

Nos. 04-1144,
05-0145, and 05-0148

In the
Supreme Court of Texas

SHIRLEY NEELEY, TEXAS COMMISSIONER OF EDUCATION, THE TEXAS
EDUCATION AGENCY, CAROLE KEETON STRAYHORN, TEXAS COMPTROLLER
OF PUBLIC ACCOUNTS, AND THE TEXAS STATE BOARD OF EDUCATION,
Appellants,

v.

WEST ORANGE-COVE CONSOLIDATED INDEPENDENT SCHOOL DISTRICT,
COPPELL INDEPENDENT SCHOOL DISTRICT, LA PORTE INDEPENDENT
SCHOOL DISTRICT, PORT NECHES-GROVES INDEPENDENT SCHOOL DISTRICT,
DALLAS INDEPENDENT SCHOOL DISTRICT, AUSTIN INDEPENDENT SCHOOL DISTRICT,
AND HOUSTON INDEPENDENT SCHOOL DISTRICT, *ET AL.*,
Appellees.

On Direct Appeal from the 250th District Court, Travis County, Texas

STATE APPELLANTS' REPLY BRIEF

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STATE APPELLANTS' REPLY BRIEF

TO THE HONORABLE SUPREME COURT OF TEXAS:

In its opening brief, the State demonstrated that the Districts wholly failed to carry their burden to establish that Texas's system of education and school finance is unconstitutional in any respect. In their responses, the Districts made no legal argument nor cited any evidence in the record showing that they had satisfied this heavy burden. Accordingly, the Court should reverse the trial court's judgment and hold that Texas's system (1) is constitutionally adequate, (2) is constitutionally efficient with regard to funding for facilities, and (3) does not create a state property tax.

SUMMARY OF THE ARGUMENT

In its opening brief, the State urged the Court to reject the Districts' invitation to position itself as the final arbiter of education policy in Texas. The State cautioned that Article VII, §1, which provides no enforceable right of action, also provides no judicially manageable standard for evaluating whether the system is constitutionally adequate. And the State demonstrated that if the Court were to embark on the path laid by the Districts, its review would usurp the Legislature's authority to set education policy, in effect guaranteeing the Court's constant involvement and oversight of the very decisions that the Court has repeatedly held are beyond the scope of the judiciary—namely the details of how to adequately deliver a general diffusion of knowledge. *See, e.g., West Orange-Cove Indep. Sch. Dist. v. Alanis*, 107 S.W.3d 558, 582 (Tex. 2003) (“We agree . . . that it is outside the scope of judicial authority to review the Legislature's policy choices in determining what constitutes an adequate education, and we emphasize that the courts cannot undertake to review those choices one by one or attempt to define in detail an adequate education.”).

The Districts offer no doctrinal reason for the Court to conclude that the adequacy of the system is not a political question. They merely rely on the fact that the Court has previously declared *efficiency* claims under Article VII, §1 to be justiciable. But the fact that the efficiency of the system may be susceptible to judicial review does not mandate that adequacy is also justiciable. The Court has never before been asked to assess the adequacy of Texas's public school system, and it can—and should—decline to do so now.

The Districts make little effort to address the State’s argument that Article VII, §1 provides no enforceable right. Instead, they incorrectly invoke *stare decisis* because the Court has previously decided claims under Article VII, §1. But, as with the question of whether adequacy is justiciable, *stare decisis* does not apply because the Court has never before been presented with the question whether Article VII, §1 provides an enforceable right of action. Applying its established precedent concerning the characteristics of a self-executing constitutional right, the Court should conclude that Article VII, §1 provides no such right and dismiss the Districts’ claims.

Even if the Court were to determine that all Article VII, §1 claims—including adequacy—present justiciable questions that invoke enforceable rights, the Districts have not demonstrated that Texas’s accountability system is irrational, as is their burden under the Court’s precedent. They deny that rational-basis—or any other standard of deference—applies. Rather, they urge the Court to apply no standard at all, and simply decide whether, in the Court’s judgment, the system is adequate. The Districts’ approach, which was enthusiastically adopted by the trial court, cannot be squared with the Court’s clear directives limiting the scope of its review to whether the system is arbitrary, *i.e.*, irrational. The Court should decline the Districts’ invitation to depart from precedent and assume a policymaking role properly reserved to the Legislature.

As the State has amply demonstrated, and the Districts have failed to rebut, the state accountability system is rational. Accordingly, the trial court’s judgment that the system is constitutionally inadequate should be reversed.¹

The Edgewood and Alvarado Districts’ attempts to defeat the State’s arguments concerning the efficiency of the facilities-funding system are similarly unpersuasive. The Districts, like the trial court, continue to ignore the Court’s direction that financial efficiency is required “only to the provision of funding necessary to provide a general diffusion of knowledge.” *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 729-30 (Tex. 1995) (*Edgewood IV*). Because the Districts are providing a general diffusion of knowledge at current levels of funding, the system is presumptively efficient.

Even if the Court finds it necessary to examine the purported disparity in facilities funding, the Edgewood and Alvarado Districts did not—and cannot—cite record evidence *comparing* districts’ facilities needs statewide—a fundamental element of their efficiency claim. Simply analyzing the bare gap in facilities funding, as the Edgewood Districts advocate, fails to distinguish facilities that are necessary to provide a general diffusion of knowledge from those that are demanded locally for enrichment purposes. Indeed, their approach would eventually lead to the “leveling-down” of the system, a result the Court has expressly rejected. Even if the Court chooses to analyze the pure gap in facilities funding,

1. The trial court also held that the system failed the constitutional requirement of suitability. It did not, in its judgment or its findings, ascribe to it a meaning independent of adequacy or efficiency. The Districts have treated the suitability requirement in a similar fashion in their pleadings and in their briefing to the Court. In their Appellees’ Briefs, none of the Districts made any argument that the system was unsuitable for reasons apart from their arguments concerning the adequacy and efficiency of the system. Because those arguments fail, the system continues to be suitable. *See also* State Appellants’ Br. at 90-92.

the Edgewood and Alvarado Districts' claims fail for lack of proof and cannot be resurrected through after-the-fact extrapolation and recharacterization of their experts' testimony. Accordingly, the Court should reverse the trial court's judgment and hold that the system is efficient with respect to facilities funding.

Finally, in its opening brief, the State explained that the proper assessment of the WOC Districts' state-property-tax claim can be accomplished only by limiting the "tax floor" to costs incurred in compliance with state accountability standards and other state requirements and by excluding costs incurred by districts to fulfill strictly local community demands. The State demonstrated that the WOC Districts' claims fail as both a matter of proof and law because the Districts are all meeting or exceeding state accountability standards while at the same time offering extensive lists of non-state-required classes and programs, establishing that they are providing a general diffusion of knowledge plus local enrichment and are, thus, exercising meaningful discretion in setting their tax rates.

In response, the WOC Districts attempt to sidestep the undeniable characteristic of a state-property-tax claim—that the *State* has driven up the cost of the tax floor such that it equals the tax ceiling—in three alternative ways. They argue that (1) "a general diffusion of knowledge" mandates every class or service they provide—regardless of whether it is required by the accountability system or other state law; (2) classes and extra-curricular activities that are not expressly required by the curriculum are nonetheless necessary to prevent students from dropping out of school; or (3) the extra classes, programs, and

activities are demanded by their communities and satisfy, even though they are not expressly required by, state requirements.

Taken to its logical conclusion, the WOC Districts' tax-floor formulation would eliminate any control the State might have over the tax floor, thus guaranteeing the Districts' ability to singlehandedly create a constitutional violation while effectively prohibiting the Legislature from ever being able to set a cap on property taxes. It would render meaningless the very essence of a *state*-property-tax claim: that "it is imposed directly by the State or when the State so completely controls the levy, assessment and disbursement of revenue, either directly or indirectly, that the authority is without meaningful discretion." *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 502 (Tex. 1992) (*Edgewood III*). The Court should reject the WOC Districts' tax-floor formulation, approve the State's, and reverse the trial court's judgment on the WOC Districts' state-property-tax claim.

