulted on its obligation to provide an adequate education, as measured by outputs and inputs, the trial court properly declared the public school system of Texas in violation of both the adequacy and suitability clauses of Article VII, § 1 of the Texas Constitution.

For these reasons, the judgment should be affirmed in all respects as to the WOC Plaintiffs' claims.

ARGUMENT AND AUTHORITIES

I. The school finance system has evolved into a state property tax in violation of Article VIII, § 1-e of the Texas Constitution.

Article VIII, § 1-e provides that “[n]o State ad valorem taxes shall be levied upon any property within this State.” *Edgewood III* held that an ad valorem tax is a state tax “when the State so completely controls the levy, assessment and disbursement of revenue, either directly or indirectly, that the authority employed is without meaningful discretion.” 826 S.W.2d at 502. *Edgewood IV* held that, “[i]f a cap on tax rates were to become in effect a floor as well as a ceiling, the conclusion that the Legislature had set a statewide ad valorem tax would appear to be unavoidable because the districts would have lost all meaningful discretion in setting the tax rate.” 917 S.W.2d at 738.

The trial court found that the school finance system violates the state tax prohibition in Article VIII, § 1-e because the \$1.50 tax cap has in effect become both a floor and a ceiling, leaving the districts without meaningful discretion in setting their tax rates. COL 16, 17; *see also* FOFs 102-07, 140-41, 163-64, 186-87, 201-02, 216-17, 229-30, 243-44, 254-55, 267-74, 290-91. The State attacks the trial court’s findings and conclusions by arguing that the court too broadly defined the tax floor and the meaningful discretion required by the Constitution. The State’s argument improperly eliminates meaningful discretion from the equation and is further flawed because it is based upon an erroneous, extreme position that a district lacks meaningful discretion *only if* it is taxing

at the cap and has no choice but to spend *every penny* of its taxing authority on satisfying the cost of “state requirements,” which it defines as “items over which the districts have no choice.” State Br. at 99.

A. The trial court properly defined the tax floor.

1. The State’s argument that only absolute state control over ad valorem taxes violates Article VIII, § 1-e should be rejected – again.

In the initial appeal of this case, the State argued that the plaintiffs could not assert a property tax claim unless 100% of districts were taxing exactly at the \$1.50 cap and were doing so just to provide an accredited education (i.e., an “academically acceptable” rating under the accountability system). This Court “plainly rejected” the State’s argument that “nothing short of virtually absolute state control of ad valorem taxation violates article VIII, section 1-e.” *West Orange-Cove I*, 107 S.W.3d at 579. In spite of the Court’s holding, the State has reverted to its argument that Article VIII, § 1-e can be violated only if the state maintains virtually absolute control of ad valorem taxation, advancing the highly unrealistic proposition that school districts have “meaningful discretion” if they have discretion to reduce their tax rate a fraction of a cent below \$1.50 while still meeting state requirements because they can eliminate any course, extracurricular activity, benefit, or program not specifically required by state law. CR1:253, 255. The State’s argument is misguided, both in its deviation from this Court’s holdings and in its misunderstanding of what is required to provide a general diffusion of knowledge.

- a. **The trial court properly concluded that the tax floor includes more than spending on “items over which districts have no choice.”**

According to the State, only two layers of school district funding count toward the calculation of the tax floor: (1) the cost of complying with express state mandates, and (2) the cost of satisfying state accreditation requirements. What the State fails to acknowledge is that there is a third layer that is an extension of, and intertwined with, the first two layers, and that layer is a necessary component of the constitutional equation: the cost of providing all students with a meaningful opportunity to achieve state standards (i.e., provide a general diffusion of knowledge). The trial court properly found, based on *West Orange Cove I*, that this third layer counts towards the tax floor and that districts must be afforded meaningful discretion so that they can provide a fourth level of funding for local enrichment.¹⁹ COL 4.

First layer: Express State mandates and uncontrollable costs. Before doing anything else, districts must ensure that they are in compliance with express state laws and regulations relating to curriculum requirements, special education instruction, district and school governance, information collecting and reporting, and employee relations, among others, many of which are identified in PX522. App. I. These state mandates

¹⁹ This is in accord with section 42.002(b) of the Education Code, which states that the Foundation School Program is intended to provide (1) “sufficient financing for all school districts to provide a basic program of education that [(a)] is rated academically acceptable or higher . . . and [(b)] *meets other applicable legal standards*” and (2) “substantially equal access to funds to provide an enriched program.” TEX. EDUC. CODE § 42.002(b) (emphasis added). FOF 39.

The trial court correctly concluded that “the phrase ‘other applicable legal standards’ means that the FSP is intended to provide sufficient funding not only to enable districts to attain an ‘academically acceptable’ ranking but also to meet all relevant duties for offering programs and services under Chapters 28-34 and 37-39 of the Texas Education Code, together with associated regulations implementing these and other mandates, including many of the directives described [in FOFs 18-29].” FOF 40.

range from the general (districts required to provide an “intensive program of instruction to a student who does not perform satisfactorily on [a TAKS] assessment instrument,” *see* TEX. EDUC. CODE § 28.0213) to the specific (provide a written or audiotape copy of a student’s individualized education program in Spanish if that is the parent’s native language, *see* TEX. EDUC. CODE § 29.005). They also range from the expensive (22:1 class size mandate in grades K-4, *see* TEX. EDUC. CODE § 25.112) to the inexpensive (provide parents and students specified information on bacterial meningitis, *see* TEX. EDUC. CODE § 38.0025). The cost of these mandates vary significantly by district.²⁰ Districts must hire sufficient administrative personnel and teachers to comply with these mandates.

Furthermore, districts have no choice but to spend money on variety of uncontrollable costs including, by way of example, (1) utilities (water, gas, electricity) (2) legal costs, (3) insurance costs, (4) maintenance and custodial costs; (5) election costs (for bonds, etc.), and (6) costs for tax appraisal and collection. RR5:46-48; PX699:11.

Second layer: Spending necessary to achieve “academically acceptable” rating.

At the second layer of spending, districts must ensure that they are able to earn an “academically acceptable” rating under the accountability system. This ranking is determined based on test scores (TAKS and SDAA for students with disabilities), high school completion rates and middle school dropout rates. A district must hire enough qualified teachers and provide enough remedial programming to ensure that its students

²⁰ For example, the costs of implementing section 28.0212 of the Education Code, which requires districts to develop “personal graduation plans” for each student failing a state test, will obviously depend on the number of failing students in the district.

pass the TAKS/SDAA tests in sufficient numbers (a threshold that, as discussed *infra*, is deliberately set low), and provide enough anti-dropout programming to ensure that its high school completion rate stays at or above 75% and its middle school dropout rate stays at or below 2.0%.

Third layer: Spending necessary to provide all students with a meaningful opportunity to learn state standards. The third layer of spending is an extension of, and is inexorably intertwined with, the first two layers, but it recognizes that a district's responsibilities do not end once 25% of its students can pass the science TAKS test, 35% pass the math TAKS test, and 50% can pass the English and social studies TAKS test (the measure of "academically acceptable" under the 2003-04 accountability system). Instead, districts must provide an opportunity for all students to achieve state standards.

To do so, districts must put qualified teachers in the classroom (which they could not do if they paid at the state's minimum salary schedule) and pay stipends to attract teachers in shortage areas. *See, e.g.,* PX458; RR12:81-84, 92-100; RR6:75-76, 107; RR26:68-69; RR5:161. They must maintain reasonable class sizes, particularly in schools with significant disadvantaged populations, so that students do not get "lost" in the classroom. *See, e.g.,* RR7:17-18; RR16:136-38; RR23:143-44, 209-10; RR5:57-58. They must invest in professional and staff development to ensure that teachers are familiar with the new curriculum and assessment instruments adopted by the state, can tailor their instruction to student needs and the standards being assessed, and are aware of the latest techniques for instruction of special education, limited English proficient, and at-risk students. *See, e.g.,* PX458; PX12:113-14; RR16:143-45; RR19:54; RR26:69.

They must remediate TAKS failures through a variety of strategies, including the use of instructional specialists, extended-day or extended-year programming, or credit recovery courses. *See, e.g.*, RR5:33-35, 61-81; RR21:172-73; RR20:11-12. They must offer programming to combat the dropout problem and keep students interested in school (through extracurricular activities and electives, the hiring of dropout specialists, the creation of truancy courts, etc.) FOF 99; *see, e.g.*, RR5:51, 147; RR6:67-68, 123. Districts must also provide vocational and career courses to give those students that cannot attend college an opportunity to succeed in post-secondary employment settings. *See, e.g.*, RR16:138; RR23:71-72.

Further, a district must provide a sufficient support network, including, but not limited to (1) adequate and well-maintained facilities, (RR22:44-59; RR23:84); (2) nurses to keep students healthy (RR7:23; RR5:188); (3) security guards in certain dangerous schools to keep students safe and focused on learning (RR5:130-31; RR18:15); and (4) guidance counselors to help students with course selection and with planning for college or careers (RR16:136). COL 10. While nurses, counselors, and security guards may not be statutorily required, it is a “matter of common sense” that they are critical to the functioning of many schools. COL 11.

Moreover, allowance must be made for statewide expectations shared by nearly every community in Texas. Twice, this Court has emphasized that “the State’s provision for a general diffusion of knowledge must reflect changing times, needs, and public expectations.” *West Orange-Cove I*, 107 S.W.3d at 572 (quoting *Edgewood IV*, 917 S.W.2d at 732 n.14). Nearly all communities in Texas expect school districts to provide

a certain level of extra-curricular and co-curricular activities, AP and honors classes, and a range of other core and elective classes that satisfy TEKS requirements but that may not specifically be referenced in a statute or regulation. These common expectations of all Texas communities certainly are part of “public expectations” and thus are to be included in third layer of the tax floor.

Fourth layer: Community-specific enrichment. Although this layer does not fall within the definition of “general diffusion of knowledge” and is not part of the tax floor, this Court has recognized that districts must also have meaningful discretion to offer local enrichment programming based on the desires of the particular community. *See infra* Section I.B.

b. The State’s formula does not work.

Following this Court’s instructions in *West Orange-Cove I*, 107 S.W.3d at 579-82, the trial court properly incorporated the constitutional mandate of adequacy (the third layer of district spending) into the tax floor. The State asserts that the trial court should have counted only the first and second layers towards the tax floor. The State contrasts these two layers – which it labels “state requirements . . . over which districts have no choice,” State Br. at 99, 96-97, with all other district spending – which it attributes to “local preferences.” But this dichotomy breaks down in practice.

The Legislature often issues broad mandates to districts but the State does not micromanage how districts comply with these mandates. For example, the Legislature requires districts to:

design and implement appropriate compensatory, intensive or accelerated instructional services for students in the district's schools that enable the students to be performing at grade level at the conclusion of the next regular school term [and provide] accelerated instruction to a student . . . who . . . has not performed satisfactorily on each section [of the exit-level assessment instrument] or who is at risk of dropping out of school.

TEX. EDUC. CODE § 29.081(a), (b).²¹ This provision makes clear that the state requires districts to provide “appropriate” remediation, but it does not dictate to districts the amount of remediation required or the manner in which it should be delivered. In the absence of more specific mandates, the State mistakenly labels spending intended to comply with this statutory mandate – such as the after-school instruction provided by Austin ISD (State Br. at 110) or the summer school offered by Dallas ISD (State Br. at 107) – as a “local preference.”

The flaws in the State's position are exemplified by spending associated with the State's implementation of “promotion gates” at the third, fifth and eighth grades. These “gates” prevent students from being promoted to the next grade unless they pass certain TAKS examinations. *See* TEX. EDUC. CODE § 28.0211. Fifth-graders in the current academic year (2004-05) must pass TAKS examinations in both reading and math to be promoted to sixth grade. According to figures recently released by the TEA, one in four Texas fifth-graders failed the TAKS reading tests, including 36% of the state's African-American students and 34% of the state's Hispanic students.²² More than one in five Texas fifth-graders failed the TAKS math tests, including 36% of the state's African-

²¹ *See also* TEX. EDUC. CODE § 28.0213(a) (“A school district shall offer an intensive program of instruction to a student who does not perform satisfactorily on an assessment instrument . . .”).

²² *See* http://www.tea.state.tx.us/student.assessment/reporting/results/summary/sum05/taks/grade5_feb05.pdf (visited Apr.2005); *see also* <http://www.tea.state.tx.us/press/taks305.html>. (visited Apr. 2005).

American students and 26% of the state's Hispanic students.²³ In Dallas ISD, only 55% of the district's fifth-graders passed the reading test, a 2.3% drop from 2004, while 68% passed the math test.²⁴ In short, even looking at the reading test alone, more than 4,500 fifth-graders in Dallas ISD, and almost 70,000 fifth-graders statewide are in danger of being held back unless they can pass the test during one of two additional testing dates before the end of the school year.

The trial court's definition of the floor recognizes that districts must provide the intervention necessary to give these students a meaningful opportunity to get back on track and on grade level.²⁵ But because the promotion gates are not a factor in the accountability ratings districts receive, the State considers funds expended by districts to help students pass "promotion gate" tests to be a "local community preference" rather than a "state requirement" and thus not part of the floor.²⁶ Indeed, the State would label much of the funds spent in the "third layer" (including funds spend to hire qualified

²³ See <http://www.tea.state.tx.us/press/taks5thgr.html> (visited Apr. 28, 2005).

²⁴ See http://www.dallasisd.org/inside_disd/calendars/calendardata/news_releases/1110571087.html (visited Apr. 28, 2005); http://www.dallasisd.org/inside_disd/calendars/calendardata/news_releases/1114199176.html (visited Apr. 28, 2005).

²⁵ Superintendent Pat Forgione described Austin ISD's three-level intervention strategy to keep students on grade-level, modeled after the state's Open Court Reading Program. RR5:60-66; PX 699:17-18. The first-level intervention calls for additional work in the classroom by the regular teacher. The second level calls for the use of instructional specialists who pull students out of the classroom and work on the areas of difficulty. If neither of these approaches succeed, the third-level intervention calls for attendance in after-school and/or summer school programs. App. G at 5. Dr. Forgione testified that he has been unable to devote sufficient resources to the second and third levels of intervention. RR5:64. Austin ISD has eliminated 55 instructional specialists and 74 reading recovery teachers from some of its neediest elementary schools, for a total savings of \$9.7 million annually. RR5:33-34, 57-78, 228; PX699:5.

²⁶ There is a general requirement that districts provide "accelerated instruction" to students that fail "promotion gate" tests, but no specifics about the manner or scope of that accelerated instruction. See TEX. EDUC. CODE § 28.0211(c).

teachers, combat the dropout problem or for professional and staff development) as a “local community preference.”

Under the State’s unduly narrow definition of the floor, a district, in order to state a property tax claim, would have to be taxing exactly at the \$1.50 cap and:

- pay its teachers according to the minimum salary schedule set by the state (PX518), regardless of the local labor market and even though most districts could not hire *any* teachers under that schedule, *see infra* p. 48-49;
- have no course offerings beyond those specifically required by statute or regulation, despite the fact all courses listed by the State satisfy TEKS requirements and that their elimination may not result in any cost savings (*see infra* p. 48);
- offer no co-curricular or extracurricular activities, despite the testimony of both State and Plaintiff witnesses about the importance of these activities in combating the dropout rate, building students’ leadership and socialization skills, and admission into college or the military service academies, *see infra* p. 50 (FOF 99, 133, 160, COL 13);
- have no athletic facilities, regardless of when they were built (i.e., when districts still had “meaningful discretion”) and despite the fact that such facilities are constructed using I&S, not M&O funds (and thus are not relevant to the \$1.50 cap argument);
- offer no advanced placement or honors classes;
- eliminate all magnet schools, regardless of when or why they were originally created (typically in response to federal court orders arising from desegregation cases, some of which are still binding) (RR6:162-65);
- outsource janitorial, transportation, copying and food service, regardless of whether any cost savings could be achieved (PX728:93-94);
- have no nurses, guidance counselors, security guards or janitors in its schools, none of which are specifically required by state law.

State Br. at 102-22. Moreover, taking the State’s position to its logical conclusion, a district would always have meaningful discretion because it could increase class sizes in

grades 5-12, regardless of the detrimental impact on dropout rates or academic performance. *See* TEX. EDUC. CODE § 25.112 (providing class size restrictions for grades K-4 only). In short, the State’s position blithely ignores reality²⁷ and is inconsistent with this Court’s holdings.

2. The trial court recognized that the State’s adoption of more rigorous academic and curricular requirements, not local community preferences, has driven up the cost of the floor.

The State’s definition of the floor wholly fails to explain the massive aggregation of districts at the \$1.50 cap and the exhaustion of capacity in the system, as detailed *infra* Statement of Facts, Section C.1, and by a litany of findings by the trial court. *See* FOFs 105-07; RR8:61-64, 67-72; PX705:58-59, 65; PX535, 539. The State does not even mention these findings, much less challenge the sufficiency of the evidence underlying these findings. Instead, the State would have this Court believe that hundreds of school boards across the state have decided to tax their constituents at the maximum rate simply to pay for “local community preferences” or, in the case of property-poor districts, to maximize state aid. State Br. at 99 & n.66.

The State’s argument is fatally flawed. First, if the incentive of additional state aid alone were enough to push districts to the \$1.50 cap, one would have expected districts to

²⁷ For example, if Austin ISD eliminated its AP and honors classes, all extra- and co-curricular activities, shut down its magnet schools, eliminated any courses and electives not specifically referenced in statute (e.g., calculus, vocational, fine arts, foreign languages), the consequences would be devastating. Parents with economic means would withdraw their children from Austin ISD and put them in private school or move to neighboring school districts with a fuller range of offerings. Out-migration of the middle class from the city would lead to falling property values, and the ability of the city to attract economic development would be substantially diminished. Austin ISD would be left with an even poorer student body, and the costs of meeting the state’s accountability standards would rise accordingly. Any discretion to eliminate these programs and courses is not “meaningful.”

reach the cap soon after the implementation of Senate Bill 7 in 1993. Second, the State's theory fails to take into account the countervailing political incentive to keep tax rates down – an incentive with which the current Legislature is all too familiar.

The aggregation of districts at the \$1.50 cap is hardly a chance occurrence.