ARGUMENT

I. THE TRIAL COURT SHOULD HAVE DISMISSED THE DISTRICTS' CLAIMS.

A. The Adequacy and Efficiency of Texas's Public Schools Present Non-Justiciable Political Questions.

All three Districts recite the standards—efficiency, suitability, and adequacy—and proclaim that the Court's prior invocation of these touchstones demonstrates the manageability of the judicial standards to which they relate. WOC Br. at 55-56; Edge. Appellees' Br. at 20; Alv. Appellees' Br. at 12-13. But the Districts do not explain what these standards mean or how they are to be applied. Instead, they argue that the mere fact

that the Court has applied the efficiency standard in the past is sufficient to show that the standards are judicially manageable. *See* Edge. Appellees’ Br. at 15-16, 18 (“The Texas Supreme Court has repeatedly decided that the Texas school finance system is both efficient and inefficient.”). That argument is akin to trying to prove that a baseball umpire’s individual strike zone is based on objective, measurable standards by pointing out that the umpire has previously declared some pitches strikes and others balls. That the Court has ruled on efficiency in the past does not, in and of itself, establish that any of the standards—efficiency, suitability, and adequacy—are manageable or ascertainable, especially over the long term.

The Court has recognized that these standards are “admittedly not precise,” *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 392 (Tex. 1989) (*Edgewood I*), and indeed has acknowledged that they must be flexible to “reflect changing times, needs, and public expectations,” *Edgewood IV*, 917 S.W.2d at 732 n.8. While the Districts claim that they “do not ask this Court to make policy decisions,” Edge. Appellees’ Br. at 17, their briefs—full of detail about the minutiae of educational policy—belie that assertion. Indeed, the Edgewood Districts’ assertion that “the Court can readily discover further standards” as necessary to resolve constitutional challenges—without suggesting what the new standards would be or how they might be applied—negates the very concept of a standard. Edge. Appellees’ Br. at 18. As the Districts describe it, the Court’s test for constitutionality as measured by the vague standards of efficiency, suitability, and adequacy is something like

Justice Potter Stewart’s test for obscene material: “I know it when I see it.” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

The State recognizes that the Court has previously declined to view efficiency as a political question. But that assessment is not forever carved in stone. Sixteen years after its decision in *Edgewood I*, the Court is only now in a position to recognize that its prior school-finance decisions have not elucidated an objective meaning of the efficiency, suitability, and adequacy standards. Instead, they have only established a precedent that the Court will decide anew in each successive school finance case whether the Legislature’s latest efforts are sufficient to satisfy the standards of the day. Indeed, several former Justices of the Court presciently recognized the slippery path down which the Court is treading. *See Edgewood IV*, 917 S.W.2d at 768 (“Today’s departure from the strict *Edgewood I* standard will mire the judiciary in deciding purely political questions.”) (Spector, J., dissenting); *id.* at 751 n.1 (suggesting that “what is an efficient, suitable educational system is a political question that this Court is ill-equipped to answer”) (Enoch, J., concurring and dissenting). At least with respect to adequacy—an issue the Court did not squarely address in any of the *Edgewood* decisions—the Court can and should hold that Plaintiffs’ claims present a non-justiciable political question.

As the extra-jurisdictional cases cited in the parties’ briefs reflect, the courts of other States are divided on whether adequacy claims present a justiciable issue. *Compare* State Appellants’ Br. at 33-34 & n.27 *with* WOC Br. at 62 n.48. This split illustrates that reasonable judicial minds can differ on the adequacy issue. At this juncture, then, the

question is whether the Court desires to maintain its role as the perennial arbiter of school finance challenges. The experience of the New Jersey Supreme Court offers a preview of the path the Districts invite the Court to follow. That court “has struggled in its self-appointed role as overseer of education for more than twenty-one years, consuming significant funds, fees, time, effort, and court attention.” *City of Pawtucket v. Sundlun*, 662 A.2d 40, 59 (R.I. 1995). This Court need not—and should not—follow New Jersey into the thicket of perpetually reviewing adequacy challenges to the State’s school finance system.

The WOC Districts argue that the funding disparity at issue in *Edgewood I* “has been largely addressed,” suggesting that the Court is nearing the end of the road. WOC Br. at 64. In a similar vein, the Alvarado Districts blame the State for the litigation history, implying that these lawsuits would not have occurred if only the Legislature had taken appropriate action. Alv. Appellees’ Br. at 13. But the Districts present false hope. The financial interests of property-wealthy and property-poor school districts are naturally divergent; thus, it is almost inevitable that any legislative action that satisfies one side will disappoint the other, leading to further constitutional challenges. If the Court chooses to find the Districts’ adequacy claims justiciable, it should not do so under the erroneous perception that this case, or the next, is likely to put an end to the school finance litigation machine.

B. Article VII, §1 Is Not Self-Executing.

In its opening brief, the State argued that Article VII, §1 is not self-executing because it identifies educational goals and exhorts the Legislature to enact laws in furtherance thereof. State Appellants’ Br. at 39-45 (citing *City of Corpus Christi v. City of Pleasanton*,

276 S.W.2d 798 (Tex. 1955)). The WOC Districts, citing two out-of-state law review articles, urge that the State’s argument “ignores the modern presumption that state constitutional provisions are self-executing.” WOC Br. at 65 (citing Kelly Thompson Cochran, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. REV. 399, 455 (2000), and 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)). However, the WOC Districts do not—and cannot—argue *Texas* law follows the trend they describe.

The Cochran article, on which they primarily rely, argues: “State courts initially presumed that most constitutional provisions would require enabling legislation, but that presumption has been reversed in modern times as state constitutions have been amended to grant rights and impose specific duties on government officials.” 78 N.C. L. REV. at 455 (citing [16] AM.JUR.2D *Constitutional Law* §142 (1993)).² The current American Jurisprudence lists Arizona, Arkansas, California, Florida, New York, Ohio, and South Carolina as adopting the “modern presumption.” *See* 16 AM.JUR.2D *Constitutional Law* §100 & nn.66-67 (2004). Texas is conspicuously absent from this list.

Texas’s absence is explained by the fact that, as the WOC Districts recognize, Texas follows a different rule regarding self-execution. Under Texas law, a provision is self-executing only if it supplies a sufficient rule by which the duty imposed may be judicially

2. The citing reference to §142 appears to be an error, as this section addresses the “injury-in-fact” requirement in equal protection cases. *See* 16 AM.JUR.2D *Constitutional Law* §142 (2004).

enforced. *See Frasier v. Yanes*, 9 S.W.3d 422, 426 (Tex. App.—Austin 1999, no pet.); *Motorola, Inc. v. Tarrant County Appraisal Dist.*, 980 S.W.2d 899, 902 (Tex. App.—Fort Worth 1998, no pet.). Neither this Court nor any other Texas appellate court has ever held that Texas recognizes the presumption of self-execution to which the courts in seven other States adhere.

Tellingly, the Cochran article recognizes that States not following the “modern presumption” would reject constitutional school finance claims on the ground that the relevant constitutional provisions are not self-executing:

The problem is that all but a handful of state constitutions assign primary responsibility for education to the legislative branch. Thus, if courts in these jurisdictions mechanically apply the older versions of the self-executing test, *they would conclude that the right to an adequate education is not self-executing because education is assigned to state legislatures.*

78 N.C. L. REV. at 455-56 (citations omitted) (emphasis added). Although the author asserts that “[i]t is difficult to reconcile such a conclusion . . . with the school financing cases holding that the right to an adequate education is judicially enforceable,” *id.* at 456, this irreconcilability does nothing to undermine the necessary consequence of the rule under Texas law limiting self-execution. As Cochran acknowledges, that rule requires “that the right to an adequate education is not self-executing because education is assigned to state legislatures.” *Id.* at 456.

Finally, the author’s claim of irreconcilability is not surprising, given the article’s stated goal of promoting judicial activism in the school finance context. *Id.* at 475 (“Even when there are no existing remedies for constitutional violations, state courts have ample

authority—perhaps even a duty—to provide relief.”). In other words, Cochran acknowledges the soundness of the constitutional position adopted by States that do not adopt the “modern presumption” and disputes only the result, with which Cochran disagrees on policy grounds. This reasoning supports the State’s position, not that of the Districts.