Rather, this aggregation can only be explained by a rise in the floor caused by:

- the *State's* adoption of the TEKS curriculum, which is much more comprehensive and rigorous than the previous curriculum (FOFs 25-26, RR25:56-57, 59; RR6:149, 217-18);
- the *State's* decision to shift from the TAAS exam to the “significantly more difficult” TAKS exam (State Br. at 58; FOFs 46-48; RR25:22-29, 122-28; DX16425:8);
- the *State's* decision to “significantly increase the difficulty of the three available high school programs” (State Br. at 7) and make the Recommended High School Program the default graduation program for all ninth-grade students entering high school beginning in 2004-05 (FOFs 27, 44);
- the *State's* implementation of “promotion gates” at the third, fifth and eighth grades which prevent students from being promoted to the next grade unless they pass certain TAKS examinations or qualify for an exception (FOF 28);
- the *State's* decision to condition high school graduation upon the passage of four TAKS exit examinations in English/Language arts (including English III and writing), social studies (including early American and United States history), science (including biology, chemistry and integrated physics), and mathematics (including algebra and geometry) (FOF 48);
- the *State's* decision to comply with NCLB in order to receive federal funds, which obligated school districts to meet a wide range of new unfunded or partially funded federal mandates described by the trial court (FOFs 54-65);
- the *State's* imposition of numerous unfunded or partially funded mandates on school districts (FOFs 51-53; PX522; PX641; RR6:46-53; RR13:12-13);
- rapidly growing populations of economically disadvantaged and LEP students, resulting in significantly higher costs for school districts that are not compensated adequately through the *State's* school finance formulas. (FOFs 67, 77-85);

- the *State's* failure to make adjustments in a number of formulas that are intended to compensate districts for certain uncontrollable school or community characteristics, such as competitive salary differentials, transportation costs, size, and sparsity (FOF 86-88);²⁸ and
- serious shortages in qualified teachers resulting from the *State's* failure to produce enough certified teachers, requiring districts to improvise by creating their own alternate certification programs (FOFs 89-98; 491-92, 635).

In light of these developments, it is absurd for the State to attribute the aggregation of districts at the \$1.50 cap to local spending preferences. Numerous superintendents testified, and the trial court found, that these rising state academic and curricular requirements have driven districts to the \$1.50 cap. FOFs 49, 101; *see, e.g.*, RR5:72-82 & PX699:23; RR6:42-46.

To be sure, the state affords districts discretion in *how* they achieve the performance targets it sets. (For this reason alone, no district could ever attribute each penny of its tax effort to a specific and identifiable state requirement.) Assuming that they have the funds available, districts can choose among various instructional strategies, including early childhood education, reducing class sizes, block scheduling, curriculum specialists, extended day or year programs, etc., depending on the characteristics of their student population and the larger community. But there can be no doubt that by adopting TEKS, shifting from TAAS to TAKS, adopting the RHSP as the default high school graduation program, and by virtue of the other changes described above, the state has

²⁸ The Cost of Education Index has not been updated since 1991. The Small District Adjustment has not been updated since 1985. The Sparsity Adjustment has not been updated since 1985. The Transportation Adjustment has not been updated since 1984. FOFs 86-87.

pushed districts to the \$1.50 cap and denied districts any meaningful discretion in setting their tax rates.

Former Lieutenant Governor Ratliff – the author of Senate Bill 7 – said it best:

I am convinced that, just by my knowledge of the overall situation in Texas, school districts are virtually at the end of their resources, and to continue to raise the standards by all these features that you just talked about is reaching a situation where *we're asking people to make bricks without straw*. * * * The thing that has gone wrong with the system is that, by virtue of the State's abdicating on its paying of its share, it has driven the system into one where so many school districts are capped out and can't provide additional resources to continue the progress that we have had.

RR13:20-21. In light of these developments, Lieutenant Governor Ratliff testified that it was “very difficult” for him to conclude that the system he helped create did not operate as a state property tax. RR13:25-26.

3. Even if the floor were defined by reference to the accountability system and state mandates alone, many districts still would lack meaningful discretion.

Even if this Court were to adopt a more narrow view of the floor, looking only at the accountability system, state mandates, and other uncontrollable costs, districts still lack meaningful discretion in setting their tax rates.

On March 31, 2005, Commissioner Neeley raised the standards for districts and campuses to achieve an “academically acceptable” rating for the coming school year (2005-06).²⁹ The required passing rates for Reading/English Language Arts, Writing and Social Studies will increase from 50% to 60%. The required passing rates for

²⁹ Commissioner Neeley's modifications are available at <http://www.tea.state.tx.us/perfreport/account/2005/statefinal.pdf>.

Mathematics will increase from 35% to 40%. And the required passing rates for Science will increase from 25% to 30%.³⁰ *Given student performance levels in 2004, these changes would result in 1,213 out of the 6,732 rated campuses in Texas being deemed academically unacceptable, as compared to 92 in the current school year.*³¹

Even before these standards were revised upward, the TEA projected in its August 2004 Legislative Appropriations Request that in 2005-06, based on the level of appropriations requested, 30% of districts would receive an accreditation ranking of academically unacceptable, and 25% of campuses will receive a similar ranking. PX808:5; FOF 272; RR23:173-79. Commissioner Neeley testified that these projections were a “pretty accurate estimate” based on “current enrollment trends and ten years of benchmarks from TAAS.” RR23:177.

The State surely will respond that the plaintiff districts must wait until these projections come true before they can bring suit. But districts need the resources now to avert this scenario (FOF 38), particularly because the standards for an “academically acceptable” rating will continue to be raised annually through 2010. *See supra* note 29. As the trial court and numerous State experts recognize, education is a cumulative process in which student achievement is affected, not only by the resources that are available in a particular isolated year, but more importantly by the resources that have

³⁰ The Commissioner stated: “The standards for mathematics and science reflect the lower performance in these subjects in 2004 compared to reading/ELA, writing, and social studies, and the greater gaps in performance between the 2004 and 2005 student passing standards.” *See supra* note 29, at 1.

³¹ *See* Joshua Benton, *TEA Stiffens School Rating System*, DALLAS MORNING NEWS, Apr. 6, 2005 at A1; Jason Spencer, *Both Sides Criticize Neeley’s School Accountability Plan*, HOUSTON CHRON., Apr. 6, 2005 at B6.

been provided over the course of a student's time in the system. FOF 38; PX754:125-26; PX742:105; RR25:72-73; RR27:61. To meet these rising standards – even to achieve an “academically acceptable” rating under Commissioner Neeley’s newly revised standards, districts must make the necessary investments now. FOF 38. State accountability expert, Dr. Criss Cloudt, agreed that “any calculation of cost of the system needs to take into consideration the increase in standards that you expect as opposed to just the standards that are in place this first year of the new system.” PX742:105.

B. The trial court correctly concluded that a district should be able to exercise control over 10% of its taxing capacity to have “meaningful discretion.”

The State also challenges the trial court’s conclusion that “a district has meaningful discretion only when it can devote, at a minimum, 10% of its taxing capacity, or approximately 15 cents of tax effort to raise additional revenues to enrich its programs beyond what is required to provide a ‘general diffusion of knowledge’ and comply with state and federal mandates.” COL 14.

Instead, the State argues that districts have “meaningful discretion” as long as they can “reduce their M&O tax rate by a fraction of a cent below \$1.50” while still meeting state requirements. CR1:255; State Br. at 98. However, “*meaningful* discretion” has to mean more than that. COL 15. A penny of tax effort in Kaufman ISD yields only about \$110,000 in local revenue and state aid, which represents approximately 2.7 teachers. FOF 268. Even in a large district like Dallas ISD, a penny of tax effort yields only \$6 million – or about 120 teachers – which is a drop in the bucket considering that the district (1) has 161,000 students and 20,000 employees and (2) has made over \$107

million in budget reductions since the 2001-02 school year. RR6:83, FOFs 129-32, 141; PX700:1; App. G. at 4-6.

This Court repeatedly has held that districts must have an opportunity to provide local enrichment programs to their students, if they so choose, beyond the educational offerings required to provide a “general diffusion of knowledge.”³² In *Edgewood I*, this Court noted that an efficient system does not “mean that local communities would be precluded from supplementing an efficient system established by the legislature.” 777 S.W.2d at 398. In *Edgewood II*, this Court again observed that “[o]nce the Legislature provides an efficient system in compliance with article VII, § 1, it may, so long as efficiency is maintained, authorize local school districts to supplement their educational resources if local property owners approve an additional local property tax.” 804 S.W.2d at 500. In *Edgewood IV*, this Court explicitly recognized that there must be a range between the tax rate needed to provide a “general diffusion of knowledge” and the \$1.50 cap in order to avoid a violation of Article VIII, § 1-e; in other words, districts must have an opportunity to provide supplemental programs beyond what is required for adequacy. *See* 917 S.W.3d at 731, 738. This Court concluded that property-wealthy districts had, on average, 28 cents of tax effort (or 18.6% of their taxing capacity) to use for supplementation above and beyond adequacy, and that property-poor districts had, on average, 19 cents of tax effort (or 12.6% of their taxing capacity) for supplementation. Even then, the system only barely passed constitutional muster, *id.* at 726, and only on a

³² The Legislature has also recognized that one of the purposes of the Foundation School Program is to provide access to an “enriched program.” TEX. EDUC. CODE § 42.002(b).

5-4 vote. Finally, in *West Orange-Cove I*, this Court reaffirmed its earlier holdings and even noted that a district taxing at \$1.47 could assert a state property tax claim. 107 S.W.3d at 566, 583.

Obviously, the definition of “meaningful discretion” has to lie somewhere between a penny of tax effort and 19 cents of tax effort – the amount deemed constitutional in *Edgewood IV*. Recent legislative action may provide some guidance on this question. House Bill 2, the school finance bill passed by the Texas House of Representatives on March 11, 2005, contemplates a “buy-down” of local property tax rates by one-third, so that the \$1.50 cap would, in effect, become an \$1.00 cap. *See* Tex. H.B. 2, 79th Leg., R.S., art. 1, sec. 1A.01 (2005) (modifications to Section 42.251-.253 of the Education Code). House Bill 2 contemplates an additional 15 cent “enrichment” tier beyond the \$1.00 cap, which represents a 15% enrichment level.³³ *Id.* The Senate Public Education Committee’s recently passed substitute for House Bill 2, at full implementation, also contemplates a buy down to an \$1.10 tax rate, but contemplates an additional 15 cent “enrichment” tier – a 13.6% enrichment level beyond the cap.³⁴ Tex. C.S.H.B. 2, 79th Leg., R.S., art. 1, sec. 1A.25 (2005).³⁵

³³ When calculated according to the trial court’s methodology, a district could devote 13.04% (\$0.15 out of \$1.15) of its taxing capacity, or approximately 15 cents of tax effort, to raise additional revenues to enrich its programs beyond what the House calls the “base program” at full implementation.

³⁴ When calculated according to the trial court’s methodology, a district could devote 12% (\$0.15 out of \$1.25) of its taxing capacity, or approximately 15 cents of tax effort, to raise additional revenues to enrich its programs beyond the “base program” at full implementation.

³⁵ *See* <http://www.senate.state.tx.us/75r/Senate/Commit/c530/handouts05/h042505a.htm> (visited May 4, 2005).

Finally, in conducting its review, this Court should consider that the phrase “meaningful discretion” necessarily is interrelated with the definition of adequacy. For example, a very narrow definition of adequacy – such as the one offered here by the State (“academically acceptable” rating) or the 55% TAKS passing rate standard utilized in the State’s cost-function study (discussed at FOFs 285-90) – would require a broader definition of “meaningful discretion.” Plaintiffs’ expert Lynn Moak, a former TEA Deputy Commissioner and prominent school finance consultant with over 40 years of experience dealing with the Texas school finance system, testified that a 15% measure of discretion above adequacy would be “meaningful” if adequacy were defined in accordance with the State’s cost-function study. RR9:15-18; RR7:134-41. He based this assessment on his years of personal experience working with school districts on their budgets. RR9:15-18. The trial court used a broader definition of adequacy but a more narrow definition of “meaningful discretion.”

In any case, even if this Court were to adopt a more restrictive definition of “meaningful discretion,” the trial court’s fact findings still support a judgment in favor of the WOC Plaintiffs on their state property tax claim. For each West Orange-Cove Focus District, the trial court found that (1) even at \$1.50, the district could not provide an adequate education and that (2) reducing its tax rate to \$1.35, \$1.40, or even \$1.45 would “seriously jeopardize its ability to maintain an ‘academically acceptable’ accreditation ranking while complying with all other federal and state mandates and regulations.” FOFs 139-41, 162-64, 185-87, 201-02, 215-17, 228-30, 242-44, 253-55, 267-28.

C. The trial court correctly found that school districts lack “meaningful discretion” in setting their tax rates.

1. The WOC Focus Districts have been forced to the \$1.50 cap.

The trial court made detailed findings regarding the financial predicament of the WOC Focus Districts (FOFs 115-268) in finding a violation of Article VIII, § 1-e as applied to them. COL 16. These findings illustrate the WOC Focus Districts’ profound demographic challenges, rising costs and expectations, and substantial budget reductions and unfunded needs. The State challenges these findings only to the extent they are not applied against its unduly narrow definition of the tax floor. But because the trial court defined the floor correctly, the State’s challenge fails. The trial court’s findings and the testimony of the WOC Plaintiff superintendents aptly illustrate these districts’ lack of meaningful discretion in setting their M&O tax rates.³⁶ *See, e.g.*, RR5:6-232, RR6:6-186, RR7:5-120.

The predicament of Austin ISD provides a useful illustration of the challenges facing the WOC Plaintiffs and school districts across the state. Like the state as a whole, Austin ISD has a student population that continues to become more diverse and more challenging to educate. Of Austin ISD’s 79,000-plus students this year, 54.7% are

³⁶ The State did not make any showing that any of the WOC Focus districts were wasting money. All districts received a perfect score on the State’s FIRST (Financial Integrity Rating System of Texas) rankings. FOF 112. Moreover, Austin ISD and Dallas ISD recently were the subject of extensive performance reviews by the Comptroller. In April 2000, the Comptroller made 163 recommendations to Austin ISD about how to achieve cost savings, recommending savings of approximately \$52 million over five years, or approximately 2% of the budget. Austin ISD has implemented all but two of the recommendations, which the trial court concluded it had sound reasons for not implementing. FOF 161. The Comptroller made 193 recommendations to Dallas ISD about how to achieve cost savings. FOF 134. Dallas ISD implemented 192 of these recommendations, saving \$59.9 million over a five-year period, which represents slightly less than 1% of all district expenditures over the same time period *Id.*

Hispanic, 13% are African-American, and 29.4% are White. FOF 144. The percentages of economically disadvantaged students (now 58.2%), LEP students (almost 23%) and minority students (70.6%) have been rising steadily.³⁷ FOFs 144-45; App. G at 1.

The financial pressures on the district have been particularly acute, despite the fact that it is classified as a property-wealthy district under the state's finance system and has been at the \$1.50 cap since 2002-03. FOF 143. The combination of soaring costs, rising recapture payments, and property value decreases has resulted in severe financial strain on the district. At trial, Austin ISD Superintendent Pat Forgione described the almost perverse way in which the finance system can affect a district like Austin ISD. RR5:31-35. In 2002-03, Austin ISD's local tax levy raised \$645 million for the district. FOFs 148-49. But in the following year, 2003-04, at the same maximum tax rate, the local tax levy raised only \$625 million, because property values in Austin declined. *Id.* But Austin ISD's recapture payments actually increased, because it was conditioned on the prior year's higher property value assessment. RR5:31-33. This confluence of events resulted in a budgetary swing of \$38 million without even considering inflation – \$20 million of revenue lost because of the decline in property values, plus a recapture payment that climbed by \$18 million. FOF 149; RR5:31-33.

Austin ISD was forced to slash over \$42 million from its budget in the 2003-04 school year alone. RR5:33-34. These cuts, which were educationally detrimental,

³⁷ The other WOC Focus Districts face similar demographic challenges, (PX705:5; RR7:157-60), with Dallas ISD at the top of the list. Dallas has a student population that is 92% minority (including a surging Hispanic population), 79% economically disadvantaged, and 32% LEP. FOFs 117-19; PX700:3-9; App. E at 1-2.

included (a) the elimination of 55 instructional specialists and 74 reading recovery teachers from some of its neediest schools (resulting in a reduction of over \$9.6 million); (b) the reduction of campus staffing ratios (i.e., cutting 2% of campus instructional staff); (c) cuts of over \$6 million in supplies, reading materials, software, equipment, and travel expenses; (d) cuts of over \$4.2 million in central administrative staff, programs, and services, which included about 125 positions and constituted approximately 18% of the central office staff; and (e) significant cuts to magnet programs, gifted and talented programs, and athletic programs.³⁸ *Id.*; PX699:5; App. G at 2. Even with these cuts, Austin ISD had to use approximately \$45 million of its fund balance³⁹ in the last two budget cycles (1) to hire more teachers at the secondary level (to reduce class sizes in grades 10-12 from 32:1 to 28:1 for core classes), its greatest area of academic need, and (2) for teacher pay increases, which were necessary in light of the district's continued difficulty at hiring and retaining qualified teachers because of the cost of living in Austin, the district's challenging student demographics, and competition from suburban districts. FOFs 150-51, 154, 159; RR5:43-44. As a result, Austin ISD's fund balance after 2004-

³⁸ Other WOC Focus Districts have made similar cuts. FOFs 128-32, 178, 195-96, 210-11, 225-26, 238, 251, 261-62. For example, Dallas ISD has made over \$107 million in budget reductions since the 2001-02 school year, (FOFs 129-32) including a reduction of 350 teaching positions in 2003-04, which had the effect of increasing pupil-teacher ratios at middle schools (from 19:1 to 23:1) and high schools (from 25:1 to 28:1). FOF 131. These cuts also forced most campuses to doing away with "block scheduling," an educational strategy endorsed by Commissioner Neeley and aimed at maximizing instructional time for students. *Id.*; PX740:60-61; RR23:202-03.

³⁹ A district's fund balance is its "rainy day" fund, whereby it reserves funding for economic recession or worse. Keeping fund balances too low may lead to a district having its credit rating downgraded, increasing the amount of interest it must pay on debt. A Chapter 41 district that does not receive state aid and that only receives tax revenues in January must borrow money if it does not have a sufficient fund balance to cover payroll costs in the fall semester. Moreover, districts are understandably reluctant to pay recurring costs (teacher salaries, programs, etc.) out of fund balance because these costs will continue to diminish the fund balance year after year. *See* FOFs 109-13.

05 is projected to be approximately half of the optimal level suggested by the TEA. FOF 150; PX699:10; App. G at 3. As Dr. Forgione testified, using fund balance for recurring costs like teacher salaries is a “bad idea” and is an indication of the district’s desperate fiscal predicament. RR5:43-44.

Austin ISD’s student performance on the TAKS test in 2004 shows that the district has enormous deficiencies to address. Only 43% of the district’s fifth graders (74% Anglo, 27% Hispanic, 23% African-American, and 24% economically disadvantaged), 47% of its eight graders (76% Anglo, 30% Hispanic, 25% African-American, and 25% economically disadvantaged) and 37% its tenth graders (62% Anglo, 19% Hispanic, 13% African-American, and 15% economically disadvantaged) met the panel-recommended standard for all TAKS tests in 2004.⁴⁰ FOF 155; RR5-72-73; PX 699:23; App. G at 6.

Austin ISD projects that over 28% of its 6th–12th graders require intervention assistance this year just to get the failing students to grade level, and that such intervention assistance would cost the district an estimated \$21.2 million. FOF 157; RR5:70-73; PX699:22. These unfunded needs include expenses related to class size reduction, adding teachers and specialists in core curricular areas, alternative campuses for at-risk students, tutors, and increased infrastructure, and programs to address the dropout problem. App G. at 6; PX699:22. Dr. Forgione estimated that the district needs

⁴⁰ All of the WOC Focus Districts have significant student performance deficits to address (FOFs 136, 184, 200, 209, 227, 241, 252, 260), with Dallas ISD again facing the most serious challenge. Only 33% of the Dallas ISD’s fifth graders (54% Anglo, 32% Hispanic, 30% African-American, and 30% economically disadvantaged), 39% of its eight graders (64% Anglo, 39% Hispanic, 36% African-American, and 37% economically disadvantaged), and 24% its tenth graders (54% Anglo, 22% Hispanic, 19% African-American, and 20% economically disadvantaged) met the panel-recommended standard for all TAKS tests in 2004. FOF 136; PX700:29.

an additional \$20 million to address its needs at the K-5 levels. RR5:81. To be able to meet the total need described – approximately \$40 million – Austin ISD would need to raise its M&O tax rate by approximately ten cents, which, of course, it cannot do while at the \$1.50 cap. FOF 158.

Dr. Forgione described the “Sophie’s choices” that he is forced to make on a daily basis and testified that budgeting for the district is like “trying to put the fingers in the dike,” shifting money away from great needs to address even greater needs. RR5:67-68, 78, 228. A review of his testimony confirms the propriety of the trial court’s finding that Austin ISD lacks meaningful discretion to reduce its tax rate. FOF 164. Dr. Forgione’s testimony paralleled that of many other superintendents. *See, e.g.*, RR6:6-186, RR7:5-120; RR15:138-57; RR16:92-156; RR17:5-48, 92-138; RR18:5-48; RR22:110-77.

2. The State’s list of WOC Focus District expenditures does not demonstrate that they have meaningful discretion in setting their tax rates.

The State’s brief includes a lengthy bullet-point litany that is intended to show excess by the WOC Focus Districts, the State’s point being that, if these expenditures were not made, then the districts would have meaningful discretion in setting their tax rates. But here again the State turns a blind eye to the realistic needs of the districts and to what is required for an adequate education that meets changing needs and public expectations. The following response is organized by the types of items listed by the State at pages 105-22 of its brief:⁴¹

⁴¹ In addition to the items addressed in the text, the State also claims that Dallas ISD’s utilization of the constitutionally authorized local option homestead exemption (Article VIII, section 1-b) means it is exercising “meaningful discretion.” But the trial court found, based on the testimony of Superintendent

Courses that satisfy state requirements but are not explicitly required by law. As the State admits, these courses (such as calculus, AP courses, or a second choice of foreign language) are not only legitimate and beneficial, but in most cases “satisfy the state-required curriculum.” State Br. at 104-05. These courses either fulfill particular subject matter requirements (such as math or technology applications) or the elective credits the state requires for high school graduation. *See, e.g.*, 19 TEX. ADMIN. CODE § 74.53(c). Further, the State relies upon course catalogs or other documents on school district websites – most of which were not in evidence and may not represent classes actually offered. RR7:115. These courses are given only when there is sufficient student demand; thus, the elimination of any of these courses would mean that a district would have to provide other classes for those students to take.⁴² RR7:117. Finally, Texas law requires that districts provide a course when requested by more than ten students. RR7:116; *see* 19 TEX. ADMIN. CODE § 74.3(b)(4).

Teacher salaries. The State assumes excess if teachers are paid a penny more than the state’s minimum salary schedule or if a teacher is ever given a raise. This is remarkable given the undisputed evidence of a severe teacher shortage in Texas, attributable in large part to inadequate salaries. *See supra* Statement of Facts, Section

Mike Moses, that repeal of the homestead exemption would have endangered passage of a \$1.3 billion bond issue, the largest bond issue in the history of the state, which was needed to address critical facilities needs. FOF 123. Accordingly, the trial court found that Dallas ISD’s failure to repeal the homestead exemption was not an exercise of “meaningful discretion.” FOF 123. The trial court also found that the scope of Dallas ISD’s needs far exceeds the amount of money that would be raised through repeal of the optional homestead exemption. FOF 123. *See also West Orange-Cove I*, 107 S.W.3d at 582-83.

⁴² For example, if a district decided to eliminate all foreign languages other than Spanish, it would have to offer more Spanish classes to accommodate all the former French or German students that need to satisfy the foreign language requirement for graduation.

C.3; FOF 97. The teacher salary schedule calls for beginning teachers to be paid \$24,240. Nearly every superintendent testified that if a district paid according to the schedule, it could not fill its classrooms, much less hire and retain certified and “highly qualified” teachers as required by the state and NCLB. *See, e.g.*, RR5:160-61.⁴³

Remedial efforts. School districts provide a variety of programs and strategies designed to help students – particularly at-risk students – meet state achievement standards. Many of these programs, such as pre-kindergarten, full-day kindergarten, and immigrant intake centers are designed to help low-income, ESL, and other at-risk students “catch-up” with other students so they will have a reasonable opportunity to succeed in school and satisfy state requirements. Other remedial programs, such as summer school and extended day programs, are designed to help those students who have already failed TAKS exams continue with their education and meet state requirements in the future. Although the State does not necessarily dictate to districts which programs they must offer, the State has not left districts with discretion to eliminate these remedial and catch-up programs. *See* TEX. EDUC. CODE §§ 29.081(a), (b); § 28.0213(a).⁴⁴

⁴³ For example, the State takes Dallas ISD to task for providing a three percent raise to teachers in 2004-05 and paying more than the state salary schedule requires. However, the evidence at trial established that Dallas ISD teacher salaries are lower than most districts in the Dallas-Fort Worth Metroplex, even though, given its challenging student population, it should be paying more than its neighboring districts to attract qualified teachers. App. H at 3; RR6:54-56; FOF 127. Dr. Moses testified that Dallas ISD has had to grapple with critical shortages of qualified math, science, bilingual, ESL, and special education teachers and needed to hire 127 ESL teachers at the time of trial. FOF 127; RR6:73-74.

Further, the State fails to mention that many districts cannot pay at the minimum salary schedule because the Legislature has passed a law prohibiting a district from paying a teacher who was employed in the 2000-01 school year an amount less than what it was paying that teacher in that year. *See* TEX. EDUC. CODE § 21.402(d); RR8:50.

⁴⁴ The large number of students failing the TAKS test has forced districts to employ a variety of costly strategies to prevent and remediate these failures, including the programs described above, as well as

Extra and co-curricular activities. The trial court properly concluded that extra-curricular activities (such as sports, fine arts, speech) are part of the “public expectations” of every community in Texas and fall within the scope of the “general diffusion of knowledge” mandate. COL 12-13. This conclusion was based on uncontroverted evidence at trial, from both State and plaintiff witnesses, that these activities (1) help keep many students in school that might otherwise drop out; (2) teach students valuable social skills, including leadership and how to work as part as of a team (a critical skill in the labor market); (3) ensure that students have access to a well-rounded education; and (4) contribute to a student’s ability to get into college or the service academies. RR5:51-52; RR6:83, PX740:75-76; RR23:166-68; PX754:264-65. Moreover, the amount of money spent on extracurricular activities is minimal, considering the important role they play in public education and the expectations of the public at large. Most of the WOC Focus Districts spend less than 2% of their budgets on all extra and co-curricular activities combined. FOFs 133, 160, 182, 213, 222. For example, if Dallas ISD eliminated *all* extra and co-curricular activities, it could trim, at most, 1 to 1.5 pennies off its tax rate. RR6:83.

Facilities. The State fails to understand that districts use funds raised through tax-supported bond issuances (supported by the I&S portion of the tax levy or state aid in some cases), rather than funds generated by M&O taxes, to acquire real property or build facilities. Thus, facility construction or real property acquisitions do not impact M&O

curriculum specialists, credit recovery courses, and reduced class sizes. Based on extensive evidence regarding the necessity and effectiveness of these programs and strategies, the trial court correctly determined that districts need to be able to devote more resources to these programs, not less. FOF 76.

tax rates. Further, the State has made no attempt to identify when or at what costs these facilities were built or properties acquired. Thus, these facilities could have been built or property acquired at a time when districts still had significant taxing capacity.

3. The trial court correctly found that the lack of meaningful discretion is systemic.

The *West Orange-Cove I* court held that a “single district states a claim under article VIII, section 1-e if it alleges that it is constrained by the State to tax at a particular rate,” 107 S.W.3d at 579. But the trial court went further, determining that the “lack of ‘meaningful discretion’ in the system is not confined to the West Orange Cove Focus Districts or any particular region or type of district, but rather is part of a statewide pattern.” FOF 271. The trial court drew upon a wealth of evidence in support of this finding. In addition to the data on the number of districts taxing at the cap and the lack of capacity in the system, as well as the cost pressures generated by the rising academic standards (discussed *supra* Section I.A.2), the trial court also took into account the following evidence:

The testimony of superintendents from other districts. Superintendents from Intervenor districts testified at trial as to the enormous challenges they face in adequately educating their largely poor and minority student populations, despite taxing at \$1.50 cap. RR15:138-57; RR16:92-156; RR17:5-48, 92-138; RR18:5-48; RR22:110-77. Other Intervenor superintendents similarly testified in depositions admitted into evidence.

The testimony of Commissioner Neeley—former superintendent of Galena Park ISD—was particularly telling. As superintendent, Dr. Neeley recommended and

implemented an M&O tax rate of \$1.56 (pursuant to an exception to the \$1.50 cap set forth in Texas Education Code Auxiliary Laws, Article 2784g), in the 2003-04 school year, and testified that there was no “fat” in her budget. RR23:145-50; PX740:57,77-78. Even with this six cent advantage over most districts and a “no fat” budget, Dr. Neeley conceded that Galena Park ISD still had “miles to go” and “lots of work to do” in light of the district’s 2004 TAKS scores.⁴⁵ FOF 271; RR23:155, PX622:6.

Studies by the Legislative Budget Board (LBB). In biennial studies regarding the necessary costs of a regular program allotment required to meet a minimal level of accreditation, the LBB has confirmed the erosion and actual elimination of “meaningful discretion.” FOF 107; *see also* RR8:67-72, PX535; PX705:65. In a 2003 report, the LBB projected that the costs for a regular program (in which 50 percent of the students could pass all sections of TAAS) would be \$4,820 for FY 2004 and \$4,974 for FY 2005 respectively. *Id.* Foundation School Program revenues were projected to be \$3 short of the requirements in 2004, and \$144 short in 2005, even assuming districts were taxing at the maximum tax rate. Furthermore, as the trial court found, this study understates costs in several ways, the most important of which being that it was based on the prior accountability system and does not reflect the costs associated with the new accountability system, including the implementation of TAKS, the Recommended High School Program, and the promotion gates. FOF 107.

⁴⁵ Galena Park ISD was the state’s largest exemplary district during the last year of Commissioner Neeley’s reign as superintendent. But the district’s scores from the 2004 TAKS administration demonstrates just how difficult the transition from TAAS to TAKS is for districts. Only 44% of Galena Park ISD’s ninth-graders, 31% of its tenth-graders (including 24% of Hispanics) and 41% of its eleventh-graders could pass all required TAKS tests at the panel-recommended standards. PX622:6.

Outcome measures. Statewide TAKS scores, college readiness scores and other student performance measures discussed *infra* at Section III.D.1.a, illustrate in stark terms the challenges facing Texas schools. These challenges cannot be met in a system without financial capacity.

TEA's 2004 Legislative Appropriations request. This request sets out performance objectives that the TEA projects can be met given the level of appropriations requested. In 2005, the TEA projects that 30% of districts will receive an accreditation ranking of academically unacceptable, and that 25% of campuses will receive a similar ranking. In looking at the percentage of students passing all TAKS tests, the highest projected percentage is 72% in year 2007. With respect to African-American, Hispanic, and economically disadvantaged students, that figure remains below 60% through 2005 and then barely edges into the low 60s in 2006 and 2007. Finally, the TEA predicts that 43% of high school graduates will need remediation in 2005 and that, during the entire period of projections (through 2007-08), the State will not be able to graduate two-thirds of graduating students under the RHSP. FOF 272.

Two "cost function" studies. The trial court also relied on dueling "cost function" studies presented by the State and the WOC Plaintiffs. FOFs 275-91. These studies are discussed in greater detail, *infra* Section III.D.3 but both support the trial court's finding of a lack of "meaningful discretion" in the system.

For the reasons stated above, the trial court's declaratory and injunctive relief on the WOC Plaintiffs' state property tax claim should be affirmed on the ground that Texas's school finance system violates Article VIII, § 1-e of the Texas Constitution.

II. The West Orange-Cove Plaintiffs' claims are justiciable.

The State unabashedly asks the Court to set aside and overrule 16 years of precedent and declare certain of the school finance claims nonjusticiable on political question, standing and other grounds. The *West Orange-Cove I* court's response to the solo dissenter's effort to recast this Court's state property tax jurisprudence is particularly apt:

We do not agree with the dissent that the importance of *stare decisis* can be minimized in this area. For fourteen years the Legislature has worked to bring the public school finance system into conformity with constitutional requirements as declared by this Court. To announce now that we have simply changed our minds on matters that have been crucial to the development of the public education system would not only threaten havoc to the system, but would, far more importantly, undermine the rule of law to which the Court is firmly pledged.

West Orange-Cove I, 107 S.W.3d at 585.

A. Article VII, § 1 does not present a nonjusticiable political question.

Disregarding this Court's precedent, the State uses *Baker v. Carr*, 369 U.S. 186 (1962) to argue that the Article VII, § 1 claims present a nonjusticiable political question. But the Supreme Court in *Baker* rejected the political question argument and held that a challenge to a legislative apportionment statute was justiciable, stating that "the mere fact that the suit seeks protection of a political right does not mean it presents a political question." *Id.* at 209. The Court held that courts must engage in a "delicate exercise" to determine whether it is appropriate to attribute "finality to the action of the political departments" and whether there are "satisfactory criteria for a judicial determination."

Id. at 210. For over 16 years, this Court has engaged in this exercise in the school finance cases and has properly determined that the issues presented are justiciable.

1. Article VII, § 1 empowers and obligates the Legislature to provide for an adequate public school system subject to judicial oversight.

In *West Orange-Cove I*, this Court correctly noted that Article VII, § 1 of the Texas Constitution is “[c]entral to some of the [Texas school finance] cases and basic to them all.” 107 S.W.3d at 563. The Court explained that, in addition to empowering and obligating the Legislature to set the policies and fashion the means for providing for a public school system, Article VII, § 1 also requires the Legislature to meet three standards in performing this constitutionally-imposed duty:

First, the education provided must be *adequate*; that is, the public school system must accomplish that “general diffusion of knowledge . . . essential to the preservation of the liberties and rights of the people”. Second, the means adopted must be “*suitable*”. Third, the system itself must be “*efficient*”.

Id. (emphasis added).

Because the constitution specifically charges the Legislature with the duty to establish and make suitable provision for the public school system, this Court has consistently and properly refrained from “prescrib[ing] the means which the Legislature must employ in fulfilling its duty.” *Id.* (quoting *Edgewood II*, 804 S.W.2d at 498); *see also Edgewood I*, 777 S.W.2d at 399; *Edgewood IV*, 917 S.W.2d at 726. But this Court has also consistently noted the judiciary’s “final authority to determine adherence to the Constitution” *West Orange-Cove I*, 107 S.W.3d at 563 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Love v. Wilcox*, 28 S.W.2d 515, 520 (Tex. 1930)); *see also*

Edgewood I, 777 S.W.2d at 399; *Edgewood II*, 804 S.W.2d at 498; *Edgewood IV*, 917 S.W.2d at 726.

It is telling that the State avoids virtually any mention of this Court's earlier discussion of the political question issue. In *Edgewood I*, this Court reversed the court of appeals' holding that the case presented a nonjusticiable political question. In rejecting the court of appeals' analysis, this Court dispensed with the notion, now urged in this appeal by the State (State Br. 32-35), that Article VII, § 1 reflects a "textually demonstrable commitment" of *total* and *unchecked* discretion to the Legislature. The Court examined the text of the Constitution and found that it provided for judicial oversight:

This is not an area in which the Constitution vests exclusive discretion in the legislature; rather[,] the language of article VII, section 1 imposes on the legislature an affirmative duty to establish and provide for the public free schools. *This duty is not committed unconditionally to the legislature's discretion*, but instead is accompanied by standards. By express constitutional mandate, the legislature must make "suitable" provision for an "efficient" system for the "essential" purpose of a "general diffusion of knowledge." While these are admittedly not precise terms, they do provide a standard by which this court must, when called upon to do so, measure the constitutionality of the legislature's actions.

Edgewood I, 777 S.W.2d at 394 (emphasis added).

In so holding, the Court also addressed the argument now made by the State that public school finance issues are so complex that they are beyond the judicial pale. The unanimous *Edgewood I* court noted that, as early as its second term, the Court recognized that the judiciary's proper role as the final arbiter of constitutional questions requires it to pass on such questions even when they are "doubtful" or "difficult." *Id.* (quoting *Morton*

v. Gordon, Dallam 396, 397-98 (Tex. 1841)). Consistent with a tradition of recognizing that the separation of powers requires great judicial deference to legislative acts but also places the power to adjudicate constitutional disputes in the judiciary, the *Edgewood I* court aptly stated that, if the Legislature has not discharged its constitutional duty, it is the Court's duty to say so.

In the subsequent *Edgewood* opinions, the Court repeatedly recognized the justiciability of the Article VII, § 1 standards, and, in *Edgewood IV*, the Court was again careful to delineate the proper roles of the Legislature and the judiciary in school finance:

This Court's role under our Constitution's separation of powers provision should be one of restraint. We do not dictate to the Legislature how to discharge its duty. As prominent as this Court's role has been in recent years on this important issue, it is subsidiary to the constitutionally conferred role of the Legislature. The people of Texas have themselves set the standard for their schools. Our responsibility is to decide whether that standard has been satisfied, not to judge the wisdom of the policy choices of the Legislature, or to impose a different policy of our own choosing.

Edgewood IV, 917 S.W.2d at 726. While the Court made clear that it would not second-guess the Legislature's *policy* choices, it also reiterated that it would not abdicate its own role in determining whether the constitutional standards in Article VII, § 1 were satisfied.

Finally, this Court's opinion in *West Orange-Cove I* again held that the Court retains its traditional role as the arbiter of whether the Legislature has fulfilled its duty to meet the standards set in Article VII, § 1. Indeed, this Court summarized in a single sentence the most cogent response to the State's contention that the claims in this suit are not justiciable: "[T]he Legislature has the sole right to decide *how* to meet the standards

set by the people in article VII, section 1, and the Judiciary has the final authority to determine *whether* they have been met.” *Id.* at 563-64.⁴⁶

2. Article VII, § 1 provides judicially discoverable and manageable standards.

The State also contends that the Article VII, § 1 claims involve nonjusticiable “political questions” because there are “no judicially discoverable and manageable standards for addressing the districts’ adequacy and efficiency claims.” State Br. at 36. The State admits, as it must, that this Court has long held that efficiency claims *do* present “judicially discoverable and manageable standards” (State Br. at 37-38; *see also* CR1:77), but the State contends that (1) the “pure” adequacy claim is not justiciable, and (2) the Court should reverse course and conclude, contrary to its prior jurisprudence, that efficiency claims are likewise not justiciable. Both arguments should be rejected.