Similarly, the Fernandez article cited by the WOC Districts does not suggest that Texas has embraced the “modern presumption” of self-execution. Instead, the article begs the question that lies at the heart of the self-execution debate: when should a court create a cause of action from a mandatory, non-prohibitory constitutional provision? 17 HARV. ENVTL. L. REV. at 344 (“As affirmative commands to the legislature to exercise its power in a particular way, these provisions raise the constitutional question underlying the doctrine of self-execution: to what extent does the court have authority to order another branch of government to act?”). Fernandez’s analysis suggests that the State’s interpretation of Article VII, §1—itself a “mandatory, non-prohibitory constitutional provision”—is both viable and consistent with separation-of-powers doctrine:

Enforcing such a provision would require the court to order the legislature to pass laws, which would be constitutionally and politically unacceptable under the principle of separation of powers. If a court were to order the legislature to supply needed legislation to fulfill a constitutional mandate, the legislature could simply refuse to obey. As is the case with the federal Constitution, state constitutions do not provide the judiciary with an affirmative mechanism to enforce its commands to the legislature. *Consequently, courts may declare mandatory non-prohibitory provisions ineffective or non-self-executing, construing them as mere exhortations to the legislature.*

....

Similarly, if a court finds that the legislature must create an enforcement mechanism to carry out the policy goal expressed by a mandatory

constitutional provision, concern for separation of powers might lead the court to declare the provision non-self-executing.

Id. at 344-45 (citations omitted) (emphasis added). *See also* 2 GEORGE D. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 508 (1974) (describing Article VII, §1 as “largely hortatory”).

Neither the Edgewood nor the Alvarado Districts advance the “modern presumption” theory that the WOC Districts urge. And the Districts’ arguments are inconsistent in other ways as well. For example, the Edgewood Districts fail to distinguish or even cite the Court’s decision in *City of Pleasanton*, and instead simply assert that “Article VII, §1 [p]rovides a [p]rivate [r]ight of [a]ction.” Edge. Appellees’ Br. at 19. The Alvarado Districts, by contrast, implicitly concede that no private right of action exists under the constitutional provision itself. Alv. Appellees’ Br. at 15 (arguing that Texas’s rule regarding self-executing provisions “only applies when the Legislature has failed to enact any legislation and *someone seeks to enforce a private right under the Constitution* in the absence of a statutory provision.”) (emphasis added). The Districts’ arguments that Article VII, §1 is self-executing are not persuasive, and the Court should reject them.

C. The School Districts Lack Standing To Sue.

The Districts argue that the fact that standing was not raised in any of the previous challenges to Texas’s school-finance system suggests that the argument lacks merit. WOC Br. at 68 n.51; Edge. Appellees’ Br. at 20. However, the Districts do not dispute that each of the previous challenges, unlike this case, involved individual plaintiffs. *See* State Appellants’ Br. at 44-45. Because objecting to the school districts’ standing would not have

reaped any practical benefit in those cases—*e.g.*, dismissal of all claims—the State’s failure to assert the argument previously is no reflection on its merits. Indeed, the fact that the Court raised the issue *sua sponte*, and that the Justices disagreed on the issue, suggests that the argument has force and should be considered again, this time with the benefit of the parties’ briefing. *Compare West Orange-Cove*, 107 S.W.3d at 583-84, *with id.* at 588-89 (Smith, J., dissenting).

Standing, which is a constitutional prerequisite to maintaining suit, “requires the claimant to demonstrate an interest distinct from that of the general public such that the actions complained of have caused a particular injury.” *Tex. Dep’t of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 646 (Tex. 2004); *Williams v. Lara*, 52 S.W.3d 171, 178-79 (Tex. 2001). The “particularized injury” requirement “inheres in the nature of standing, which ‘stems from two limitations on subject matter jurisdiction: the separation of powers doctrine and, in Texas, the open courts provision.’” *City of Sunset Valley*, 146 S.W.3d at 646 (quoting *Brown v. Todd*, 53 S.W.3d 297, 302 (Tex. 2001)). These provisions require an actual grievance, not one that is merely hypothetical or generalized. *Id.* (citing *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993)). The Districts in this case lack standing because they cannot meet the “particularized injury” requirement.

The Districts themselves are not injured by what they allege to be constitutional defects in the State’s distribution of school funds. Rather, it is the Districts’ constituents—students and their parents, teachers and other employees, and taxpaying residents—who would presumably be injured by the unconstitutional funding allocations the

Districts allege. See *West Orange-Cove*, 107 S.W.3d at 591 (Smith, J., dissenting) (“In addition to taxpayers, school districts represent their students and employees.”).

The Districts do not effectively dispute the absence of injury to themselves, but instead cite language in *Nootsie, Ltd. v. Williamson County Appraisal District*, 925 S.W.2d 659 (Tex. 1996), as allowing them to rely on the harms perceived by the Districts’ constituents to satisfy the “particularized injury” requirement. WOC Br. at 67-68; Edge. Appellees’ Br. at 21-22; Alv. Appellees’ Br. at 16. In *Nootsie*, the Court stated that a district’s assertion that “it is charged with implementing a statute that it believes violates the Texas Constitution . . . provides the district with a sufficient stake in th[e] controversy” for standing purposes. 925 S.W.2d at 662. The *West Orange-Cove* majority relied on this statement to conclude that school districts need not have constitutional rights at stake to enjoy standing. 107 S.W.3d at 583-84. Although some language in *Nootsie* may support the Districts’ assertions, that aspect of *Nootsie* is contrary to the Court’s standing jurisprudence and should be disregarded.

In *Nootsie*, the party challenging the appraisal district’s standing pointed out that the district itself had no constitutional rights at stake. 925 S.W.2d at 662. The Court responded: “This argument misses the mark because the district does not contend that the statute violates constitutional rights belonging to the district.” *Id.* In so doing, the Court sidestepped the particularized-injury requirement, implicitly suggesting that the appraisal district was exempt from the rule without explaining why. The majority’s analysis in *West Orange-Cove*, and the Districts’ arguments in this case, similarly reiterate *Nootsie*’s conclusion without

reconciling it with the Court’s numerous cases establishing the particularized-injury requirement. Thus, the Court should reconsider its reliance on *Nootsie* and dismiss the Districts’ claims for lack of standing.

II. THE DISTRICTS’ ARGUMENTS CHALLENGING THE CONSTITUTIONAL ADEQUACY OF TEXAS’S EDUCATIONAL SYSTEM ARE WITHOUT MERIT.

Unable to establish that the accountability system fails rational-basis review, the Districts attempt to circumvent that inquiry by asserting that neither rational-basis nor any other standard of deference applies to a constitutional adequacy claim. The Court should reject the Districts’ assertion, as it contradicts the Court’s clear, repeated statements that its review is limited, at most, to determining whether Legislative choices are “arbitrary,” *i.e.*, irrational. Similarly, the Court should decline the Districts’ invitation to put aside the accountability system, which was chosen by the Legislature as the measure of adequacy, and evaluate the system on the basis of educational “inputs.” As the State pointed out in its opening brief, that task would be judicially unmanageable. State Appellants’ Br. at 70-77. The fact that the Districts did not respond with *any* standards the Court could use in performing the review they request highlights the inherent nature of inputs as policy choices that the Legislature—not the courts—must make. The Court should reverse the trial court’s judgment and hold that the system is constitutionally adequate.

A. The Court Should Reject the Districts’ Extraordinary Call for Standardless Review of Constitutional Adequacy.

The WOC, Edgewood, and Alvarado Districts each dispute the State’s assertion that rational-basis review is the appropriate standard of deference for the Court to apply in

determining the constitutional adequacy of Texas’s educational system under Article VII, §1. *See* WOC Br. at 69-71; Edge. Appellees’ Br. at 24-28; Alv. Appellees’ Br. at 18-21. But, rather than advancing some alternative standard, such as intermediate or even strict scrutiny (in fact, the Alvarado Districts reject strict scrutiny explicitly because they believe it would provide too much deference, *see* Alv. Appellees’ Br. at 19-20), they make the extraordinary claim that *no* standard applies at all. *See* WOC Br. at 71; Edge. Appellees’ Br. at 24-28; Alv. Appellees’ Br. at 18-21. Their assertion that the Court has applied standardless review in its previous school finance decisions cannot be squared with the Court’s repeated admonitions that substantial deference is required, particularly when reviewing the system’s adequacy. *See West Orange Cove*, 107 S.W.3d at 581-82; *Edgewood IV*, 917 S.W.2d at 736 (citing *Mumme v. Marrs*, 40 S.W.2d 31, 36 (Tex. 1931)). The Court should decline the Districts’ invitation to substitute its policy judgment for that of the Legislature and should continue to afford the Legislature deference under the rational-basis standard.

1. The Court has repeatedly stated that the deferential standard of *Mumme v. Marrs* applies to determinations of constitutional adequacy.