Although the WOC Plaintiffs do not raise an “efficiency” claim, a review of the Court’s efficiency jurisprudence is instructive, as it illustrates the fallacy of the State’s contention that Article VII, § 1 contains no “judicially discoverable and manageable standards.”

⁴⁶ The State argues that Article VII, § 1’s assignment of a duty to the Legislature precludes a judicial evaluation of whether the Legislature has satisfied its duty. But most state courts have rejected this argument, finding adequacy or equity claims to be justiciable despite the fact that the education articles of their constitutions contain a similar delegation to the legislative branch. *See, e.g., Idaho Sch. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724, 734 (Idaho 1993); *Montoy v. State*, 102 P.3d 1160, 1163-64 (Kan. 2005); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 215 (Ky. 1989); *McDuffy v. Sec’y of the Executive Office of Educ.*, 615 N.E. 516, 550 (Mass. 1993); *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 689-90 (Mont. 1989); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1381 (N.H. 1993); *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661, 667-68 (N.Y. 1995); *Leandro v. State*, 488 S.E.2d 249, 253-54 (N.C. 1997); *DeRolph v. State*, 677 N.E.2d 733, 737 (Ohio 1997); *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535, 539 (S.C. 1999); *Pauley v. Kelly*, 255 S.E.2d 859, 870 (W. Va. 1979); *Campbell County Sch. Dist. v. State*, 907 P.2d 1238, 1264 (Wyo. 1995). Ignoring the above cases, the State cites a few contrary cases from other jurisdictions. State Br. at 33-34.

First, the Court in *Edgewood I* held, in rejecting the court of appeals' conclusion that efficiency was a nonjusticiable political question, that the standards by which the judiciary is to assess whether the Legislature has fulfilled its constitutional duty are apparent on the face of Article VII, section 1:

the language of article VII, section 1 imposes on the legislature an affirmative duty to establish and provide for the public free schools. This duty is not committed unconditionally to the legislature's discretion, but instead is accompanied by standards. By express constitutional mandate, the legislature must make "suitable" provision for an "efficient" system for the "essential" purpose of a "general diffusion of knowledge." While these are admittedly not precise terms, they do provide 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.

As the school finance litigation unfolded, and in response to both what the legislature did (and did not do) and the resulting claims, the Court found itself increasingly called upon to give more guidance on the standards listed in Article VII, § 1, culminating in the decision in *Edgewood IV* that the system passed constitutional muster, though barely.

A significant feature of *Edgewood IV* is this Court's express recognition that there are two components to "efficiency": financial, and qualitative. *Id.* at 729. In discussing these components, the Court noted that it had not addressed the qualitative aspect of the school finance scheme in *Edgewood I* because the financial disparities between school districts were so vast that the Court based its decision solely on those disparities. *Id.* But the *Edgewood IV* court went on to hold that the trial court had mistakenly focused exclusively on the financial component of efficiency, ignoring that a financially "equal"

school finance scheme (i.e., one in which all districts were providing the same level of funding per student) could nonetheless be constitutionally inefficient if that system did not achieve a *qualitative* level of efficiency (i.e., if more money per student is required to provide a “general diffusion of knowledge”). *Id.* at 730. While the *Edgewood IV* court equated the “qualitative” component of efficiency (general diffusion of knowledge) with the accreditation scheme, it was careful to note that this linkage was not absolute. The Court held that the Legislature “may [not] define what constitutes a general diffusion of knowledge so low as to avoid its obligation[s] [under] article VII, section 1” and that “the State’s provision for a general diffusion of knowledge must reflect changing times, needs, and public expectations.” *Id.* at 730 n.8, 732 n.14.

Accordingly, the Court’s decision in *Edgewood IV* did two significant things. *First*, it reiterated that efficiency claims are justiciable. *Second*, it expressly recognized what was at least implicit in the prior *Edgewood* opinions, namely, that proper adjudication of constitutional claims under Article VII, § 1 necessarily includes judicial examination of the qualitative component of such claims, i.e., whether the Legislature’s policy choices meet the constitutional “general diffusion of knowledge” standard.

West Orange Cove I also acknowledges the justiciability of the general diffusion of knowledge standard. In that case, the court of appeals had held that the notion of what constitutes an “adequate” education, that is, what “general diffusion of knowledge” means, was nonjusticiable. *West Orange-Cove Indep. Sch. Dist. v. Alanis*, 78 S.W.3d 529, 540 (Tex. App.—Austin 2002). The court of appeals believed that this Court’s decision in *Edgewood IV* forever foreclosed judicial inquiry into the meaning of “general

diffusion of knowledge” because this Court suggested in *Edgewood IV* that the Legislature (and therefore the Court) had equated “general diffusion of knowledge” with bare accreditation. *Id.* (citing *Edgewood IV*, 917 S.W.2d at 726). But this Court noted that the linkage described in *Edgewood IV* did not remove from the realm of justiciable controversies the issue of what the constitutional phrase “general diffusion of knowledge” means. *West Orange-Cove I*, 107 S.W.3d at 581-82. This Court explained that *Edgewood IV* deliberately left open the possibility that “general diffusion of knowledge” could mean something different from accreditation:

It may well be that the requirements are identical; indeed, as in *Edgewood IV*, we presume they are, giving deference to the Legislature’s choice. But it is possible for them not to be – an accredited education may provide more than a general diffusion of knowledge, or vice versa

Id. at 581. This Court rejected the court of appeals’ conclusion that judicial review of what constitutes an “adequate” education (i.e., one that provides a “general diffusion of knowledge”) is foreclosed, repeating its oft-stated position that “it is the judiciary’s responsibility in a proper case to determine whether those choices as a whole meet the standard set by the people in article VII, section 1.” *Id.* at 582.

Continuing to make explicit what was tacit in *Edgewood I*, the *West Orange-Cove I* court explained that the “efficiency” standard contained an “adequacy” component. “[T]he constitutional standard of efficiency requires substantially equal access to revenue only up to a point, after which a local community can elect higher taxes to ‘supplement’ and ‘enrich’ its own schools. That point, of course, although we did not expressly say so in *Edgewood I*, is the achievement of an adequate school system as required by the

Constitution.” *Id.* at 566. Noting that the overriding and determinative issue in *Edgewood I* was the gross financial disparities between districts regarding tax effort, the *West Orange-Cove I* court explained that “[this Court] w[as] not called upon in *Edgewood I* to consider what constitutional adequacy entails, [but] the interrelationship between the standards of adequacy and efficiency was fundamental to our reasoning in that case.” *Id.* And while *Edgewood IV* used accreditation as the “adequacy” benchmark for assessing the constitutional efficiency of the school finance system, the *Edgewood IV* decision, as this Court correctly recognized in *West Orange-Cove I*, permits judicial oversight of the question of whether Texas’s school system, given “changing times, needs, and public expectations,” continues to provide for a “general diffusion of knowledge,” as required by the Texas Constitution. *Id.* at 571-72.⁴⁷

There is no principled reason for this Court to depart from its precedent; nor is there any reason to chart a different course for a so-called “pure” adequacy claim. Indeed, the vast majority of state courts have treated adequacy claims as justiciable, not as off-limits “political questions.”⁴⁸

⁴⁷ The *Edgewood IV* court also indicated that the issue of whether the constitutional “general diffusion of knowledge” standard is met requires consideration of evidence. In footnote 10, the Court referred to something it characterized as an evidentiary finding “that meeting accreditation standards, which is the legislatively defined level of efficiency that achieves a general diffusion of knowledge, requires about \$3,500 per weighted student.” *Edgewood IV*, 917 S.W.2d at 731 n.10. But, as the State acknowledges in its brief at footnote 47 (page 72), those issues were severed in *Edgewood IV* and had not been litigated. See also *Edgewood IV*, 917 S.W.2d at 768 (Spector, J., dissenting, who noted that “[a]t the trial of the [*Edgewood IV*] case, the Texas Commissioner of Education testified, in regard to Senate Bill 7, that ‘our present accreditation criteria at the acceptable level . . . does not match up with what the real world requirements are.’”).

⁴⁸ Courts across the country have found adequacy cases to be justiciable. See, e.g., *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 507 (Ark. 2002) (stating that “[t]his Court’s refusal to review school funding under our state constitution would be a complete abrogation of our judicial responsibility and would work a severe disservice to the people of this state. We refuse to close our eyes or turn a deaf ear

The Court should not accept the State’s request to beat a hasty retreat from the school finance crisis, thereby leaving Texas school children at the mercy of a political

to claims of a dereliction of duty in the field of education.”); *Idaho Schools for Equal Educ. Opportunity v. Evans*, 850 P.2d 724, 734-35 (Idaho 1993) (“[W]e decline to accept the respondents’ argument that the other branches of government be allowed to interpret the constitution for us. That would be an abject abdication of our role in the American system of government.”); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 213-14 (Ky. 1989) (“To avoid deciding the case because of ‘legislative discretion,’ ‘legislative function,’ etc., would be a denigration of our own constitutional duty. To allow the General Assembly . . . to decide whether its actions are constitutional is literally unthinkable.”); *McDuffy v. Sec’y of the Executive Office of Educ.*, 615 N.E.2d 516, 554-55 (Mass. 1993) (citing *Marbury v. Madison* for proposition that courts “have the duty . . . to adjudicate a claim that a law and the actions undertaken pursuant to that law conflict with [or fall short of] the requirements of the Constitution. ‘This,’ in the words of Mr. Chief Justice Marshall, ‘is of the very essence of judicial duty.’”) (internal citation omitted); *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 109 P.3d 257, 260-61 (Mont. 2005) (rejecting *Baker v. Carr*-based political question argument and concluding that, “[a]s the final guardian and protector of the right to education, it is incumbent upon the court to assure that the system enacted by the Legislature enforces, protects and fulfills the right [to education]”); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1381 (N.H. 1993) (concluding that constitutional right to adequate education is justiciable and that “any citizen” has standing to “enforce the State’s duty” to fulfill this right); *Abbott v. Burke*, 693 A.2d 417, 428-29 (N.J. 1997) (holding that, while deference should be given to legislative content and performance standards, it is still the courts’ duty to ensure that these standards, “together with funding measures, comport[] with the constitutional guarantee of a thorough and efficient education for all New Jersey school children”); *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661, 666-68 (N.Y. 1995) (“We conclude that a duty [to provide a sound, basic education] exists and that we are responsible for adjudicating the nature of that duty.”); *Leandro v. State*, 488 S.E.2d 249, 261 (N.C. 1997) (rejecting “political question” argument and stating that “[w]hen a government action is challenged as unconstitutional, the courts have a duty to determine whether that action exceeds constitutional limits. . . . Therefore, it is the duty of this Court to address plaintiff-parties’ constitutional challenge to the state’s public education system.”); *DeRolph v. State*, 677 N.E.2d 733, 737 (Ohio 1997) (rejecting argument that school finance challenge presents nonjusticiable political question and citing both *Marbury v. Madison* and *Edgewood I* with approval); *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535, 540 (S.C. 1999) (Because “[i]t is the duty of this Court to interpret and declare the meaning of the Constitution,” the trial court should not have “us[ed] judicial restraint, separation of powers, and the political question doctrine as the bases for declining to decide the meaning of the education clause.”); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 84-87 (Wash. 1978) (citing *Marbury v. Madison* and stating that a finding of nonjusticiability would be “illogical”); *Pauley v. Kelly*, 255 S.E.2d 859, 870 (W. Va. 1979) (after reviewing decisions from other jurisdictions, noting the deference courts give to legislatively promulgated education policies but stating that “these jurisdictions have not hesitated to examine legislative performance of the [constitutional mandate], and we think properly so, even as they recite that courts are not concerned with the wisdom or policy of the legislation”); *Vincent v. Voight*, 614 N.W.2d 388, 396 n.2 (Wis. 2000) (after noting that *Baker v. Carr* holds that “a court must decide on a case-by-case inquiry whether a so-called political issue is justiciable,” concluding that “the [school finance] issues presented to us in this case are appropriate for decision by this court in the exercise of our constitutional role”); *State v. Campbell County Sch. Dist.*, 32 P.3d 325, 334-45 (Wyo. 2001) (rejecting separation of powers argument and stating that “[a]lthough this Court has said the judiciary will not encroach into the legislative field of policy making, as the final authority on constitutional questions the judiciary has the constitutional duty to declare unconstitutional that which transgresses the state constitution.”).

system that for far too long has failed to meet basic constitutional requirements unless prodded by this Court to do so. This Court was not wrong in *Edgewood I* and in subsequent cases when it embraced the challenge of determining the constitutionality of Texas's school finance system. The overwhelming disparity in funding that confronted the Court in *Edgewood I* has been largely addressed and the Court's decisions have contributed directly to the academic gains in the 1990s touted in the State's Brief. PX529:11-13; RR7:190-91. It would be catastrophic were the Court to now abandon its long-acknowledged duty to ensure continued legislative compliance with constitutional standards.

B. Article VII, § 1 is a self-executing provision and permits this action.

Aside from its political question argument, the State claims non-justiciability on a second ground, arguing that Article VII, § 1 is not self-executing (i.e., fails to supply a rule sufficient to protect the right given or permit enforcement of the duty imposed⁴⁹) and thus “cannot be enforced through suits such as this one.” State Br. at 40. The State's argument is premised on the contention that Article VII's requirements that the public school system be efficient, adequate and suitable are not sufficiently specific. Again, while the Court has characterized these terms as “not precise,” the Court has also consistently and properly held that “they do provide a standard by which this court must, when called upon to do so, measure the constitutionality of the legislature's actions.”

⁴⁹ *Motorola, Inc. v. Tarrant County Appraisal Dist.*, 980 S.W.2d 899, 902 (Tex. App.—Fort Worth 1998, no pet.) (citing *Mitchell County v. City Nat'l Bank of Paducah, Ky.*, 43 S.W. 880, 883-84 (1898)).

West Orange-Cove I, 107 S.W.3d at 563 (citing *Edgewood I*, 777 S.W.2d at 394 and *Edgewood IV*, 917 S.W.2d at 736).

The State’s primary authority is *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798 (Tex. 1955). In that case, Corpus Christi claimed that Pleasanton had unlawfully wasted water produced from artesian wells by routing the water in a way that resulted in water loss by evaporation, transpiration and seepage. Although Corpus Christi primarily based its case upon claimed statutory violations, it also relied upon the following constitutional provision:

The conservation and development of all of the natural resources of this State . . . are each and all hereby *declared public rights and duties*; and the Legislature shall pass all such laws as may be appropriate thereto.

TEX. CONST. art. XVI, § 59 (emphasis added). The Court initially found no statutory violation. The Court then found that the constitutional provision, which does nothing more than declare the conservation of natural resources to be a public right and duty, was not self-executing and did not give the Court the right to second-guess the Legislature’s decisions regarding the routing of well water. *Corpus Christi*, 276 S.W.2d at 803.

The State argues that “Article VII, § 1 is not self-executing for the same reasons.” State Br. at 41. But this argument ignores the modern presumption that state constitutional provisions are self-executing.⁵⁰ Furthermore, Article VII, § 1 is distinctly

⁵⁰ See Kelly Thompson Cochran, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. REV. 399, 455 (2000) (discussing the modern presumption and citing authorities); Jose L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENVTL. L. REV. 333, 339-41 (1993) (discussing the development of the modern presumption of self-execution and citing authorities). This presumption recognizes that absent judicial protection of the right to education, the constitutional provision would be a nullity. See 16 AM. JUR. 2d *Constitutional Law* § 100 (1998) (listing authorities for the modern

different from Article XVI, § 59. Article VII, § 1 does not simply identify free public education as a “public right and duty” and then pass the baton to the Legislature free of constitutionally-framed standards. To the contrary, as repeatedly recognized by this Court, Article VII, § 1 provides justiciable standards of efficiency, adequacy, and suitability. *West Orange-Cove I*, 107 S.W.3d at 563; *Edgewood IV*, 917 S.W.2d at 736; *Edgewood I*, 777 S.W.2d at 394.

Moreover, *Corpus Christi* held only that the court could not usurp the Legislature’s responsibility for determining “what types of conduits and reservoirs may be used for the transportation and storage of water.” 276 S.W.2d at 296. That is consistent with this Court’s delineation of responsibilities in the school cases, as the Court repeatedly has acknowledged that “the Legislature [is] the sole authority to set the policies and fashion the means for providing a public school system,” while the courts are called upon to “measure the constitutionality of the legislature’s actions.” *West Orange-Cove I*, 107 S.W.3d at 563.

This Court’s recognition of joint responsibilities by the Legislature and the courts is supported by the many cases in which a court, when confronted with a self-executing constitutional provision, recognizes that legislative action is necessary to effectuate the provision’s purposes while the court retains jurisdiction to ensure that legislative action comports with constitutional standards. *See, e.g., Mitchell County*, 43 S.W. at 883 (holding that, under a self-executing constitutional provision, it was up to the Legislature

presumption that state constitutional provisions are self-executing, and noting that “courts may be influenced . . . by the knowledge that if not treated as self-executing, the legislature would have the power to ignore and practically nullify the directions of the fundamental law.”).

to promulgate the necessary, supporting procedures in compliance with constitutional standards); *Motorola*, 980 S.W.2d at 902 (same). This Court’s constitutional assessment of the Legislature’s actions is also consistent with a significant number of out-of-state cases evaluating the constitutionality of school finance law under state constitutions. *See, e.g., Cochran, supra*, at 455-56 (“Although the adequacy precedents did not use a formal ‘self-executing’ analysis, they weighed concerns about judicially manageable standards and separation of powers in holding that students have an enforceable right to education under their states’ constitutions.”).

C. The West Orange-Cove Plaintiffs have standing to assert claims under Article VII, § 1 and Article VIII, § 1-e.

The State has also resurrected the standing argument rejected by this Court in *West Orange-Cove I*, 107 S.W.3d at 583-84. The State argues that the school districts lack standing because the challenged statutes afford rights only to taxpayers, not school districts. State Br. at 43. The Court’s prior analysis remains persuasive and requires that the standing objection be rejected – again.

In *West Orange Cove I*, the Court properly looked to its prior decision in *Nootsie, Ltd. v. Williamson County Appraisal District*, 925 S.W.2d 659 (Tex. 1996). In *Nootsie*, the Court held that a county appraisal district had standing to seek a declaratory judgment that the Legislature had unconstitutionally defined open-space land for tax purposes. *Nootsie* argued that the appraisal district lacked standing because it had no inherent vested rights protected by the Constitutions of Texas and the United States, but the Court rejected this argument:

This argument misses the mark because the district does not contend that the statute violates constitutional rights belonging to the district. Instead, the district asserts an interest because it is charged with implementing a statute that it believes violates the Texas Constitution. This interest provides the district with a sufficient stake in this controversy to assure the presence of an actual controversy that the declaration sought will resolve. *See Nueces County Appraisal Dist. v. Corpus Christi People's Baptist Church, Inc.*, 860 S.W.2d 627, 630 (Tex. App.—Corpus Christi 1993) (holding that an appraisal district is the proper party to challenge the constitutionality of a tax statute), *rev'd on other grounds*, 904 S.W.2d 621 (Tex. 1995); *cf. Robbins v. Limestone County*, 114 Tex. 345, 268 S.W. 915, 917 (1925) (holding that county and road districts can sue the state highway commission on the ground of the invalidity of statutes).

Id. at 662.

As noted by this Court in *West Orange-Cove I*, the school districts stand in precisely the same position as the county appraisal district in *Nootsie*: all are required to implement statutes that they regard as unconstitutional. 107 S.W.3d at 583-84. As such, the districts' interest in the controversy is sufficient to confer standing. The history of the Texas school finances cases,⁵¹ school finance cases from other states,⁵² and the Texas Education Code⁵³ also support a finding that school districts have standing in this case.

⁵¹ The *West Orange-Cove I* court correctly noted that school districts have prosecuted similar suits, without challenge, for over 20 years. Indeed, the standing argument did not surface until Justice Smith raised it *sua sponte* in *West Orange-Cove I*, and the State did not challenge standing in this suit until the eve of trial. CR1:74-82. The State now argues that the history of this litigation is not informative because taxpayers were also involved in prior suits, but that does not alter the fact that school districts were allowed to pursue their claims without challenge. This is well illustrated by *Edgewood IV* where the suit was prosecuted primarily by school districts (numbering over 230). 917 S.W.2d at 727. The only taxpayer claims that are described as such were brought by the “Gutierrez appellants” and requested a “hybrid voucher system.” *Id.* at 747. The Court rejected those claims because they impermissibly asked the Court “to prescribe the structure of this state’s public school system.” *Id.* at 747-48.

⁵² Texas is not unique: many states have recognized that school districts have standing to challenge the state’s school finance system because of the stake they have in ensuring that their students receive an adequate education. *See, e.g., Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365, 377-78 (N.C. 2004); *Idaho Schools for Equal Educ. Opportunity v. Evans*, 850 P.2d 724, 736 (Idaho 1993); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 202 (Ky. 1989); *State ex rel. Sch. Dist. of City of Independence v. Jones*, 653 S.W.2d 178, 189 (Mo. 1983); *Seattle School Dist. No. 1 of King County v. State*, 585 P.2d 71,

III. The school finance system fails to satisfy the constitutional requirement of adequacy.

Article VII, § 1 provides that a “general diffusion of knowledge” (i.e., an adequate education) is “essential to the preservation of the liberties and rights of the people.” The trial court concluded that the Texas school finance system is unconstitutional because the state has substantially defaulted on its constitutional obligation to provide for general diffusion of knowledge. The State argues that the trial court erred by (1) declining to apply rational-basis review, (2) determining that the accountability system does not provide for general diffusion of knowledge, and (3) defining the general diffusion of knowledge standard (i.e., adequacy) too broadly. The State’s arguments should be rejected because the rational-basis review standard does not apply, the accountability system by itself does not satisfy the constitutional adequacy requirement, and the trial court properly defined adequacy in accordance with legislative pronouncements, this Court’s precedent, and the evidence.

A. Rational-basis is not the proper standard of review.

The State, relying on *Mumme v. Marrs*, 40 S.W. 31 (Tex. 1931), argues that the Court should defer to the Legislature so long as its acts are non-arbitrary. State Br. at 47-49. The State, however, fails to distinguish between an equal protection claim and a state

82 (Wash. 1978); cf. *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 629 (10th Cir. 1998), (school districts had standing to bring federal claims against the state); *Rogers v. Brockette*, 588 F.2d 1057, 1069 (5th Cir. 1979) (holding that a Texas school district had standing to sue state authorities over the state’s management of a school breakfast program regulated by federal law).

⁵³ The Education Code provides that “school districts . . . have the primary responsibility for implementing the state’s system of public education and ensuring student performance in accordance with this code” and authorizes school boards to “sue and be sued.” TEX. EDUC. CODE §§ 11.002, 11.151.

constitutional claim for the positive right to an adequate education. Rational-basis review has no application to the latter.

Rational-basis review does not apply when a court is called upon to determine whether the Legislature has satisfied its constitutional duty to provide an adequate education. *See Edgewood I*, 777 S.W.2d at 394 (holding that “article VII, section 1 imposes on the legislature *an affirmative duty* to establish and provide for the public free schools”) (emphasis added); *see also Roosevelt Elem. Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 811-16 (Ariz. 1994) (court need not determine whether rational-basis review applied to equal protection argument because education provision of state constitution was determinative of case); *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 496 (Ark. 2002) (court did not need to consider whether strict scrutiny applied or whether fundamental interest was implicated because education provision of state constitution imposed absolute constitutional duty on state); *cf. Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 329-50 (N.Y. 2003) (finding violation of education article of state constitution without reference to rational-basis review).

The relevant question before the Court is whether, as a matter of law, the school system achieves the constitutionally prescribed end of an adequate education. As the Court has recognized, although the Legislature has the right to decide how to provide this constitutionally required education, this Court determines whether the constitutional standards have been met. *West Orange-Cove I*, 107 S.W.3d at 563-64 & n.12 (citing *Edgewood IV*, 987 S.W.2d at 726).

This Court’s decision in *Mumme v. Marrs*, 40 S.W. 31 (Tex. 1931), does not provide otherwise. First, as the State recognizes, *Mumme* addressed an equal protection challenge to the Rural Aid Act. State Br. at 47-48. *Mumme* is about the means the legislature chose to fulfill its duty, a different question from whether it fulfilled the duty. See *West Orange-Cove I*, 107 S.W.3d at 563-64, 585. Second, in *Edgewood I, II, and IV*, this Court considered challenges to the school finance system under Article VII, § 1 of the Constitution, and in none of these cases did the Court apply a rational-basis standard or evaluate the then-existing school finance system by whether it was constructed in an arbitrary manner.⁵⁴

This Court has made it abundantly clear that the Legislature is to make the policy decisions concerning school finance, and there deference is proper. It is the province of the courts, however, to determine “whether the Legislature on the whole has discharged its constitutional duty.” *West Orange-Cove I*, 107 S.W.3d at 585. If the Legislature has not provided an adequate school system, then it violates the Texas Constitution. The inquiry for this Court is whether there is a constitutional violation, not whether there is a rational basis for the Legislature’s actions.

B. The trial court properly rejected the State’s definition of adequacy.

The State complains that the trial court “abandoned the accountability system as the touchstone for measuring whether an adequate education has been achieved.” State

⁵⁴ The Legislature also has recognized that rational-basis analysis is not the standard of review. In the November 1992 special session on school finance, the Legislature considered proposing a constitutional amendment to change the standard of review of the school-finance system to the federal rational-basis review. House Research Organization, Texas House of Representatives, *Daily Floor Report* 10-11 (Nov. 11, 1992). This measure failed to pass.

Br. at 64. The State instead contends that the Legislature fulfills its constitutional duty simply by “by putting into place a comprehensive system of accountability standards” (State Br. at 71), a slight variation from its position in the trial court that an “academically acceptable” rating in the accountability system demonstrates adequacy. CR1:250. Stated either way, the trial court properly rejected the State’s proposed definition of adequacy.

1. An accountability system and curriculum standards are necessary, but not sufficient, components of adequacy.

The State argues that the Legislature satisfied its constitutional duty simply by installing the basic architecture of the system – curriculum standards, assessment and accountability – and whatever actually happens in the classrooms of Texas is irrelevant to the constitutional analysis. The State claims to find support for its position based on the *Edgewood IV* court’s statement that the “accountability regime . . . meets the Legislature’s constitutional obligation to provide for a general diffusion of knowledge statewide.” State Br. at 64 (citing *Edgewood IV*, 917 S.W.2d at 730). But the State takes this statement out of context, and in doing so, fundamentally misreads *Edgewood IV*.

The *Edgewood IV* court, unlike the State, recognized that there is an additional critical factor: sufficient resources. 917 S.W.2d at 731 n.10 (“Based on the evidence at trial, the district court found that meeting accreditation standards, which is the legislatively defined level of efficiency that achieves a general diffusion of knowledge, requires about \$3,500 per weighted student.”); *id.* at 732 (“Property-poor and property-rich districts presently can attain the revenue necessary to provide suitably for a general

diffusion of knowledge at tax rates of approximately \$1.31 and \$1.22.”). If the provision of an accountability system alone were enough to satisfy the constitutional mandate, this Court’s warning about the “floor” (cost of providing for a general diffusion of knowledge) converging with the “ceiling” (the \$1.50 cap) would not make sense because there would never be a cost associated with the floor. *Id.* at 738. As Justice Enoch correctly observed, “The standard of suitability gives the Legislature broad discretion, but limits that discretion by requiring a real relationship between the finance system and the subject and object of the Constitution.” *Id.* at 753-54 (Enoch, J., concurring and dissenting).

The State also claims to find support from the recent Massachusetts Supreme Court case, suggesting that the court’s conclusion that Massachusetts has satisfied its constitutional adequacy mandate was based on its implementation of an “integrated curriculum, assessment and accountability system” like Texas’s. State Br. at 53 (citing *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134 (Mass. 2005)). However, the State neglects to mention the significant funding increases that accompanied these educational reforms in Massachusetts – specifically an increase in total K-12 spending from \$3.6 billion in 1993 to \$10.1 billion in 2002, which represents a 280% increase in educational spending in less than a decade. *See Hancock*, 822 N.E.2d at 1147.

Other state supreme courts have rejected the precise argument made by the State. For example, the New Jersey Supreme Court observed:

The standards themselves do no ensure any substantive level of achievement. Real improvement still depends on the sufficiency of educational resources, successful teaching, effective supervision, efficient

administration, and a variety of other academic, environmental, and societal factors needed to assure a sound education. Content standards, therefore, cannot answer the fundamental inquiry of whether the new statute assures the level or resources needed to provide a thorough and efficient education...”

Abbott v. Burke, 693 A.2d 417, 428-29 (N.J. 1997); *see also Claremont Sch. Dist. v. Governor*, 794 A.2d 744, 751-58 (N.H. 2002) (recognizing that accountability is crucial component of adequacy but must be considered in conjunction with funding component). Moreover, North Carolina – notwithstanding the fact that it is widely considered to have one of the premier accountability systems and set of curriculum standards in the nation (*see, e.g., PX758:48-51*) – also has had its school finance system declared unconstitutional on adequacy grounds within the past year because districts lacked the necessary resources to educate their at-risk students. *See Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365 (N.C. 2004).

The consensus among courts and commentators is that adequacy requires strong academic standards, accountability *and sufficient funding* to accomplish the goals set by the particular state. A report of a Task Force of the National Conference of State Legislatures recently set forth the following principles for building an adequate education system: (1) articulating “clear and measurable educational goals or objectives,” (2) identifying “the conditions and tools that . . . provide . . . every student a reasonable opportunity to achieve expected educational goals or objectives,” and (3) ensuring “sufficient funding is made available and used to establish and maintain these conditions and tools.” Michael A. Rebell, *Educational Adequacy, Democracy, and the Courts*, in

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(Timothy Ready et al. eds., 2002), *available at* http://www.schoolfunding.info/resource_center/research/adequacychapter.pdf (hereinafter, “Rebell”) (quoting NATIONAL CONFERENCE OF STATE LEGISLATURES, EDUCATIONAL ADEQUACY: BUILDING AN ADEQUATE SCHOOL FINANCE SYSTEM 5, 10-18 (1998)) (emphasis added). The State’s focus on the first element alone is strikingly incomplete.

In short, the “architecture” of the system (TEKS, TAKS, accountability system) is a necessary *but not a sufficient* condition of educational adequacy. Even the best architectural drawings are worthless if one lacks the resources to build them and cannot pay for the lumber and the bricks. One commentator explained: “There’s incontrovertible logic, ethical, fiscal and legal, in the tight two-way link between standards and adequate resources. If a state demands that schools and students be accountable—for meeting state standards, for passing exit exams and other tests—the state must be held equally accountable for providing the wherewithal to enable them to do it.” PETER SCHRAG, FINAL TEST: THE BATTLE FOR ADEQUACY IN AMERICA’S SCHOOLS 246-47 (2003).

2. An “academically acceptable” rating is not the measure of an adequate education.

The State contends that “if districts are performing at an objectively acceptable level, then the resources they have must, by definition, be adequate for that result.” State Br. at 72. Presumably, the State is referring to a rating of “academically acceptable” under the accountability system as the objective measure of “acceptability.” As the trial court found, this position is untenable. FOFs 30-37.

Under the 2003-04 accountability system, a district is considered “academically acceptable” even if (i) a quarter of its student population drops out between ninth and twelfth grade (RR:25:188), (ii) only 25% of its remaining students (and various disaggregated student groups) pass the science TAKS test and (iii) only 35% pass the math TAKS test. Furthermore, in 2003-04, the State Board of Education set the student passing rate at 1 standard error of measurement (“SEM”) below the panel-recommended cut scores for grades 3-10 and 2 SEMs below the recommended cut scores for 11th grade. To pass the 11th grade science test, a student need answer only 43.6% (24 out of 55) of the questions correctly. To pass the 11th grade math test, a student need answer only 41.7% (25 out of 60) of the questions correctly. FOF 30-31; PX675.

A specific example sheds further light on the inadequacy of the “academically acceptable” rating from a constitutional perspective. Central Senior High School in Beaumont ISD is rated academically acceptable, even though only 27 percent of its students could pass all TAKS tests in the 2003-2004 school year, compared to the state average of 68 percent. (Only 17% could pass at the panel-recommended standard being phased in this year). App. L at Section I, p.2. The school has a longitudinal dropout rate of almost three times the state average. *Id.* at Section I, p.4. Only 10% of the graduating class was deemed “college ready” for English/Language Arts and 11% was deemed “college ready” for Mathematics. *Id.* at Section I, p.5. The members of the 2003 graduating class that took the SAT (presumably, the more highly educated students in the school) posted a mean SAT score of 772 – 200 points below the state average and 250 points below the national average. *Id.* at Section I, p.5.

When Dr. Criss Cloudt, the TEA's Associate Commissioner of Accountability, was asked whether part of the State's rationale in setting the standards so low was to prevent there from being a lot of districts rated academically unacceptable, she conceded that the State did not want to discourage low-performing districts and cause them to "give up." PX742:21-22. When asked whether she thought these standards were high enough to reflect "an adequate level of performance," Cloudt stated that the standards were going to be adjusted upward. PX742:101-02. When asked whether, as the State's accountability expert, she was satisfied that these percentages for the number of students to pass portions of the TAKS test were sufficient to be minimally acceptable, she testified: "I'm accepting of the standards for 2004 with the understanding that the rigor of the accountability system is going to be ratcheted up every single year." PX742:103. Thus, while the 2003-04 measures may be appropriate as a starting point in light of the new accountability regime, the TEA rightly does not regard these measures as a measure of adequacy. In fact, Cloudt testified that the accountability system is "only one measure in terms of the quality of education being offered" and that it measures only "a portion of what the requirements are for the Texas public schools." RR25:159.

Examining the history of the accountability system in Texas, the trial court correctly found that:

[T]hese passing rates were set not to constitute a minimal level of adequacy but rather to ensure that most districts and campuses fell upon the "academically acceptable" side of the line, which is consistent with longstanding practice in Texas. The State cannot on one hand draw the "academically acceptable" line with the specific intention of ensuring that the vast majority (if not all) of the districts in Texas fall on the "right" side of it, and on the other hand claim that this line is the measure of adequacy.

FOF 32; *see also* App. E at 2; PX529:12; RR7:193-96; State App. F. As WOC expert Lynn Moak testified, “When the Commissioner sets the standard, the Commissioner is highly aware of how many districts by that chance might be affected. And I believe this system has been consistently set in such a way as to absolutely minimize the number of districts that would be declared to be low performing.” RR7:196.⁵⁵

Finally, the trial court offered a number of other reasons for why an “academically acceptable” rating is not synonymous with adequacy: (1) the accreditation rankings rely heavily on TAKS scores, which measures less than one-half of the TEKS subjects required for the RHSP and less than one-fourth of the TEKS subjects required for elementary and middle school; (2) the exit-level TAKS test is a measure of mid-high school level achievement, not a measure of whether a student is ready to go to college or prepared for a postsecondary employment setting, and therefore TAKS results cannot inform whether a district is meeting the legislative directive to prepare students to “continue to learn in postsecondary educational, training, or employment settings,” TEX. EDUC. CODE § 28.001; and (3) to the extent an “academically acceptable” ranking also depends on dropout and completion rates, the evidence casts considerable doubt as to the reliability of this data. FOF 34-36; *see also* AX9019; RR15:20-45. The trial court also cited many “legislative pronouncements and requirements for both districts and students that describe a level of educational ‘adequacy’ that districts must provide that extend

⁵⁵ The conservative think-tank, the Texas Public Policy Foundation, also finds the current standard for an “academically acceptable” rating unacceptably low as a measure of adequacy. *See* Chris Patterson & Sandy Kress, What Does 'Acceptable' Mean (Mar. 30, 2005), *available at* http://www.texaspolicy.com/commentaries_single.php?report_id=772 (visited Apr. 7, 2005).

significantly beyond the achievement of an ‘academically acceptable’ accreditation ranking.” FOF 18-29. Indeed, the Legislature itself never has equated an “academically acceptable” rating with its duty to provide a “general diffusion of knowledge.”

For all of these reasons, the trial court correctly concluded that the WOC Plaintiffs had rebutted the presumption that an “academically acceptable” rating was synonymous with a “general diffusion of knowledge,” a conclusion consistent with this Court’s opinion in *West Orange-Cove I*. See 107 S.W.3d at 581.

C. The trial court properly defined adequacy.

1. The trial court properly framed adequacy in terms of an opportunity for all students to achieve state standards.

The trial court carefully crafted a definition of “general diffusion of knowledge” that relies on legislative standards and enactments, is consistent with this Court’s prior guidance, and properly frames adequacy in terms of an opportunity for all students to achieve state standards.

The core of the trial court’s definition is set forth in COL 7:

To fulfill the constitutional obligation to provide a general diffusion of knowledge, districts must provide “*all Texas children . . . access to a quality education that enables them to achieve their potential and fully participate now and in the future in the social, economic, and educational opportunities of our state and nation.*” TEX. EDUC. CODE § 4.001(a) (emphasis added). Districts satisfy this constitutional obligation when they provide all of their students with a *meaningful opportunity* to acquire the essential knowledge and skills reflected in Texas’s curriculum requirements (TEKS), and the Recommended High School Program, such that upon graduation, students are prepared to “continue to learn in postsecondary educational, training, or employment settings.” TEX. EDUC. CODE § 28.001 (emphasis added). . . .