Contrary to the Districts’ claims, the Court made absolutely clear in both *West Orange-Cove* and *Edgewood IV* that considerable deference is required when a court evaluates a constitutional adequacy challenge. Although the judiciary may “determine, in a proper case, whether the Legislature on the whole has discharged its constitutional duty,” *West Orange-Cove*, 107 S.W.3d at 585, “[t]he legislative determination of the methods, restrictions, and regulations is final, except when so arbitrary as to be violative of the

constitutional rights of the citizen,” *Edgewood IV*, 917 S.W.2d at 736 (quoting *Mumme*, 40 S.W.2d at 36). Moreover,

it is outside the scope of judicial authority to review the Legislature’s policy choices in determining what constitutes an adequate education, and we emphasize that the courts cannot undertake to review those choices one by one or attempt to define in detail an adequate education.

West Orange-Cove, 107 S.W.3d at 582. Regardless of what level of deference may be required for *different* constitutional claims (*i.e.*, efficiency or Article VIII, §1-e state-property-tax claims), there can be no doubt that courts evaluating an *adequacy* claim must give great deference to legislative decisions. *See id.* The Districts are flatly wrong to argue otherwise.

The WOC Districts alternatively concede that deference is required but then attempt to change the definition of “deference” from that which the Court has already adopted. They argue that, contrary to the Court’s statements and the common legal understanding of the term, “deference” does not mean subjecting the legislative action at issue to an appropriate level of scrutiny, *i.e.*, strict scrutiny, intermediate scrutiny, or rational-basis scrutiny. Instead, they argue that it means something entirely different—holding the Legislature to every aspirational goal it has expressed in statutes. WOC Br. at 79-86. Aside from the fact that the WOC Districts’ definition is ungrounded in precedent and contrary to common understanding, the Court should disregard it for two additional reasons.

First, the Court has already rejected the argument that legislative goals are enforceable under Article VII, §1. In *Edgewood IV*, the Court considered that very question:

The property-rich districts argue that the Legislature itself has established standards for measuring suitability and has failed to meet those standards. In particular, the districts point to two general provisions in the Texas Education Code: section 16.001 (“State Policy”), which provides that the education system is to be “substantially financed through state revenue sources;” and section 16.002 (“Purpose of Foundation School Program”), which states that Tier 1 “guarantees sufficient financing for all school districts to provide a basic program of education that meets accreditation and other legal standards.”

917 S.W.2d at 736. The Court rebuffed this argument, holding that “the Legislature’s funding obligations are generally limited to what it appropriates, regardless of what it promises in other statutes.” *Id.* Therefore, what the Legislature may or may not have “promised” in its mission statement or other aspirational portions of the Education Code cannot provide the standard for a *constitutional* action against the State.³

Second, the Court has already defined the scope of judicial review as that outlined in *Mumme*. It did so in *Edgewood IV*, 917 S.W.2d at 736 (quoting *Mumme*, 40 S.W.2d at 36), and in *West Orange-Cove*:

We reiterate that the Constitution requires, not that courts make such policy decisions, but that they determine, in a proper case, whether the Legislature on the whole has discharged its constitutional duty.

Id. at 585 (citing *Mumme*, 40 S.W.2d at 36). By repeatedly citing and quoting *Mumme* whenever it has described the courts’ role in reviewing constitutional adequacy claims, the Court has sent a clear message: when the courts “determine” “whether the Legislature . . . has discharged its constitutional duty,” they must apply *Mumme*’s standard, which recognizes that “[t]he legislative determination of the methods, restrictions, and regulations is final,

3. Likewise, the testimony of TEA employees cannot define the contours of the constitutional standard, contrary to the WOC Districts’ assertions, WOC Br. at 88-90.

except when so arbitrary as to be violative of the constitutional rights of the citizen.” *Id.* at 585 & n.125.

2. *Mumme* applied the equivalent of rational-basis review to a claim under Article VII, §1.

As explained in the State’s opening brief, *Mumme*’s standard of “arbitrariness” is the equivalent of the modern rational-basis standard. *See* State Appellants’ Br. at 47-49. The Districts do not challenge this fact; instead, they attempt to distinguish *Mumme* by erroneously reinterpreting it as solely an equal-protection case, ignoring its parallel decision under Article VII, §1.

Although at least one group of Districts concedes that *Mumme* applied rational-basis review, *see* Alv. Appellees’ Br. at 18, all three groups advance the demonstrably false argument that *Mumme* was only an equal-protection case, and not an Article VII, §1 case. WOC Br. at 69-70; Edge. Appellees’ Br. at 25; Alv. Appellees’ Br. at 18. As a threshold matter, this argument is of no moment, given the Court’s express adoption of *Mumme* as its standard of scrutiny for adequacy cases under Article VII, §1. *See West Orange-Cove*, 107 S.W.3d at 585 (citing *Mumme*, 40 S.W.2d at 36); *Edgewood IV*, 917 S.W.2d at 736 (quoting *Mumme*, 40 S.W.2d at 36).

In any event, *Mumme* is, on its face, an Article VII, §1 decision as well. The Court quoted the text of Article VII, §1 and then proceeded to discuss whether the Rural Aid Act comported with that provision. *See Mumme*, 40 S.W.2d at 35-36. The Court articulated the broad authority granted to the Legislature under Article VII, §1, and stressed the great deference the judiciary must afford to the Legislature’s decisions:

The Legislature alone is to judge what means are necessary and appropriate for a purpose which the Constitution makes legitimate. The legislative determination of the methods, restrictions, and regulations is final, except when so *arbitrary* as to be violative of the constitutional rights of the citizen.

Id. at 36 (emphasis added). The Court next specifically discussed the “suitability” requirement of Article VII, §1, again emphasizing the broad deference due to the Legislature. *See id.* Before deciding the Article VII, §1 claim, the Court set out the standard applicable to the accompanying equal-protection claim—again, in language of deference to legislative determinations: “Equal protection of laws is secured if the statutes do not subject the individual to *arbitrary* exercise of the powers of government.” *Id.* (emphasis added). The standards the Court articulated for both the equal-protection and Article VII, §1 claims were strikingly similar, both hinging on the concept of arbitrariness. *See id.* Not surprisingly, in view of the equivalent standards of deference, the Court made a global holding applicable to both claims: “Tested by the principles stated, we do not think the act before us is discriminatory, arbitrary, or unreasonable.” *Id.* at 36-37. By its terms, *Mumme* applied a standard of arbitrariness—the equivalent of rational basis—to the equal-protection claim *and* to the Article VII, §1 claim. *See id.* The Districts’ attempt to artificially limit *Mumme* to equal protection should be given no credence.⁴

4. The Edgewood Districts argue that, even if rational-basis does apply, the Texas version of rational basis is more exacting than the federal standard. *See* Edge. Appellees’ Br. at 35 n.24. To support this assertion, the Edgewood Districts cite a 1994 dissenting opinion by former-Justice Doggett and the Court’s 1984 decision in *Whitworth v. Bynum*, 699 S.W.2d 194 (Tex. 1985), a case under the Texas Constitution’s equal-rights provision. Edge. Appellees’ Br. at 35 n.24. Of course, as an equal-rights case, *Whitworth* is distinguishable. Moreover, the Court recently rejected the very reading of *Whitworth* that the Edgewood Districts advance, explaining:

We do not read *Whitworth* and [*State v. Richards*, 301 S.W.2d 597 (Tex. 1957)] to establish the more exacting standard the plaintiffs suggest. To the extent they might suggest such a

B. The Rationality of the Accountability System is the Decisive Factor in Reviewing the Adequacy Claim.

1. The Court should reject the Districts' attempt to deflect attention away from the accountability system's clear rationality.

In its opening brief, the State explained the details of Texas's accountability system demonstrating that the system is not only rational, it is an effective system that has proven itself with results. State Appellants' Br. at 5-25, 54-64. The Districts fail to challenge the State's explanation of the system's rational basis. Rather they attempt to marginalize the system's importance by claiming that even if the accountability system is rational, it does not accurately measure a general diffusion of knowledge. *See* WOC Br. at 85-86; Edge. Appellees' Br. at 29; Alv. Appellees' Br. at 25-28.

The Districts are attempting to obscure the fact that these two inquiries are not distinct—they are one and the same. If, within the accountability system, the State has made rational choices (*e.g.*, which subjects to test and what performance standards to enact, among others), then the Districts have necessarily failed to defeat the Court's presumption that the accountability system is the appropriate measure of a general diffusion of knowledge. To determine whether this presumption stands is the very reason we inquire into the

standard, we have recently clarified that the federal analytical approach applies to equal protection challenges under the Texas Constitution.

Bell v. Low Income Women of Texas, 95 S.W.3d 253, 266 (Tex. 2002) (citations omitted). In any event, Texas's accountability system could easily withstand challenge even under a more exacting standard, because the evidence demonstrates that the system is more than rational: it is based on sound educational practice. *See* State Appellants' Br., No. 04-1144, at 51-64; Part II.B.2-7, *infra*.

accountability system's rationality.⁵ As the Court has made clear, in an adequacy case it determines the constitutionality of the system by resolving whether it is arbitrary, *i.e.*, irrational. *See* Part II.A, *supra*. Because that inquiry is the *only* question the Court may answer in reviewing constitutional adequacy, the Court should reject the Districts' attempt to change the constitutional focus and circumvent rational-basis review.

2. The Districts do not even attempt to rebut the State's demonstration that the components of the accountability system criticized by the trial court are rational.

In its opening brief, the State explained the rational basis supporting each element of the accountability system that the trial court criticized. *See* State Appellants' Br. at 54-64. Instead of attempting to rebut the State's explanation and meet their burden of demonstrating that the system is irrational, the Districts ignore the State's explanation and limit themselves to reiterating the trial court's initial criticisms: the composition of the TAKS test, the choice of base indicators to determine accountability ratings, the phase-in of the TAKS cut scores and accountability ratings, the timing of the exit-level TAKS test, and the method of calculating the dropout rate. *See* WOC Br. at 75-79, 85-86; Edge. Appellees' Br. at 29-35; Alv. Appellees' Br. at 26-34. Moreover, to some extent, all of the Districts concede the rationality of certain elements of the system. *See* WOC Br. at 1 (“[C]urriculum and accountability standards [are] *not* challenged in this suit.”); Edge. Appellees' Br. at 30 (“[T]he State may have its reasons to implement [the chosen accountability standards].”);

5. The equivalence of these two concepts is illustrated by the conflicting positions the Districts are forced to take in attempting to argue their point. *Compare* WOC Br. at 1 (“[C]urriculum and accountability standards [are] *not* challenged in this suit.”) *with* WOC Br. at 23 (“[A]ccreditation standards are set too low to be a meaningful measure of adequacy.”).

Alv. Appellees' Br. at 28 ("Alvarado Appellees do not question [] a phase-in period for a new testing instrument such as the TAKS.").

3. Additional criticisms raised by the Districts fail to demonstrate that the accountability system is irrational.

The Edgewood and Alvarado Districts raise additional objections to aspects of the accountability system that the trial court did not fault. These criticisms, like the trial court's, are merely disagreements with the State's policy choices, and do not demonstrate that the system is irrational. Moreover, these alleged faults are largely at the margins of the accountability system and have a very limited impact, which is perhaps the reason the trial court did not rely upon them.

a. The "required-improvement" feature is rational.

The Edgewood Districts condemn the accountability system's "required-improvement" feature, which enables a campus or district to obtain a rating of "recognized" or "academically acceptable" (but not "exemplary") even if the percentage of students passing the TAKS does not yet meet the required levels for those ratings.⁶ *See* Edge. Appellees' Br. at 30. Required improvement is a degree of improvement from one year to the next that, if continued the following year, would lead to meeting the required standard. *See* 2004 Accountability Manual, Alv. Ex. 9031 at 17-18, 36. Thus, the example offered by

6. In its Appellants' Brief, the State noted that the Commissioner of Education had not yet announced the accountability standards for 2006 and beyond. On March 31, 2005, those standards were released. As expected, they gradually raise the passing rate required to achieve an "academically acceptable" and a "recognized" rating. *See* Accountability System for 2005 and Beyond, Commissioner of Education Final Decisions, March 2005, <http://www.tea.state.tx.us/perfreport/account/2005/index.html> (Attached at App. A).

the Edgewood Districts is correct: if 7% of a district's students passed the science portion of TAKS in 2003 and 16% passed in 2004 (an increase of over 100%), the district would have been eligible for an "academically acceptable" rating in 2004 because, if the district's 9-point improvement in 2004 were repeated in 2005, that district would reach 25%, the required passing rate for an "academically acceptable" rating. *See id.*; *see also* State Appellants' Br. at App. J.

The purpose of the required-improvement feature is to reward and encourage campuses and districts that are approaching the required standards through sometimes remarkable improvement (for example, the over-100% improvement shown in the Edgewood Districts' example) instead of penalizing them with an "academically unacceptable" rating despite such improvement. *See* Accountability System for 2005 and Beyond, Commissioner of Education Final Decisions, March 2005, <http://www.tea.state.tx.us/perfreport/account/2005/index.html> at 1-2, 5-6 (Attached at App. A). Thus, although some might disagree with the State's policy decision to incorporate the incentive of required improvement into the accountability system, it is by no means irrational. Moreover, its specific impact on the system as a whole is negligible: in 2004, only 4 of the 713 districts (0.6%) rated "academically acceptable" achieved that rating using required improvement. *See* Highlights of the 2004 Accountability System <http://www.tea.state.tx.us/perfreport/account/2004/highlights.pdf> at 1, 3 (Attached at App. B).⁷

7. Although a number of districts used required improvement to achieve a "recognized" rating (110 of 378, or 29% of recognized districts), the requirements are stringent. A campus or district may not use required improvement to achieve a "recognized" rating unless its passing rate is within five percentage points of the required level. Alv. Ex. 9031 at 21. Thus, in 2004, a campus or district must have had a passing rate

b. Inclusion of “continuing” students in the definition of a “completer” is not irrational.

The Edgewood Districts also question the State’s definition of a high-school “completer” because it includes students who have not graduated after four years and who re-enroll in high school for a fifth year. Edge. Appellees’ Br. at 31. As the State explained in its opening brief, students who fail to graduate in four years but who return to high school for a fifth year are included as completers in order to create an incentive for schools to re-enroll those students. State Appellants’ Br. at 15 n.16. The Edgewood Districts do not contest the fact that returning students are much more likely to earn diplomas than are those who either do not return or who enter a GED program. *Id.*; 25.RR.185-86. Given that this policy choice encourages students to return to high school, it surely cannot be considered irrational.

Moreover, the number of continuing students is not large enough to have a substantial effect on the system as a whole. In 2003,⁸ the statewide percentages of continuing students were 7.9% overall, 10.6% for African-Americans, 5.1% for Asians and Pacific Islanders, 12.6% for Hispanics, 6.2% for Native Americans, 3.9% for whites, and 12.4% for the economically disadvantaged. *See* Secondary School Completion and Dropouts in Texas Public Schools 2002-03, http://www.tea.state.tx.us/research/pdfs/dropcomp_2002-03.pdf at viii (2002-03 Completion and Dropout Manual). Thus, if continuing students and GED

of at least 65% for all students and for each disaggregated group, on all tests, to be eligible to achieve a “recognized” rating using required improvement.

8. The 2003 completion and dropout data is the most recent available.

recipients had been excluded from the ranks of completers in 2003, the completion rate would still have been 84.2% overall, 81.1% for African-Americans, 91.5% for Asians and Pacific Islanders, 77.3% for Hispanics, 84.7 % for Native Americans, 89.8% for whites, and 77.8% for the economically disadvantaged, *id.*, all of which are higher than the 75% completion rate required for an “academically acceptable” rating, Alv. Ex. 9031 at 36 (State Appellants’ Br. at App. K). The inclusion of continuing students as completers is rational and does not call the entire accountability system into question.

c. The State’s method of calculating the dropout rate is rational.

The Edgewood and Alvarado Districts repeat the trial court’s criticisms of the State’s method of calculating the dropout rate. Edge. Appellees’ Br. at 32-33; Alv. Appellees’ Br. at 29-33. As explained in the State’s opening brief, these objections amount to nothing more than the trial court’s and the Districts’ preference for a 4-year attrition-rate method, which is only a rough *estimate* and would treat students as dropouts even if they entered private school, home-schooling, moved to another State, or died.⁹ State Appellants’ Br. at 61-64. By contrast, the State, like the National Center for Education Statistics (NCES), has chosen to use an annual *actual* dropout rate. *Id.*; 27.RR.100. According to NCES statistics, Texas’s raw dropout rate is at the national average, and, when adjusted for poverty and limited-English proficiency, is the *lowest in the nation*. 27.RR.38.