COL 7.

This definition has two key elements. First, per this Court’s instructions, the trial court deferred to the Legislature in defining the *content* of an adequate education – namely the TEKS curriculum and the Recommended High School Program. Second, consistent with legislative directives, the trial court defined “adequacy” in terms of the provision of a *meaningful opportunity* to *all* students to acquire the knowledge and skills identified as necessary by the Legislature.⁵⁶

“Opportunity” and “access” are critical concepts in properly defining “general diffusion of knowledge.” While the state or school districts cannot be blamed if all students do not avail themselves of this opportunity, “this opportunity must still ‘be placed within reach of all students,’ including those who ‘present with socioeconomic deficits.’” *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 337 (N.Y. 2003) (citations omitted). Districts cannot ensure, and no court has required, that 100% of their students will succeed, as some will not for reasons beyond a district’s control. But, under the trial court’s definition of adequacy (in contrast to the State’s proposed definition, in which a 75% student failure rate on science tests would still be adequate), a district cannot just write off many of the hardest-to-educate students.

Students will not have a meaningful opportunity to meet state standards if they do not have qualified teachers in the classrooms or if class sizes are so large that students are denied any individual attention. Many students will not have a meaningful opportunity to

⁵⁶ Contrary to the State’s argument (State Br. at 69 n.45), the trial court did not conclude that all statutory and administrative requirements are part of the general diffusion of knowledge. Rather, the trial court observed that in assessing the cost of the “floor” for the purposes of the state property tax claim, it had to include the costs of meeting these mandatory statutory and administrative requirements. COL 8.

meet state standards if they do not have access to appropriate remediation, which may consist of instructional specialists, extended-day programs, extended-year programs (summer school), or other programs. RR5:57-58, 60-81; PX699:15, 17-22.

Districts, particularly those with significant numbers of economically disadvantaged and LEP students, need access to funds to provide full-day kindergarten and pre-kindergarten programs to help these students become “education-ready” and have a meaningful opportunity to succeed; these programs have positive effects on outcomes such as school achievement, grade retention, special education, high school graduation rates, college attendance, earnings and employment, crime and delinquency.⁵⁷ PX725:23-28, 33-45, 52-55, 61-62; RR23:22-23; RR20:10-11; RR6:72-73; *see also Abbott v. Burke*, 710 A.2d 450, 461-64 (N.J. 1998) (discussing research base and noting that all parties recognized that “early childhood programs are critically important . . . if at-risk children are to have any chance of achieving educational success”).

Likewise, many districts – both urban and suburban – have students entering their systems that lack proficiency not only in English, but also in their native languages (because of a lack of formal schooling in their home countries). *See* RR6:25-28; RR7:14-15. These students, particularly those that arrive at the secondary level, will not have a meaningful opportunity to learn the required curriculum unless districts can provide them with small class settings and intensive instruction. RR6:25-28; RR15:146-51.

⁵⁷ The provision of full-day early childhood programs is critical because many working parents, on account of scheduling and transportation difficulties, will not enroll their children in half-day programs. PX725:50-51.

The concept of “opportunity” does not guarantee that all students will meet state standards or that unlimited resources must be made available to overcome all impediments to student learning. But the trial court recognized that the plaintiff districts are being forced to cut (or cannot otherwise pay for) core personnel and programming necessary to ensure that all of their students are given a meaningful opportunity to learn the TEKS and graduate with the skills needed to succeed in “postsecondary educational, training, or employment settings.” TEX. EDUC. CODE § 28.001.

2. **The trial court’s definition incorporates the Legislature’s policy choices and is consistent with this Court’s jurisprudence, the jurisprudence from other states, and the testimony of numerous State and plaintiff witnesses.**

The trial court’s definition of adequacy is consistent with (i) the Legislature’s repeated pronouncements, (ii) this Court’s previous guidance, (iii), the testimony of the State’s own expert witnesses, as well as numerous superintendents and (iv) decisions from the highest courts of many other states. It incorporates, rather than rejects, the policy choices and pronouncements of the Legislature.

- a. **The trial court’s definition of adequacy incorporates, rather than criticizes, the policy choices of the Legislature.**

In defining adequacy, the trial court complied with this Court’s instruction not to “review the Legislature’s policy choices in determining what constitutes an adequate education, [or to] undertake to review those choices one by one or attempt to define in detail an adequate education.” *West Orange-Cove I*, 107 S.W.3d at 582.

First, the trial court explicitly deferred to the Legislature in defining the scope of what students are expected to learn – making specific reference to the TEKS and the

Recommended High School Program. State experts agreed that that these curriculum requirements reflect the knowledge that the Legislature is supposed to “generally diffuse” to the populace. Susan Barnes, Associate Commissioner for Standards and Programs at the TEA, testified that the TEKS “are broad, complex, deep, covering a broad scope of information, knowledge, and skills that will meet the statutory direction to . . . educate our children” and equated TEKS with the “general diffusion of knowledge” requirement. RR6:217-18. Similarly, State expert Ann Smisko, former TEA Associate Commissioner for Curriculum, Assessment, and Technology, testified that the “general diffusion of knowledge” included all TEKS requirements. PX748:30-31, 69. Dr. Smisko also agreed that the Recommended High School Program (which students now enter by default) is now the minimum bar for “general diffusion of knowledge.” PX748:68-69.

Second, the trial court also relied extensively on legislative statutes and directives in determining that the constitutional mandate of “general diffusion of knowledge” required the provision of a meaningful opportunity to achieve an adequate education to all students. FOFs 18-29. For example, following *Edgewood IV*, the Legislature articulated its intent to establish a more rigorous curriculum and spoke in terms of its obligation to *all students*:

It is the intent of the legislature that the essential knowledge and skills developed by the State Board of Education under this subchapter shall require *all* students to demonstrate the knowledge and skills necessary to read, write, compute, problem solve, think critically, apply technology, and communicate across all subject areas. *The essential knowledge and skills shall also prepare and enable all students to continue to learn in postsecondary educational, training, or employment settings.*

TEX. EDUC. CODE § 28.001 (emphasis added).

In passing Section 4.001 of the Education Code, the Legislature again acknowledged its duty to ensure that *all* Texas school children have *access* to a *quality* education reflecting the reality of the competitive employment market and the changing world, and affirmed that the preservation of democracy and the promotion of the state’s economic well-being were linked to how well the state provided for this “general diffusion of knowledge”:

The mission of the public education system of this state is to ensure that *all Texas children have access to a quality education* that enables them to achieve their potential and fully participate now and in the future in the social, economic, and educational opportunities of our state and nation. *That mission is grounded on the conviction that a general diffusion of knowledge is essential for the welfare of this state and for the preservation of the liberties and rights of citizens.*

TEX. EDUC. CODE § 4.001(a) (emphasis added).

In *West Orange-Cove I*, the Court concluded that, through the passage of Section 4.001, “the Legislature has expressly defined the mission of the public school system, including school districts, to accomplish a general diffusion of knowledge.” 107 S.W.3d at 584 & n.124; *see also id.* at 581. While the State argues that this mission statement is merely aspirational, former Lieutenant Governor Ratliff, the author of Senate Bill 7 and the subsequent rewrite of the Education Code in 1995, testified that the goal of providing all students access to a quality education is “attainable” and “very practical.” RR13:14.

The Legislature further adopted policy language that explicitly recognized the state’s responsibility in providing adequate resources to afford all students the opportunity to meet these elevated expectations:

*It is the policy of this state that the provision of public education is a state responsibility and that a thorough and efficient system be provided and substantially financed through state revenue sources so that **each student enrolled in the public school system shall have access to programs and services that are appropriate to the student's educational needs** and that are substantially equal to those available to any similar student, notwithstanding varying local economic factors.*

TEX. EDUC. CODE § 42.001 (emphasis added); *see also id.* § 4.003.⁵⁸

The trial court's definition of adequacy was taken directly from these statutes. Even the legislative analysis of the current school finance bill that has passed the Texas House and awaits action in the Senate expresses the view that "[s]ince its very first Constitution, Texas has made the education of *every* child its primary goal." HOUSE COM. ON EDUCATION, BILL ANALYSIS, Tex. H.B. 2, 79th Leg., R.S. (2005).⁵⁹

The State suggests that the trial court substituted its own policy judgments for the Legislature's, but this argument seriously mischaracterizes the trial court's findings. The trial court – mindful of its judicial role – was not criticizing the Legislature's and TEA's policy choices in the design of the accountability system or the assessment tests. Rather, it properly concluded that the constitutional mandate of "suitability" and "general diffusion of knowledge" means more than an "academically acceptable" rating under the accountability system.

For example, the trial court did not criticize the composition of the TAKS test; it simply observed (correctly) that TAKS measures achievement in less than one-half of the

⁵⁸ *See also* TEX. EDUC. CODE § 39.023 (requiring that secondary exit-level instruments be "designed to assess a student's mastery of minimum skills necessary for high school graduation and readiness to enroll in an institution of higher education").

⁵⁹ This analysis is available at: <http://www.capitol.state.tx.us/cgi-bin/tlo/textframe.cmd?LEG=79&SESS=R&CHAMBER=H&BILLTYPE=B&BILLSUFFIX=00002&VERSION=3&TYPE=A>.

TEKS course subjects required under the RHSP and less than one-fourth of the TEKS course subjects required for elementary and middle school, and therefore, that test scores alone could not be a complete measure of adequacy. FOF 34. The trial court did not criticize the setting and phasing in of the “cut scores” for these tests from an educational perspective; instead, it specifically noted that, while they “may be an appropriate starting point in light of the phase-in of the new accountability regime and testing instrument,” cut scores of 2 SEMs below panel-recommended levels and student pass rates of 25% for science and 35% for math are not an appropriate measure of adequacy. FOF 33. The trial court did not criticize the TEA’s decision to only use three of the seven indicators listed in Section 39.051(b) of the Texas Education Code for the determination of campus and district ratings, as it is entitled to do by statute, but simply observed that other important measures of adequacy (attendance rates, college equivalency scores, SAT scores, percentage of graduates in the RHSP) are not reflected in these ratings, as Commissioner Neeley conceded. FOF 37; RR7:181-86; RR23:206. Finally, the trial court did not criticize the TEA or the Legislature for administering the exit-level TAKS in the eleventh grade. It simply acknowledged the admissions by the TEA that the exit-level TAKS is not a measure of college-readiness or readiness for the job market (PX744:100-01; PX792) and thus concluded that “TAKS results alone . . . cannot inform whether a district is meeting the legislative directive to prepare students to ‘continue to learn in postsecondary educational, training, or employment settings.’” FOF 35 (quoting TEX. EDUC. CODE § 28.001).

b. The trial court’s definition of adequacy is consistent with this Court’s previous guidance.

The trial court’s definition of adequacy also finds support from this Court’s prior school finance opinions, dating back to *Edgewood I*. There, this Court noted that “[a]t the Constitutional Convention of 1875, delegates spoke at length on the importance of education *for all the people* of this state, rich and poor alike” and that the chair of the education committee, speaking on behalf of the majority of the committee, declared:

[Education] must be classed among the abstract rights, based on apparent natural justice, which we individually concede to the State, for the general welfare, when we enter into a great compact as a commonwealth. I boldly assert that it is for the general welfare of all, rich and poor, male and female, that the means of a common school education should, if possible, be placed *within the reach of every child in the State*.

Edgewood I, 777 S.W.2d at 395 (quoting S. MCKAY, DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875 at 198 (1930)) (emphasis added).

The *Edgewood I* court also implicitly recognized some of the aspects of an adequate education in juxtaposing the education offered by property-poor districts with that offered by the wealthier districts, noting the importance of (1) extensive curricula, (2) up-to-date technological equipment, (3) adequate libraries and library personnel, (4) teacher aides, (5) counseling services, (6) lower student-teacher ratios, (7) adequate facilities, (8) parental involvement programs, (9) drop-out prevention programs, and (10) the ability to attract and retain experienced teachers and administrators. *Id.* at 393.

Next, in a concurring opinion in *Edgewood III* that became the foundation of his *Edgewood IV* majority opinion, Justice Cornyn concluded that “[a]n ‘efficient’ education requires more than elimination of gross disparities in funding; it requires the inculcation

of an essential level of learning by which *each child in Texas* is enabled to live a full and productive life in an increasingly complex world.” *Edgewood III*, 826 S.W.2d at 525-56 (Cornyn, J., concurring and dissenting) (emphasis added).

Finding that an “adequate education” was implicit in Article VII, § 1, Justice Cornyn favorably cited the Kentucky Supreme Court’s groundbreaking decision in *Rose v. Council for Better Education*, which defined adequacy in terms similar to those used by the trial court below: “This is precisely the approach taken by the Supreme Court of Kentucky, for example, in requiring that ‘[e]ach child, every child, in this Commonwealth must be provided with equal *opportunity* to have an adequate education.’” *Edgewood III*, 826 S.W.2d. at 527 (Cornyn, J., concurring and dissenting) (emphasis added) (quoting *Rose*, 790 S.W.2d 186, 211 (Ky. 1989)).

In *Edgewood IV*, this Court explicitly held that Article VII, § 1 contained a qualitative component and concluded that the “general diffusion of knowledge” and “suitability” clauses should be defined in terms of access to a quality education for all children:

Certainly, if the Legislature substantially defaulted on its responsibility such that *Texas school children were denied access to that education needed to participate fully in the social, economic, and educational opportunities available in Texas*, the “suitable provision” clause would be violated.

Edgewood IV, 917 S.W.2d at 736 (emphasis added). This statement was reiterated by the Court in *West Orange-Cove I*, 107 S.W.3d at 580.

The *Edgewood IV* court also found that the Legislature had defined the contours of its education duty through its publication of seven goals of public education (listed at

917 S.W.2d at 728 n.7), which contemplated the provision of adequate educational opportunities to all students:

In this Chapter, the Legislature defines the contours of its constitutional duty to provide a “general diffusion of knowledge” by articulating seven public education goals. These goals emphasize academic achievement. Most notably, the Legislature envisions *that all students will have access to a high quality education* and that the achievement gap between property-rich and property-poor districts will be closed.

Edgewood IV, 917 S.W.2d at 728-29 (emphasis added).

Finally, in *West Orange-Cove I*, this Court reaffirmed that Article VII, § 1 obligated the Legislature to provide an adequate education, 107 S.W.3d at 563, and specifically referenced Section 4.001 of the Education Code in connection with its discussion of this duty. *Id.* at 581, 584 & n. 124.

This Court also reaffirmed in *West Orange-Cove I* that “the State’s provision for a general diffusion of knowledge must reflect changing times, needs, and public expectations.”⁶⁰ *Id.* at 572 (quoting *Edgewood IV*, 917 S.W.2d at 732 n.14). The trial court’s definition of adequacy reflects the realization that Texas is facing rapidly changing times and needs, with more challenging demographics, the advent of a globalized, knowledge-based economy and the disappearance of manufacturing jobs that were prevalent less than a generation ago. The trial court also recognized that public expectations – as reflected in the TEKS and TAKS – have risen considerably, even since the time of *Edgewood IV*.

⁶⁰ State expert Ann Smisko described why the state curriculum must reflect changing times, needs and public expectations. FOF 26; RR25:56-57.

c. The trial court’s definition of adequacy is consistent with the testimony of both State and plaintiff witnesses.

The trial court’s definition of adequacy is also consistent with the testimony of both State and plaintiff witnesses, including the Commissioner of Education. Commissioner Neeley testified that “*all* children in the State of Texas should have access and a *meaningful opportunity* to resources to receive a high quality education, including TEKS, successful completion of TAKS, including the exit level exam, participation in the recommended high school program.” RR23:170 (emphasis added). Another State expert witness, John Murphy, testified that “a school system has a responsibility to prepare *all* of its children to compete in this society” and that competing in this society means “to get a good productive job.” PX754:34. (emphasis added). Numerous superintendents, including former Commissioner of Education Mike Moses, testified similarly. *See, e.g.*, RR6:66-67; RR7:44.

d. The trial court’s definition of adequacy is consistent with the approaches of other state courts.

Finally, the trial court’s definition of adequacy is also consistent with the approach taken by many other state courts, which (1) defer to state legislatures in defining the scope of an adequate education and (2) interpret their own education clauses to require that an opportunity to obtain an adequate education be extended to all students.

(1) Following the standards-based reform movement, state courts consistently have deferred to state legislatures in defining the scope of an adequate education.

Following a string of commission reports in the 1980s decrying the decrepit state of the American educational system, a “standards-based reform movement” arose across the country, as states effectively developed “educational standards of care” that courts could look to in assessing the adequacy of a school finance system. *See* Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”: From Equity to Adequacy*, 68 TEM. L. REV. 1151, 1175 (1995); *see also* Rebell, *supra*, at 229. This reform movement is built around substantive content standards in major subject areas set “at sufficiently high cognitive levels to meet the competitive standards of the global economy, and [is] premised on the assumption that virtually all students can meet these high expectations, if given sufficient opportunities and resources.” Rebell, *supra*, at 229. “Once the content standards have been established, every other aspect of the education system – including teacher training, teacher certification, curriculum frameworks, textbooks and other instructional materials, and student assessments – is revamped to conform to these standards [in order] to create a coherent system that will result in significant improvements in achievement for all students.” *Id.* at 230-31.

As this movement has progressed, state courts consistently have deferred to the determinations of legislatures and/or state education agencies in setting statewide standards and defining the scope of an adequate education. *See, e.g., Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997) (holding that the trial court may consider “[e]ducational

goals and standards adopted by the legislature . . . for its determination as to whether any of the state’s children are being denied their right to a sound basic education”); *Abbott v. Burke*, 693 A.2d 417, 427-28 (N.J. 1997) (concluding that the state’s educational “standards are consistent with the Constitution’s education clause” and “are facially adequate as a reasonable legislative definition of a constitutional thorough and efficient education”); *Unified Sch. Dist No. 229 v. State*, 885 P.2d 1170, 1186 (Kan. 1994) (“These standards were developed after considerable study by educators from this state and others [T]he court will not substitute its judgment of what is ‘suitable’, but will utilize as a base the standards enunciated by the legislature and the state department of education.”); *Montoy v. State*, 102 P.3d 1160, 1164 (Kan. 2005) (“Although in *Montoy I* . . . we concluded that accreditation standards may not always adequately define a suitable education, our examination of the extensive record in this case leads us to conclude that we need look no further than the legislature’s own definition of suitable education to determine that the standard is not being met under the current financing formula.”); *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724, 734 (Idaho 1993) (“Balancing our constitutional duty to define the meaning of the thoroughness requirement of art. 9 § 1 . . . with the political difficulties of the task has been made simpler for this Court because the executive branch of government has already promulgated educational standards pursuant to the legislature’s directive. . . . We gave examined the standards and now hold that, under art. 9 s. 1 the requirements for school facilities, instructional programs and textbooks, and transportation systems as contained in those regulations . . . are consistent with our view of thoroughness.”); *Vincent v. Voight*, 614 N.W.2d 388, 407

(Wis. 2000) (“By grounding the [adequacy] standard in statutes, we . . . defer to the legislature because it is uniquely equipped to evaluate and respond to such questions of public policy. . . . As such, we defer here to the legislature’s wisdom in choosing which core subjects should be involved in providing an equal opportunity for a sound basic education.”) (internal citation and quotation omitted).