9. The Edgewood Districts incorrectly characterize the State’s argument as one challenging the factual sufficiency of the evidence as to dropouts. Edge. Appellees’ Br. at 32. Rather, the State’s argument addresses the purely legal question of whether the State’s method of calculating dropouts is rational.

Texas’s annual dropout rate is calculated from “leaver” data provided by each school district.¹⁰ State Appellants’ Br. at 61-64. “Leavers,” as the State explained in its opening brief, are students who attended a particular campus or district but left during the year or did not return the following year. *Id.* at 61. The State requires districts to identify leavers, perform an initial investigation to determine the circumstances of each student’s departure, obtain appropriate documentation, and submit the leaver data to TEA. 2002-03 Completion and Dropout Manual at 6. The districts presumably obtain much of their information from parents. For instance, parents might inform their child’s school that the family is moving to another State and that their child will attend school in that State the following year.

The Edgewood Districts fault this system, claiming—without proof—that it fails to ensure reliable data. Specifically, the Edgewood Districts criticize the State’s failure to require districts to conduct an *additional* follow-up of every individual leaver to confirm the accuracy of the information obtained in the initial investigation—*i.e.*, whether a particular student had actually enrolled in private school, another public school within Texas, or a school in another State or foreign country; had truly died; or fit within any of the other leaver codes that are not counted as dropouts. *See* Edge. Appellees’ Br. at 32 & n.21; Alv. Ex. 9031 at 102 (State Appellants’ Br. at App. M). Instead of requiring districts to invest considerable time and expense for such an effort, if documentation is not forthcoming, the State allows

10. The Alvarado Districts incorrectly rely on census data regarding the percentage of Texas residents who are high school graduates. Alv. Appellees’ Br. at 30. But this data does not specify what percentage of non-graduates attended Texas public schools as opposed to Texas private schools or schools in other States or countries. Thus, the census data sheds no light on the dropout rate from Texas public schools.

districts to rely on parents or other adults to report the status of each leaver. Despite the innuendo provided by the Edgewood Districts, there is no evidence in the record that any additional layer of investigation into the status of each leaver would appreciably improve the accuracy of the leaver data that districts provide to the State.¹¹ And, given the considerable resources such investigations would likely consume, it is certainly not irrational for TEA not to require such investigations.

Finally, the Districts rely on a statement by Dr. Lori Taylor, one of the State's witnesses, that Texas's dropout rates are "so low as to not be believable." State Ex. 15889 at 9. The Districts fail to mention that Dr. Taylor clarified that statement at trial:

A: That would have been written in our report. We were probably drafting that in December or January.

Q: Okay. Did you write that?

A: I don't think I wrote it, but I think at the time it was written I concurred.

Q: Okay. Have you learned anything about the dropout calculations since whenever that language was written?

A: I have gotten a lot better information on the extent to which TEA tracks students. I thought at the time part of the problem was that TEA was losing track of kids. I've now become quite persuaded that they do a very good job of identifying the reasons for leaving for the students, and that they also, as I understand it, have a much larger denominator for the analysis than I initially believed. And that makes it much more plausible that they get dropout rates of the nature they get.

24.RR.60. Thus, there is no evidence in the record that Texas's dropout rate is unreliable or that it is calculated in an irrational manner. It does not, therefore, undermine the rationality of the accountability system.

11. The Districts' superintendents uniformly testified that they report accurate leaver data to TEA. *See, e.g.*, 5.RR.53-54; 6.RR.180-81; 7.RR.83; 17.RR.59-60; 22.RR.195-96.

d. The exclusion of a minimal number of student test scores from the accountability ratings for statistical and equitable reasons is rational.

Finally, the Edgewood Districts argue that the exclusion of some students' test scores from accountability ratings undermines the system. *Edge. Appellees' Br.* at 34-35. But the State's reasons for excluding these scores are based on statistical validity and on fairness to campuses and districts; thus, this decision is rational.

The Edgewood Districts point to the fact that test scores of students who arrive on a campus after October 31 of the school year and take the TAKS the following Spring are not counted in the passing percentages that determine a campus's or district's accountability rating. *Id.* at 34. These scores are excluded from accountability ratings because it would be inappropriate to hold campuses and districts accountable—or to give them credit—for test scores of students whom they have not had an adequate opportunity to educate. 25.RR.206-07. The State's decision to exclude these scores, therefore, is rational. Moreover, the students whose scores were not included in the 2004 accountability ratings are only a fraction of the total—merely 5.9%. *See App. B* at 5. Thus, they have no significant effect on the system as a whole.

The Edgewood Districts also find fault with the minimum-count requirements for including the passing rates of disaggregated groups in accountability ratings. *Edge. Appellees' Br.* at 34. To be counted as a group for purposes of the accountability ratings, the group must contain at least 30 students. *Alv. Ex. 9031* at 8. A minimum-count requirement is clearly rational. Otherwise, a campus or district that had only *one* student in any

disaggregated group could receive an “academically unacceptable” rating if that single student failed any portion of the TAKS test. Moreover, there is no evidence that the 30-student level is irrational. Even if a campus lacks 30 students in any one disaggregated group, those students’ scores may count toward accountability ratings at the district level. And even if not counted as a disaggregated group, these students will be included in the “all students” measure. *Id.* In 2004, the scores of 89.4% of all students enrolled in grades 3-11 were included in the accountability ratings. App. B at 5. Moreover, an even higher percentage—95.4%—of students was tested in 2004. *Id.* at 6.

Even if a small percentage of the students tested are not included in the accountability ratings, these students do not escape the accountability system. They still must pass the TAKS in the “high-stakes” grades in order to be promoted, and their failure on any portion of the test still triggers remedial measures. State Appellants’ Br. at 16-17. Accordingly, the fact that a small percentage of students’ test scores is not included in accountability ratings does not undermine the system as a whole.

4. The WOC Districts’ manipulation of test-score data is misleading.

Throughout their brief, the WOC Districts employ a sleight-of-hand with the TAKS test results that presents a highly misleading picture of student performance. As the State explained in its opening brief, the State made the decision to phase in the student passing standards, or “cut scores,” for the TAKS test over the first three years of the new test’s administration. Thus, for 2003, the cut scores (except in grades 11 and 12) were set at two

standard errors of measurement, or “SEM,” below the panel-recommended level.¹² *See* State Appellants’ Br. at App. I. In 2004, the cut scores (except in grades 11 and 12) were set at the more difficult one-SEM level. *Id.* And, in 2005, the cut scores (except in grades 11 and 12) reached the panel-recommended level.¹³ *Id.*

Instead of examining the percentage of students who passed the 2004 tests using the cut score appropriate to their grade (for most students, the one-SEM standard), the WOC Districts took the performance on the 2004 tests and judged it by the panel-recommended standard, which did not take effect until 2005. Thus, they evaluated performance on the 2004 TAKS by the higher 2005 standard, thereby manufacturing a perceived “crisis” that does not exist. In fact, the 2004 TAKS scores greatly exceeded expectations.¹⁴ Although the Districts disclosed this inappropriate comparison the first time they employed it, *see* WOC. Br. at 17, they failed to do so later in the brief, in which they make this erroneous comparison numerous times. *See, e.g.*, WOC Br. at 17, 38, 52 n.45, 107. Even worse, the WOC Districts at one point attempt to use the 2004 data to predict results an *additional* year into the future—2006. *See* WOC Br. at 38. Of course, that projection makes the extremely unlikely assumption that the students will learn nothing over the two-year period between 2004 and

12. As the State explained in its opening brief, a SEM unit represents the natural variation in performance an individual student would experience if he or she took the same test multiple times. *See* 25.RR.34; *see generally* State Appellants’ Br. at 11.

13. The cut scores for the eleventh- and twelfth-grade TAKS tests will be at the panel-recommended level in 2006 and 2007, respectively. *See* State Appellants’ Br. at App. I.

14. TEA had projected that up to 10% of districts might be rated “academically unacceptable” in 2004 because of the introduction of the TAKS test. *See* WOC Ex. 808 at 4. But because student performance exceeded expectations, only 1.9% of districts (23 of 1,227) received that rating in 2004. *See* App. B at 1.

2006. And, the WOC Districts do not cite TEA materials for this projection. Rather, they cite a newspaper article. *Id.*

Equally as misleading is the WOC Districts' citation of TEA's Legislative Appropriations Request for fiscal years 2006-07 to demonstrate inadequacy in the system. *Id.* Written in 2004, TEA's projection of the number of unacceptable districts and campuses were for 2005 (not 2006, as the WOC Districts allege) and were based on TAKS scores from 2003. *See* WOC Ex. 808 at 4. These projections are only that—projections. And, because they are based on 2003 test scores, they are necessarily a maximum. Moreover, if performance is better than expected, the actual results will be drastically lower than the projections, as in fact occurred in 2004. TEA projected that 10% of districts in 2004 would receive an “academically unacceptable” rating in 2004. *Id.* But when the ratings were actually calculated, only 1.9% of districts received that rating. App. B. at 1. Given that 2005 test scores also exceeded expectations, *see infra* at 36, there is every reason to believe that the number of unacceptable districts in 2005 will be significantly lower than TEA's projection (made in 2004, and based on 2003 test scores). While projections can be useful tools for the Legislature to consider in allocating state resources, they cannot be used to demonstrate a constitutional violation.

Most importantly, the WOC Districts were incorrect in their prediction of impending disaster for 2005, when the panel-recommended cut scores were completely phased in for most grades. Taking their evaluation of 2004 performance at 2005 standards and comparing it to *actual* performance in 2005, significant improvement is apparent. On eighth-grade

math, for example, the WOC Districts' methodology of applying 2005 standards to 2004 test scores would yield a pass rate of 57%; yet, in 2005, 61% actually passed—a 4-point improvement.¹⁵ See http://www.tea.state.us/student.assessment/reporting/results/summary/sum05/taks/gr8_apr05.pdf. Similar improvement occurred in all disaggregated groups as well. See *id.* This pattern of steady or improving performance in 2005 holds for almost all grades and subjects.¹⁶ See <http://www.tea.state.us/student.assessment/reporting/results/summary/sum05/taks/index.html>.

Properly understood, the TAKS results demonstrate steady progress toward the State's educational goals. The statistics cited in the WOC Districts' briefs, by contrast, are undermined by their creative application of past or current performance to future standards.¹⁷ The Court should not rely on the WOC Districts' misleading calculations.

15. This occurred despite a slight decrease in the actual passing rate, from 66% (with the 2004 one-SEM passing standard) in 2004 to 61% (with tougher panel-recommended passing standard) in 2005. See http://www.tea.state.us/student.assessment/reporting/results/summary/sum05/taks/gr8_apr05.pdf.

16. The 2005 TAKS results from the Spring administration are still preliminary, and will be finalized sometime in June 2005.

17. The Edgewood Districts also claim that economically disadvantaged students taking the TAAS test for the first time in 1993-94 passed at rates of more than 10% higher than the economically disadvantaged students who took the TAKS test for the first time in 2002-03. Edge. Appellees' Br. at 43. The Districts suggest that this is evidence that the system is now failing its economically disadvantaged students. Even if this score disparity were true, the comparison would be meaningless because the TAAS and the TAKS are two very different tests, with TAKS being much more difficult, 5.RR.26; 6.RR.114-15; 22.RR.195, and testing several more subject areas. The accuracy of the Edgewood Districts' comparison is uncertain, however, because neither of the record cites referenced by the Edgewood Districts makes the comparison they describe. See 4.CR.962; FOF 574.

5. The accountability system is not irrational because it does not guarantee 100% educational success.

The Districts claim that the system is inadequate because the academic performance of economically disadvantaged students lags behind that of other students. WOC Br. at 19-20; Edge. Appellees' Br. at 44-46. Texas has a challenging student population to educate, and much work will always remain to be done. In Texas, as in all other States, there remains an unfortunate "achievement gap" between economically disadvantaged children and other children. It is that gap that Texas is working to close, with much success.

Nevertheless, the Districts appear to criticize the accountability ratings because they do not magically require all students to pass the TAKS test or graduate from high school. *See* WOC Br. at 87; Edge. Appellees' Br. at 28-35. But of course, as the WOC Districts concede, it is beyond the power of the State to ensure 100% success. *See* WOC Br. at 80; *see also Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365, 383 n.11 (N.C. 2004) ("The failure to obtain [a sound basic] education may be due to any number of reasons beyond the defendant State's control, not the least of which may be the student's lack of individual effort and a failure on the part of parents and other caregivers to meet their responsibilities."). And, if a 100% success rate is ever achieved, these very Districts would no doubt challenge the system as being too lenient, thus failing to measure a general diffusion of knowledge. Moreover, as the State has demonstrated, ever-increasing standards and a strong accountability system are the keys to enhancing student achievement. *See* State Appellants' Br. at 19-20. It would be unwise to reverse Texas's commitment to high standards in order

to achieve a numerically perfect score when the result would ultimately be detrimental to Texas's educational system and to its children.

Nevertheless, the Districts cite the less-than-perfect scores on accountability indicators as proof that some students lack "access" to a general diffusion of knowledge. *See* WOC Br. at 80; Edge. Appellees' Br. at 29; Alv. Appellees' Br. at 21-22. The Districts appear to believe that "access" has not been provided unless a student is ultimately successful, which effectively holds the State to a 100% success rate.¹⁸

But the Constitution does not mandate perfection. The accountability system provides "access" to a general diffusion of knowledge by establishing incentives for districts and individual schools to do everything they can to educate students and increase their performance. Texas students' performance, although undoubtedly imperfect, is consistently improving at all levels, demonstrating that students have "access" to an adequate education. As described by the Massachusetts Supreme Judicial Court, the constitutional standard is "whether this record of considerable progress, marred by areas of real and in some instances profound failure, offends the education clause." *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134, 1152 (Mass. 2005). In Texas, as in Massachusetts, the answer is no. Surely, given

18. The Edgewood Districts continue to highlight the lower scores of limited-English-proficient (LEP) students as evidence that Texas's system fails to provide an adequate and efficient education. Edge. Appellees' Br. at 47-48. As the State has explained, *see generally* State Appellees' Br. at 21-22, LEP students (as their designation suggests) lack proficiency in the English language. The TAKS test, when given in English, is inherently more challenging to LEP students than to students who understand English. Furthermore, once a LEP student becomes proficient in English, he or she is removed from that disaggregated group—meaning that the success stories (students who become proficient) are never reflected in the reported LEP scores. Thus, the LEP passing rate on English-language tests can never be expected to mirror—and in fact will invariably be lower than—that of other groups, which contain 100% English-proficient students. Therefore, LEP scores are not an appropriate measure of the adequacy or efficiency of Texas's educational system.

Texas’s nationally-recognized success in closing the achievement gap and in producing minority test scores that lead the nation, *see generally* State Appellants’ Br. at 1-2, the Texas accountability system cannot be deemed irrational.

6. The Districts’ criticisms of the NAEP national achievement test contradict the evidence in the record—even their own witnesses’ testimony—and should be given no credence.

In its opening brief, the State explained that Texas’s performance on the National Assessment of Educational Progress (NAEP) confirmed the adequacy of the system. State Appellants’ Br. at 19-20, 51. The WOC Districts try to discredit the NAEP results. *See* WOC Br. at 104-05. Their argument is unsupported by the record; in fact, it contradicts the testimony of the WOC Districts’ own witnesses.

NAEP tests a sample of fourth- and eighth-grade students in each State in reading and math. 27.RR.22. While not as comprehensive as Texas’s accountability system, NAEP’s value in assessing educational progress is unassailable.¹⁹ At trial, uncontested testimony by both WOC and State witnesses demonstrated that NAEP is highly regarded and commonly used by education professionals in evaluating States’ educational performance. 27.RR.19-20 (state expert Dr. David Armor describing NAEP as “unparalleled,” “unmatched,” and “high-caliber”); State Ex. 16302 at 30 (WOC witness and national expert Dr. David Grissmer, stating, “[A]s far as achievement goes, I think [NAEP] is the best.”); 5.RR.15 (Austin ISD Superintendent Pat Forgione, a WOC witness, describing NAEP as “the gold standard”). The

19. Given the Districts’ similar criticism of the scope of Texas’s system, it is difficult to conceive of any testing system that would meet the Districts’ standards, except perhaps one in which 100% of subjects were tested in every grade—a process of dubious utility that is by no means constitutionally mandated.

fact that NAEP results “do not indicate how well any particular school, school district, or region is performing,” WOC Br. at 105, does not diminish their value as information about student performance at the *statewide* level. The state accountability system measures student performance at the campus, district, and statewide level, identifies individual low-performing schools, and provides assistance and incentives for improvement. In conjunction, NAEP scores, which show Texas far ahead of other States in educating students with similar socioeconomic characteristics, confirm that Texas’s educational system as a whole is performing well.