Of course, Texas has been at the forefront of the standards-based movement and its academic standards have been widely praised. The trial court, consistent with its institutional role and with the decisions of other state courts, properly embraced the Legislature’s own academic standards as the measure of an adequate education.

(2) State courts consistently have interpreted their education clauses to require that an opportunity to obtain an adequate education be extended to all students.

The trial court also was following the lead of numerous state courts in concluding that, under the education clause, an *opportunity* for an adequate education must be extended to *all* students in the state. *See, e.g., Lake View Sch. Dist. No. 25 v. Huckabee*, 2004 WL 1406270 (Ark. 2004) (“An adequate educational *opportunity* must be afforded on a substantially equal basis to *all* the school children of this state.”) (emphasis added); *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 211 (Ky. 1989) (“*Each child, every child, in this Commonwealth must be provided with an equal opportunity to have an adequate education.*”) (emphasis added); *McDuffy v. Sec’y of the Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993) (“The crux of the Commonwealth’s duty lies in its obligation to educate *all* of its children.”) (emphasis added); *Campaign for Fiscal Equity*

v. State, 801 N.E.2d 326, 332, 337 (N.Y. 2003) (holding that constitutional test is whether “New York City schoolchildren [are afforded] the *opportunity* for a *meaningful* high school education, one which prepares them to function productively as civic participants” and further holding that this opportunity “must . . . be placed within the reach of *all* students, including those who present with socioeconomic deficits”) (emphasis added, internal quotation omitted); *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997) (“We conclude that . . . the North Carolina Constitution . . . guarantee[s] *every child* of this state an *opportunity* to receive a sound basic education in our public schools.”) (emphasis added); *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535, 540 (S.C. 1999) (“We hold today that the South Carolina Constitution’s education clause requires the General Assembly to provide the *opportunity* for *each* child to receive a minimally adequate education. . . .”) (emphasis added); *Vincent v. Voight*, 614 N.W.2d 388 (Wis. 2000) (“An equal *opportunity* for a sound basic education is one that will equip students for their roles as citizens and enable them to succeed economically and personally.”) (emphasis added).

Further, one commentator’s description of other state court decisions confirms that the trial court’s definition of adequacy is consistent with the mainstream of jurisprudence:

Constitutional doctrine in state courts regarding student rights to an adequate education clearly has resulted in recent years in a growing convergence on certain core concepts. This constitutional core emphasizes that an adequate education must (1) prepare students to be citizens and economic participants in a democratic society, (2) relate to contemporary, not archaic educational needs; (3) be pegged to a “more than minimal” level; and (4) focus on opportunity, rather than outcome.

Rebell, *supra* at 218.

3. The trial court’s definition of adequacy is judicially manageable.

a. A finding of inadequacy is reserved for cases of “substantial default.”

The State asserts that the trial court’s definition of “general diffusion of knowledge” is judicially unmanageable, raising the specter of individual districts suing the State if they cannot afford to pay for security guards or if they are forced to curtail some extracurricular activities. State Br. at 68. The State is wrong.

First, while the trial court lacks the institutional competence to establish curriculum standards, it is perfectly capable of testing the standards created by the Legislature and TEA by a constitutional measure. The trial court was not asked to determine if particular courses or competencies are required for an adequate education or whether the TAKS test is an accurate measurement of student knowledge. The question before the trial court was whether school districts have the resources to provide all their students with the opportunity to meet the standards and goals that the state itself has set (which the trial court correctly found would achieve the general diffusion of knowledge). As many commentators have observed, the national standards-based reform movement has tempered separations-of-powers concerns, paving the way for successful adequacy cases across the country:

Armed with specific, clear, and meaningful standards that are the product of such an extensive political process, courts are better positioned to overcome their self-imposed obstacles to policy reform. No judge has to make additional findings of fact as to the competencies that all children are expected to achieve or whether those competencies are necessary for success in the twenty first century. No judge has to develop a remedial

scheme that tells administrators and teachers what all children should know and be able to do. Thus, concerns about judicial fact-finding, expertise, and legitimacy are ameliorated. The court's main task - at least at the liability phase of the litigation - is to determine whether a school or school system has failed to provide the opportunity for children to meet the requisite standards and whether that failure runs afoul of some legal obligation. This is something that courts are eminently capable of doing.

William S. Koski, *Educational Opportunity and Accountability in an Era of Standards-Based School Reform*, 12 STAN. L. & POL'Y REV. 301, 307 (2001); *see also* Tico A. Almeida, *Refocusing School Finance Litigation on At-Risk Children: Leandro v. State of North Carolina*, 22 YALE L. & POL'Y REV. 525, 544 & nn. 135-37 (2004) (and sources cited therein) ("Legislatively-enacted standards allow courts to overcome judicial competency concerns when they are asked . . . to address the complex issue of what constitutes adequate student achievement.").

Second, this Court has twice emphasized that an adequacy claim is viable only if the Legislature has "*substantially defaulted* on its responsibility such that Texas school children [are] denied access to that education needed to participate fully in the social, economic, and educational opportunities available in Texas." *West Orange-Cove I*, 107 S.W.3d at 580 (emphasis added) (citing *Edgewood IV*, 917 S.W.2d at 736); *cf. Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365, 381 (N.C. 2004) (holding that only "clear showing" of denial of "sound basic education" warrants judicial intervention). The mere fact that one child, one classroom, one school or one school district falls below some quality standard will not merit a finding of a constitutional violation.

Accordingly, an adequacy claim requires a showing of a substantial default, where a significant number of students are denied "access to that education needed to participate

fully in the social, economic, and educational opportunities available in Texas.” Such a showing would require a significant number of districts to be taxing at or near the maximum tax rate (or more precisely, a significant percentage of Texas students residing in districts taxing at or near the maximum rate), and thus lack access to the additional resources needed to correct this “substantial default.”

b. The trial court properly looked both to “outputs” and “inputs” in determining that a “substantial default” has occurred.

The State faults the trial court for measuring the inadequacy of the Texas school finance system based on “inputs” rather than “outputs,” but the system is inadequate under either measure. *See infra* Section III.D. In any case, the trial court (as has nearly every other state court that has considered an adequacy challenge) properly examined both “outputs” and “inputs” in assessing the adequacy of the school finance system.

With respect to outputs, the trial court examined TAKS scores from the 2003-04 school year (the most recent year of data available) and dropout and retention rates. *See, e.g.*, FOFs 75, 136, 155, 184, 200, 209, 227, 241, 252, 260, 273, 462-65, 468-76, 479-80, 554-56, 559-71, 649-50. As discussed both *supra* at Statement of Facts, Section C.4 and *infra* Sections III.D.1.a and III.D.2.a, this data provides strong evidence of the inadequacy of the system as measured by the current legislative standards and expectations. The State suggests that positive outputs necessarily imply that inputs (specifically money) are adequate. State Br. at 72. If that is the case, and given the State’s admission that available resources and student performance levels are integrally

related, (*see infra* Section III.D.4) then the converse is true as well – poor outputs imply that that districts’ resources are inadequate.

In criticizing the trial court for ignoring outputs, the State never articulates by *which* outputs the adequacy of the system should be measured. Should the trial court have ignored TAKS scores and looked at TAAS scores dating from 2002? That data is three years old and the TAAS was a much easier test that does not measure current academic expectations. Should the trial court have relied on “academically acceptable” ratings as positive “output” of the system? Certainly not, for the reasons identified *supra* at Section III.B.2.

The trial court offered a number of persuasive reasons for why TAKS scores alone are not a sufficient measure of adequacy. *See* FOFs 32-37. Courts across the country similarly have declined to measure the adequacy of their states’ school finance systems based solely on student achievement scores. *See, e.g., Leandro v. State*, 488 S.E.2d 249, 259-60 (N.C. 1997) (holding that “level of performance of the children of the state and its various districts on standard achievement tests” may be considered, but that “they may not be treated as absolutely authoritative on this issue”); *Campaign for Fiscal Equity v. State*, 655 N.E.2d 661, 666 (N.Y. 1995) (“Performance levels on such examinations are helpful but should also be used cautiously as there are a myriad of factors which have a causal bearing on test results.”); *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 109 P.3d 257, 263 (Mont. 2005).

Instead, while courts have treated student achievement scores (and other output measures like dropout rates) as highly relevant to the adequacy inquiry, they have also

relied on a range of input measures as well. *See, e.g., Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365, 381-90 (N.C. 2004); *Campaign for Fiscal Equity v. State*, 801 N.E.2d 326, 332-40 (N.Y. 2003); *Columbia Falls*, 109 P.3d at 262-63; *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 488-90 (Ark. 2002); *DeRolph v. State*, 677 N.E.2d 733, 742-45 (Ohio 1997); *Opinion of the Justices*, 624 So.2d 107, 126-44 (Ala. 1993); *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 196-200 (Ky. 1989).

These courts acknowledge that output measures are important guideposts for determining whether an educational system is functioning well. But given that the focus of adequacy cases is on educational *opportunity*, courts have been reluctant to make educational *results* the lynchpin of the constitutional analysis. *See* *Rebell, supra*, at 242. Courts instead enforce the right to an adequate education “by seeking to ensure the availability of essential resources, such as decent facilities, a safe environment, qualified teachers, and up-to-date textbooks, or by providing feasible additional support for students with special needs or at risk of educational failure.” *Id.* No court has interpreted its state constitution as requiring specific educational results.

The trial court was well within the mainstream of adequacy jurisprudence in relying on input and output evidence in support of its holding.

c. The State’s slippery slope argument should be rejected.

The State argues that the trial court’s focus on inputs rather than outputs inevitably will lead down the road of “impermissible policymaking,” ignoring that all adequacy cases ultimately are about inputs, specifically money, and that no adequacy case has been

about “outputs” alone.⁶¹ *See supra* Section III.C.3.b. The State points to extreme examples of judicial supervision of a school finance system (New Jersey) in an effort to persuade this Court to turn to the other extreme – a complete abdication of its role in interpreting the education clause of the constitution – ignoring the many state courts between the extremes that have found adequacy cases to be both justiciable and judicially manageable.

For example, the Arkansas Supreme Court held its state’s school finance system unconstitutional in 2002, affirming an award of declaratory relief similar to that ordered in this case and declining the plaintiffs’ request to order specific remedies against the state. *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 479, 507 (Ark. 2002). The court observed that its role was “limited to a determination of whether the existing school-funding system satisfies constitutional dictates, and if not, why not.” *Id.* at 507-08. After the General Assembly passed responsive legislation, the Arkansas Supreme Court, with the aid of a special master, determined that the significant progress achieved after its 2002 decision toward the provision of a constitutionally adequate education for Arkansas schoolchildren warranted release of jurisdiction over the case and issuance of a mandate. *Lake View Sch. Dist. No 25 v. Huckabee*, 2004 WL 1406270 (Ark. 2004).

⁶¹ The fact that an affirmance of the trial court’s judgment might require more money to be devoted to public education does not make this case unsuitable for judicial review. *See Edgewood I*, 777 S.W.2d at 397-98 (“In setting appropriations, the legislature must establish priorities according to constitutional mandate; equalizing educational opportunity cannot be relegated to an “if funds are left over” basis. We recognize that there are and always will be strong public interests competing for available state funds. However, the legislature’s responsibility to support public education is different because it is constitutionally imposed. Whether the legislature acts directly or enlists local government to help meet its obligation, the end product must still be what the constitution commands–i.e. an efficient system of public free schools throughout the state.”)

Kentucky provides another prime example of a successful remedial experience that resulted in a prompt legislative response without triggering a continuing judicial role. The Kentucky Supreme Court affirmed an award of declaratory relief and left the specifics of any remedial litigation to the “wisdom of the General Assembly.” *Rose*, 790 S.W.2d at 214. Within ten months of the decision, the Kentucky Legislature enacted the sweeping Kentucky Education Reform Act, one of the most thorough educational reform statutes in the nation. *See* KY. REV. STAT. ANN. § 156 *et seq.* (1996); C. Scott Trimble & Andrew C. Forsaith, *Achieving Equity and Excellence in Kentucky Education*, 28 U. MICH. J. L. REFORM 599 (1995) (discussion decision and reform efforts).

Finally, the Massachusetts Supreme Court’s affirmance of a declaration that the school finance system was inadequate, *see McDuffy v. Sec’y of the Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993), was followed by significant legislative reforms, both on the educational side (accountability system, curriculum) and on the funding side (*see supra* Section III.B.1), which led the court to (i) deny the plaintiffs’ effort to revive *McDuffy* (through a request for further relief) and (ii) terminate jurisdiction over the case. *See Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134 (Mass. 2005).

The cases cited by the State arose in different legal and factual contexts than this case.⁶² Certainly, the New Jersey and Alabama cases have not served as a deterrent to

⁶² The New Jersey case is an extreme outlier and unique in the annals of school finance litigation. The New Jersey litigation was based primarily on an equity theory and did not morph into an adequacy case until the late 1990s. Schrag, *supra*, at 117. The struggle in New Jersey is in part attributable to recalcitrance of the New Jersey legislature (contrary to the Texas Legislature’s attempts to comply with this Court’s orders in the *Edgewood* cases), *id.* at 111-25, and also to the fact that “New Jersey still ha[s] no effective mechanism for evaluating the academic performance of its children.” *Id.* at 121, 111-25. In New York, the courts, at the plaintiffs’ request, ordered that a “costing-out” or adequacy study be

other state courts, including such “red state” courts as Montana, Kansas, and North Carolina, all of which have upheld adequacy challenges within the last year.⁶³

D. The Legislature has substantially defaulted on its obligation to provide a general diffusion of knowledge.

The trial court correctly concluded that the Legislature has substantially defaulted on its obligation to suitably provide for a general diffusion of knowledge, through evidence of inadequate “outputs” *and* “inputs” at the statewide and district level, and through two cost studies that were prepared by the State and the WOC Plaintiffs.

1. Evidence of inadequacy at the statewide level.

a. Outputs

The inadequacy of Texas’ school finance system is evident from statewide “output” evidence – specifically TAKS scores and dropout/graduation rates. Statewide TAKS scores show vast gaps in performance between white students and minority students, and that economically disadvantaged and LEP students lag far behind as well. *See supra* at pp. 16-17; FOF 75. For example, in 2003-04, only 38% of tenth-graders could pass all TAKS tests at the panel-recommended cut scores, including only 20% of African-American students, 24% of Hispanic students, 22% of economically disadvantaged students, and 5% of LEP students. *See supra* at pp. 16-17; FOF 75.

performed, a very different remedy than the one ordered here. *Campaign for Fiscal Equity v. State*, 801 N.E.2d 326, 247-49 (N.Y. 2003). Finally, the Alabama reversal was prompted more from political considerations and judicial turnover than from any conclusion that there were no manageable standards. Schrag, *supra*, at 142-55. Indeed, the Alabama public school system is inadequate under any standard, *see generally Opinion of the Justices*, 624 So.2d 107 (Ala. 1993), and its example is certainly not one Texas should emulate.

⁶³ *See Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 109 P.3d 257, 263 (Mont. 2005); *Montoy v. State*, 102 P.3d 1160, 1164 (Kan. 2005); *Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365, 381 (N.C. 2004).

Texas also ranks last among the 50 states in the percentage of high school graduates in the population, 25 years and older. PX633A:8; RR15:61-62. The trial court found that “over the last decade, the high school graduation rate in Texas, defined as the number of graduates divided by the number of students enrolled in grade 8 four-and-a-half years earlier, has consistently been less than 75% for all students, and less than 70% for minority students.” FOF 650. In the 2000-01 school year (the most recent year available), there was a 40% attrition rate for all Texas students between grades nine and twelve, including an attrition rate of 52% for Hispanics and 46% for African-Americans.⁶⁴ AX9019:12-13; RR15:37-38. An examination of the graduation rates of the largest fifty districts in Texas (with 52% of the state’s enrollment) concluded that twenty of the districts had never had a longitudinal graduation rate of 74% between 1990-91 to 2000-01.⁶⁵ The four largest districts, Houston ISD, Dallas ISD, Fort Worth ISD and Austin ISD, had graduation rates of 56.2%, 56.2%, 61.4% and 68.5%, respectively, in 2000-01, the last year that data was available. AX9019:26; RR15:42-48.

Other relevant output evidence includes the THECB’s standard for college readiness. Only 28% of Texas students met the THECB’s standard for college readiness on the English exam, including only 18% of African-Americans, 20% for Hispanics, and

⁶⁴ The trial court found – as did a State expert – that the TEA’s official dropout data during this period was unreliable. FOFs 578, 649; *see also* DX15889:9; AX9019:11-29. Even relying on the TEA data, the trial court identified worrisome statistics about the dropout/retention rates of economically disadvantaged and LEP students in the system. FOFs 468-76, 479-80, 559-71.

⁶⁵ This rate is determined by taking the graduates in a particular year and dividing it by the eighth grade enrollment four-and-a-half years earlier. Eighth grade is chosen as the base year instead of ninth grade because ninth grade enrollment figures often include a “bulge” of students that had been retained at that grade level. RR15:23-24; AX9019:18.

3% for LEP students. FOF 273. While forty-two percent of Texas students met the THECB's standard for college readiness on the math exam, only 21% of African Americans, 28% of Hispanics and 13% of LEP students did. FOF 273.

The State repeatedly references the performance gains made under TAAS test from 1994-2002 as evidence that the low TAKS scores cited above will inevitably improve as a result of the incentives built into the accountability system. But the trial court rejected this argument, noting a close correlation between the academic gains made during the 1990s and the increase in per-pupil, inflation-adjusted expenditures during the same period. FOF 42; PX705:24; RR7:196-97; PX758:140-41. Unlike the period of the TAAS regime, school districts no longer have access to additional funding capacity to accomplish the performance gains. Furthermore, with the implementation of "promotion gates" at grades three, five, and eight beginning in 2003-04, the failure to pass the TAKS exams have real-world consequences for students now, whereas students faced no such consequences from 1994-2002. RR23:183-84.

The State also points to increases in passing rates from the 2003 administration of the TAKS exams to the 2004 administration as evidence that the numbers cited above inevitably will improve. But, as Commissioner Neeley acknowledged, this increase is attributable to the fact that the 2003 administration was simply a practice run, with no consequences for students or districts. RR23:42-43. Teachers' greater familiarity with the test also likely played a significant role in the "improvement" in student performance.

Finally, the State references Texas's scores on the NAEP exam as evidence of the adequacy of the state's educational system, but this reliance is misplaced. NAEP scores

are not intended and should not be used to measure how well a state is meeting its own accountability requirements or educational objectives. PX758:115, 117-18; RR5:16-17. The NAEP tests results referenced by the State only cover two subjects (math and reading) at only two grade levels (4th and 8th grade). RR5:15. They provide no indication how well students are performing in other grade levels, particularly at the high school level, or in any of the other subject areas of the TEKS curriculum. RR27:115-16. Additionally, because the NAEP is administered only to a small sample of students in each state (approximately 2000), (RR27:77), the results do not indicate how well any particular school, school district, or region is performing. PX758:188.

Moreover, the scores and rankings referenced by the State were not actual NAEP scores, but rather were scores that had been “adjusted” (by State expert Dr. David Armor) based on family socioeconomic characteristics to “level the playing field.” DX15856:1. In other words, the NAEP results as reported by the State do not indicate how well Texas students are performing in any absolute sense. Dr. Armor’s adjustment of test scores flies in the face of Texas’ own accountability system and NCLB, which expressly require that all student subgroups perform at the same levels for ratings purposes and do not permit states to “handicap” test results as Dr. Armor has done with NAEP scores.

The actual, unadjusted NAEP results tell a much different story from that told in the State’s brief – that Texas’s rank among states has dropped significantly since 2000. PX758:143-45. One of the State’s own experts, Dr. Herb Walberg, reported that “according to the 2003 NAEP results in fourth grade reading, 73 percent of states scored better than Texas. In 1992, only 62 percent of states scored better. In grade eight, 73

percent of the states now outscore Texas, though five years ago, just 57 percent did.” PX828:5. These actual unadjusted NAEP scores (as opposed to adjusted scores) are critical because they indicate how successful students will be in competing for spots in college or for jobs in the labor market. PX758:104, 186.

b. Inputs

The trial court also documented the inadequacy of the “inputs” of the Texas educational system as well. It focused on the lack of financial capacity in the system (FOFs 102-07), the state’s declining share of the burden of funding public schools (FOF 102, 104), the inadequacies of the school finance formulas (FOFs 78-88), and the inadequacy of funding for facilities. FOFs 299-306, 385-417. The trial court also pointed to the severe shortage of qualified teachers in Texas, the large number of teachers teaching out-of-field, and the high attrition and turnover among Texas teachers. FOFs 89-96, 485-98, 621-48. The Montana Supreme Court recently held that its school finance system was constitutionally inadequate based on similar evidence. *See Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 109 P.3d 257, 262-63 (Mont. 2005).⁶⁶

2. Evidence of inadequacy from plaintiff districts.

a. Outputs

The trial court also relied on “output” evidence from the plaintiff districts as well in support of its finding of inadequacy. The trial court specifically referenced the TAKS

⁶⁶ The Montana court held: “The evidence that the current system is constitutionally deficient includes the following unchallenged findings . . . : school districts increasingly budgeting at or near their maximum budget authority; growing accreditation problems; many qualified educators leaving the state to take advantage of higher salaries and benefits offered elsewhere; the cutting of programs; the deterioration of school buildings and inadequate funds for building repair and for new construction; and increased competition for general fund dollars between special and general education. 109 P.3d at 262-63.

scores of each of the WOC Focus Districts. FOFs 136, 155, 184, 200, 209, 227, 241, 252, 260. For example, with respect to Dallas ISD, the trial court noted that (1) only 33% of Dallas ISD's 5th graders, 39% of its 8th graders, and 24% of its 10th graders met the panel-recommended standard for all TAKS tests in 2004; and that (2) Dallas ISD significantly underperformed the state in terms of percentage of students taking the SAT/ACT, and the percent scoring at or above criterion on the SAT/ACT. FOF 136; App. H at 6-7. The trial court made similar findings with respect to the Edgewood Intervenor districts. *See, e.g.*, FOFs 465, 556.

b. Inputs

The trial court also examined various “inputs” at the district level in support of its conclusion that the school finance system is inadequate, including but not limited to:

- Significant budget cuts, including the cutting of numerous teacher positions (leading to increased class sizes), and instructional specialists, supplies, etc. (*see, e.g.*, FOFs 128-132, 149, 178, 196, 211, 225, 238, 251, 261);
- Reductions in services for at-risk students, such as summer school and tutoring (*see, e.g.*, FOFs 178, 195-96, 211, 225);
- Reductions in funds for teacher training and development (*see, e.g.*, FOF 178);
- The increased reliance on alternatively certified teachers (*see, e.g.*, FOF 127);
- The acute shortage of qualified teachers, particularly math, science, bilingual, and special education teachers (*see, e.g.*, FOFs 127, 159, 259, 485-509, 621);
- Inadequate facilities (*see, e.g.*, FOFs 307-38);
- The inability of districts to provide quality bilingual programming (*see, e.g.*, FOFs 153, 518-34);
- The inability of districts to provide adequate libraries and staff (*see, e.g.*, FOFs 580-620); and

- The inability of districts to provide remedial programming and adopt other instructional strategies such as full-day pre-kindergarten programs, reduced class sizes, credit recovery courses, summer school, etc. (*see, e.g.*, FOF 138, 153, 185, 228).

3. Evidence of inadequate funding from “cost studies” performed by the parties.

In many other states, legislatures – either prompted by litigation or acting on their own initiative – have undertaken studies to determine the “cost” of providing an adequate education, using one of four recognized approaches: (1) Econometric/Cost Function, (2) Professional Judgment; (3) Successful Schools; and (4) Research and Demonstration. (FOF 277; DX16395); *see generally* <http://www.schoolfunding.info/policy/CostingOut/overview.php3> (last visited Apr. 21, 2005). Texas never has attempted to ascertain the costs of achieving the state’s educational goals; rather, spending on education has been driven by litigation and the resources available in a given biennium. FOF 275; PX640.

In the absence of a legislatively-approved study, the parties presented two “costing out” studies to the court. The first was presented by the WOC Plaintiffs (the I&R Study”) and performed by Dr. Andrew Reschovsky and Dr. Jennifer Imazeki, who, prior to their work in this case, pioneered the use of cost function studies in Texas and whose Texas-based work had appeared in numerous peer-reviewed publications.⁶⁷ PX519. The State presented a second cost function study, originally commissioned by the Legislature’s Joint Select Committee on Public School Finance (not the full Legislature) and performed by a research team led by Dr. Lori Taylor (the “Taylor Study”).

⁶⁷ The WOC Plaintiffs also commissioned and presented a professional judgment study (PX568, 707), but the trial court chose not to rely on it.

DX15889. Both of these studies relied on an econometric/cost-function approach. Despite the State's belated effort to distance itself from educational cost studies, it sponsored testimonial and documentary evidence attesting to (i) the relevancy of such studies to the question of whether there is sufficient money in the school finance system and (ii) the superiority of the cost-function approach.⁶⁸ See DX16395, RR24:21-25.

A cost function study, using statewide data, first identifies a statistical relationship between per pupil spending, student performance, student characteristics, and the characteristics of each school district. Extrapolating from this statistical relationship, the study then can provide an estimate for each district of the minimum amount of money necessary to achieve various educational performance goals, given the characteristics of the particular school district and its student body. FOF 279; RR11:17-20. Both the Taylor Study and the I&R Study established that the minimum amount of money needed by school districts in Texas to meet certain performance targets varies across school districts for reasons that are outside the control of local school officials. FOF 280. Specifically, the costs of achieving a particular performance measure are higher in some districts than in other districts because more resources are needed to educate some children compared to others, because school districts in some parts of the state will need to pay more to attract high-quality teachers than districts located in other parts of the

⁶⁸ The State, citing *Hancock*, 822 N.E.2d at 1156, argues that cost studies are “rife with policy choices.” But the studies at issue in *Hancock* were professional judgment studies. The focus of cost function studies is on the outputs, not on the mix or adequacy of specific inputs. While it is true that a researcher has to make choices in order to conduct a cost study, the choices are about methodological (i.e. econometric) issues, not policy issues.

state, and because of other uncontrollable district characteristics, such as size or sparsity.⁶⁹ FOF 280; RR11:17-20.

The Taylor Study. The Taylor Study purported to measure the costs of meeting a 55% passing rate on the reading and math TAKS tests, both at the 2003 “met standard” level (2 SEMs below panel-recommended cut scores) and at the 2005 panel-recommended cut scores. The 55% figure was chosen by the researchers themselves – neither the Legislature nor any legislative committee ever sanctioned this choice. FOF 285; RR24:144, 173-74, 215-18. Ultimately, the *State’s study* concluded that 171 districts in Texas (out of the 695 for which sufficient data was available – or more than 10% of the sample, DX15889:16) lacked adequate funds to achieve even these meager targets even while taxing at the maximum \$1.50 tax rate; the collective shortfall for these districts was roughly \$563-\$731 million in 2003. FOF 290; PX703:10. Even more significantly, the Taylor Study seriously *underestimated* the costs needed to attain even a minimal 55% performance measure for the reasons identified by the trial court in FOF 288. RR11:79-83; PX708:44-47. Methodological flaws in the Taylor Study also likely led to an underestimation of costs, particularly for large, urban districts.⁷⁰ FOF 286.

⁶⁹ For this reason, it is impossible to identify a single dollar figure per student that could be deemed adequate statewide. School finance formulas that are designed to ameliorate some of these cost differences are outdated and do not compensate districts for the actual costs attributable to these uncontrollable variations. FOFs 74-88.

⁷⁰ For example, the Taylor Study did not “pupil weight” its estimation to reflect the size of districts, as is generally accepted practice. FOF 286a; RR11:43-50; RR9:35-39. Thus Houston ISD (enrollment of 211,499 in 2003-04) makes the same contribution to the study’s results as Grape Creek ISD (enrollment of 1,224). Because 40% of the students in Texas are in the 28 largest districts (and conversely because 55% of the observations in Taylor Study’s estimation sample have enrollments of fewer than 2000 students), the Taylor Study overemphasizes small district behavior and understates the urban influence on

Nevertheless, the trial court concluded that “even taken at face value,” the Taylor Study provided evidence of inadequate funding and the lack of meaningful discretion in the school finance system. FOF 290.

The I&R Study. The I&R Study made a number of different methodological choices in constructing its cost function model (RR11:30-73; PX708:9-20) – choices with which the trial court agreed. FOFs 279, 286. The I&R study ultimately projected that under the preferred calculation (RR11:75-76), it would cost approximately \$671.8 million *above 2001-02 spending levels* to get the 43 WOC Plaintiffs districts (\$649 per student) to a 55% performance standard, and approximately \$2.4 billion (\$598 per student) to get all districts in the state to this level. It also projected significant additional costs to reach performance targets of 60%, 70% and 90%. FOFs 282-84.

Despite the trial court’s finding that the I&R Study “was methodologically sound and provides strong evidence of the cost of meeting certain performance standards for particular districts . . . and for the State as a whole,” (FOF 279), and that this Court’s review is confined to questions of law, the State argues that the I&R Study “fails to demonstrate even minimum standards of credulity.” State Br. at 72.

cost relationships. FOF 286a; RR11:43-50; RR9:35-39. Stated another way, the decision not to “pupil weight” likely explains the Taylor Study’s finding of lower costs in large districts.

The effect of this error is illustrated by the Taylor Study’s treatment of Dallas ISD and Kaufman ISD, the largest and smallest of the WOC Focus Districts. Dr. Taylor concluded that Dallas ISD – with a student population that is 92% minority and 79.3% economically disadvantaged – could reduce its tax rate to \$1.27 (in effect, cutting 2,760 teachers) and still meet the 55% TAKS performance standard (even though only 31% of Dallas ISD’s 3-11 graders could pass all TAKS tests at panel-recommended cut scores in 2003). PX820. On the other hand, Dr. Taylor concluded that Kaufman ISD, with a much smaller and less disadvantaged student population, needed to tax at \$1.47 (cutting approximately 8 teachers) to meet the 55% performance standard. *Id.*

The State contends that the fact that the fact that WOC Plaintiffs have achieved the 55% TAKS performance standard in 2003-04⁷¹ without additional funds discredits the I&R model. (State Br. at 72.) But the State’s comparison is flawed three respects:

- The State ignores the fact that I&R Study projected increased costs using a baseline of 2001-02 spending levels (*see* FOF 282). Because many of the WOC Plaintiffs increased their spending in the intervening two years between 2001-02 and 2003-04 (either by raising their tax rates to \$1.50, by using fund balance, or because of an increase in federal funds, etc.), the fact that the 55% performance targets were met is not surprising (RR12:24);
- The I&R Study used other performance measures besides TAKS scores, including student retention rate, performance on the SAT, and performance on the State Defined Alternative Assessment, the testing instrument for disabled students. The State is comparing the projected costs to only one of these four measures (FOF 61; RR12:24); and
- Because of data limitations, the I&R Study (as did the Taylor Study) used test scores from grades 5-8 and 10. FOF 288b. The State’s use of average TAKS scores from Grades 3-11 is not an “apples-to-apples” comparison, particularly because the inclusion of scores from grades 3 and 4 – the high performers (*see supra* at p. 17) – may artificially boost the average.⁷²

In any case, the WOC Plaintiffs did not argue, and the trial court did not find, that the I&R Study provides a precise measure of the costs needed to achieve particular performance measures for each district. But the trial court properly relied on the I&R

⁷¹ The TAKS passing rates referenced by the State are for reading and math tests only, to permit a comparison to the outcomes measures used in the two cost function studies. FOF 288b(iii)(2). When reviewing passing rates for all TAKS tests, the performance levels drop significantly. For example, while 68% of Dallas ISD’s 3-11 graders passed the reading test and 55% passed the math tests, only 44% passed all TAKS tests at panel-recommended cut scores. State App. Tab S-1, at § 1, p. 5. In addition, using an average single passing rate for all students, grades 3-11, masks low performance by the various students subgroups and at various grades (typically middle school and high school).

⁷² The State also argues that I&R Study lacks credibility because it concluded that LEP students are less costly to educate than non-LEP students. State Br. at 72, n.46. To be precise, the I&R Study found that a district with a high percentage of LEP students has lower average costs than a district with a low percentage of LEP students, which could be explained if there were fixed costs with educating LEP students (i.e., if the cost of a bilingual teacher can be spread over fifteen students instead of ten students, the average cost per student is going to be lower). RR12:35-36. But even if this one result is anomalous, it does not discredit the entire I&R Study.

Study, and the Taylor Study as well, in answering the question before it: whether there is adequate funding in the system to provide a general diffusion of knowledge. The trial court correctly concluded that there is not.

4. All parties agree that adequate inputs are integrally related to adequate outputs (i.e., that money matters).

Finally, in discussing the inadequacies of the “inputs” and “outputs” of the system, it is worth noting that none of the parties seriously question the causal relationship between the two – that is, that increased resources result in increased student outcomes. The State’s expert, Lori Taylor, conceded that: “[t]here appears to be a fundamental economic relationship among input prices, educational outcomes and costs in Texas public schools. Other things being equal, the analyses suggest that it costs more to produce higher levels of educational outcomes.” PX829:1; *see also* PX753:39-40. Commissioner Neeley testified, based on her previous experience as a superintendent, that strategies such as block scheduling, teaming at the middle school grades, lower class sizes (including at the secondary level), good teacher salaries and benefits all contribute to the improvement of student performance. RR23:143-44. State expert John Murphy, another former superintendent, testified that expensive strategies such as reducing class sizes, extended-day and extended-year programming, adding instructional specialists, and providing full-day kindergarten were instrumental in his efforts to improve minority student achievement in the Maryland school system. PX754:92-95.

WOC Plaintiffs’ expert David Grissmer, testified that the “evidence is quite compelling” that “money and how you spend it can make a significant difference,”

“especially for minority and disadvantaged students.” PX758:105-06; PX505:3-12. And Dr. Andrew Reschovsky testified unequivocally, based on his analysis of Texas data, that “it costs more to achieve higher levels of student performance,” (RR11:62), which was confirmed in data presented by consultant Lynn Moak. RR8:196-97; PX705:23-24; App. E at 3. This Court and many other courts across the country that have considered a school finance case have reached the same conclusion. *See Edgewood I*, 777 S.W.2d at 393 (“The amount of money spent on a student’s education has a real and meaningful impact on the educational opportunity offered that student.”); *see, e.g., Campaign for Fiscal Equity v. State*, 801 N.E.2d 326, 340-41 (N.Y. 2003); *DeRolph v. State*, 677 N.E.2d 733, 744 (Ohio 1997).⁷³

For the reasons stated above, the trial court’s declaratory and injunctive relief on the WOC Plaintiffs’ adequacy claim should be affirmed on the ground that Texas’s school finance system violates Article VII, § 1 of the Texas Constitution.

IV. The school finance system fails to satisfy the constitutional requirement of suitability.

The State correctly pointed out that this Court has discussed the “suitable” clause of Article VII, § 1 as being intertwined with adequacy. *Edgewood IV*, 917 S.W.2d at

⁷³ The lone dissenter was Dr. David Armor, one of the State’s final witnesses, who testified that resources did not have a significant effect on academic achievement because money cannot overcome the strong effects of family characteristics such as poverty and parental education levels. RR27:54-58. Dr. Armor’s theory was based on his belief that African-Americans or Mexican-American students from poor socioeconomic backgrounds could not achieve at a level with white students, even if given high standards, a challenging curriculum, adequate resources and trained teachers. RR27:62-65. Dr. Armor’s theory was rejected by the trial court, as it has been rejected in other states. RR27:107-09. Moreover, Dr. Armor’s testimony contradicts the core assumptions underlying the educational reform movement in Texas initiated during then-Governor Bush’s administration, as well as the No Child Left Behind Act implemented by President Bush at the federal level (which is based on the Texas reforms).

736; *West Orange-Cove I*, 107 S.W.3d at 580. Accordingly, the trial court’s conclusion that the school finance system is inadequate also supports the conclusion that the Legislature has violated the “suitable” clause. *See* Section III.

CONCLUSION AND PRAYER

The importance of this case to the Texas educational system – indeed, to the future of the state as a whole – cannot be overstated. If the constitutional mandate of “general diffusion of knowledge” is deemed nonjusticiable or defined as narrowly as the State urges, history suggests that the Legislature will fail to provide the resources necessary to fulfill its stated mission of ensuring that “*all* Texas children have access to a *quality* education.” TEX. EDUC. CODE § 4.001(a) (emphasis added). The consequences to our state would be devastating. Texas school districts, caught in the grip of a “perfect storm,” are heading in the wrong direction, cutting teaching positions and programs despite challenging demographic trends. Unless the Legislature complies with its constitutional duties, the future of Texas looks grim.

The WOC Plaintiffs respectfully ask the Court to affirm the judgment of the trial court in all respects, with the qualification that the WOC Plaintiffs take no position on the challenges to the trial court’s judgment asserted by the Intervenors in their direct appeals (Case Nos. 05-0145 and 05-0148). The WOC Plaintiffs further request such further relief to which they are justly entitled.

Respectfully submitted,

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