The WOC Districts also criticize the State for using NAEP scores that were “adjusted” for socioeconomic characteristics “by State expert Dr. David Armor,” as if to suggest that the State’s expert improperly manipulated the test scores. WOC Br. at 105. This criticism is surprising given that WOC expert, Dr. Grissmer, used identically adjusted data and stated that adjusted data—rather than raw scores—were the appropriate means of evaluating a State’s educational system. State Ex. 15864 at 1-2 (State Appellants’ Br. at App. P). Dr. Grissmer also confirmed that the adjusted data demonstrated the success of Texas’s educational system. *Id.* at 2. In fact, the State relied on the conclusions of both Dr. Armor and Dr. Grissmer in its Appellants’ Brief. *See* State Appellants’ Br. at 1-2, 19-20 & n.21. Accordingly, the WOC Districts’ attempt to disparage both the NAEP test in general and the use of adjusted scores in particular strains credulity.

7. Not only is the record devoid of evidence disproving the rationality of the accountability system, the evidence conclusively establishes that the system is rational and reasonable.

In sum, to the extent the Districts' additional criticisms of the accountability system are valid at all, they should be put to rest as policy disagreements that do not call into question the system's rationality. Indeed, Dr. Grissmer, the WOC Districts' national expert, had the following praise for Texas' system:

Q: Are you familiar from your research not only in this report, but in other reports with the Texas accountability system?

A: Pretty much, yeah.

Q: And how would you characterize that accountability system, Doctor?

A: Well, I think it's—the results would indicate that it's a pretty good system. [I]t has focused attention [on] minority kids in particular . . . the kids that I think need the attention. It's been a system that I think has followed what I consider to be the best way to do it, is not to set absolutely high impossible standards, which a couple of states have done, but to sort of set the standards in a way that is achievable but makes progress for teachers.

. . .

Q: Why is that a good aspect?

A: I think mainly because if you set standards really high, you run into—I mean, if it's impossible standards, any of us facing impossible standards goes into morale problems. I mean, it just—you can't do it, you sort of give up. So I think there's a real balancing act between setting standards that are realistic, obtainable, but yet make significant progress. And I think Texas has done that fairly well . . .

State Ex. 16302 at 49-50 (Grissmer depo).

By enacting a system that (1) is clearly rational, (2) evokes praise from even the *Districts'* expert as having “followed . . . the best way to do it,” *id.* at 49, (3) has produced consistent improvement over time, and (4) places Texas schools among the most effective in the nation at educating a challenging population, the Legislature cannot be said to have “define[d] what constitutes a general diffusion of knowledge so low as to avoid its obligation

to make suitable provision imposed by article VII, section 1.” *West Orange-Cove*, 107 S.W.3d at 581 n.117 (quoting *Edgewood IV*, 917 S.W.2d at 730 n.8). The Districts utterly failed to defeat the presumption that the accountability system is an appropriate measure of a general diffusion of knowledge. Because this presumption stands, the Court should reverse the trial court’s judgment and hold that Texas’s system is constitutionally adequate.

C. The Court Should Decline the Districts’ Invitation to Constitutionalize Educational “Inputs.”

In an opinion that the WOC Districts acknowledge was the foundation of the Court’s decision in *Edgewood IV*, WOC Br. at 87, then-Justice Cornyn made clear that the adequacy of the educational system should “focus on results”—not on money or any other input. *Edgewood III*, 826 S.W.2d at 527 (Cornyn, J., concurring and dissenting). Justice Cornyn cautioned against straying from results as the measure of adequacy:

And if student performance is not our goal, we are engaged in a perverse exercise that will likely have ramifications un contemplated and unintended by a majority of the court.

Id. at 531. Nonetheless, the Districts ask the Court to examine the “inputs” of education, including items such as teachers, library books, facilities, and—primarily—money. As the State explained in its opening brief, examination of inputs is not necessary if the “outputs,” *i.e.*, educational results, meet constitutional requirements. *See* State Appellants’ Br. at 70-72. Moreover, examination of inputs is fraught with the danger of encroaching on the exclusive policymaking authority of the Legislature, as demonstrated by the experience of other States. *See id.* at 73-77. The Districts’ only response is to repeat the obvious: that other States have

seen fit to examine inputs as a measure of adequacy.²⁰ The Districts provide no standards by which the Court could evaluate all of the various educational inputs. According to the Districts, apparently, the Court will “know [adequacy] when [it] see[s] it.” *Jacobellis*, 378 U.S. at 197 (Stewart, J., concurring). The Court should not follow the Districts onto such uncertain ground.

Although inputs are undoubtedly important to producing educational results, there is no consensus among experts in the field of education as to whether and to what degree particular inputs impact student performance. *See* 27.RR.91-92. The Districts propose that the State simply give them more and more money, and that they will figure out how to spend it to improve performance. But money is the biggest input of all, and, as Justice Cornyn recognized, “any correlation between funding and educational results is tenuous at best.” *Edgewood III*, 826 S.W.2d at 531 (Cornyn, J., concurring and dissenting). Moreover, “it seems highly unlikely that judges are more qualified to discover a positive correlation

20. In its opening brief, the State cited decisions from the high courts of several States to demonstrate the perils of judicial involvement in assessing the educational inputs and funding necessary to achieve an adequate system of public education. State Appellants’ Br. at 73-77 & n.49. The State’s point was—and continues to be—that the education system, which depends not only on policy decisions and budgetary allocations, but also on highly technical expertise to determine the most educationally sound options to educate children, is uniquely unsuited for judicial review. In an apparent attempt to counter the State’s argument, the WOC and Edgewood Districts cite the high courts of States that have elected to take the very same perilous path of which the State warns by embarking on detailed judicial analyses of the inputs of their respective school finance systems. *See* WOC Br. at 90-95, 98-99; Edge. Appellees’ Br. at 49-51. But the fact that some States’ courts have chosen to oversee their public school systems does not lessen the intrusion that review would effect on the Legislature’s province to determine educational policy, not to mention the burden the Court will be assigning to itself should it chose to follow that path. The Court should reject the Districts’ invitation to wander into “the thicket” of judicial oversight of Texas’s school finance system. It should confine its scrutiny, at most, to a rational-basis review of the output-driven accountability system.

between public school spending and academic achievement than the experts in the field.”
Id. at 530.

The Districts give the Court no guidance whatsoever as to how the Court could possibly measure the adequacy of educational inputs. For instance, how could the Court evaluate whether particular facilities, teachers, or libraries are sufficient to provide a constitutionally adequate education? And how could the Court determine the interplay among the various inputs, for instance, whether a certain level of facilities could overcome uncertified teachers, whether a certain level of teacher or library quality could overcome old facilities, or whether extraordinary school leadership could overcome lower levels of funding? There simply is no judicially manageable way to answer these questions. Any attempt to do so would lead to the constitutionalization of individual inputs, which would impermissibly encroach on the Legislature’s policymaking authority.

For example, the Districts cite early childhood education as an important input crucial to adequate academic achievement in later years. *See, e.g.*, WOC Br. at 81. Assuming this is true as a policy matter, and that the Court were to hold that early childhood education for three- and four-year-olds is a necessary element of a constitutionally adequate education, the effect of such a holding would extend far beyond the judicial realm. If this input were constitutionalized, presumably all districts would have to offer it, regardless of whether it is necessary in a particular district or whether there is a demand for such services in a particular district. Moreover, if preschool for three- and four-year-olds is constitutionally required, then perhaps in time it would become constitutionally required to begin every child’s

schooling at three years of age, or earlier. By constitutionalizing that particular input, therefore, the Court would start down a path that could lead to judicially lowering the age of mandatory schooling, undoubtedly a legislative policymaking function.

These dangers are manifest with all inputs. For instance, the Edgewood and Alvarado Districts ask the Court to find their facilities constitutionally inadequate. *See* Edge. Appellees’ Br. at 62-63; Alv. Appellees’ Br. at 22. Although the Districts present anecdotal evidence of facilities that are old, cafeterias that double as gyms, and schools that have swamp coolers instead of air conditioning, they provide no evidence that these alleged deficiencies result in a constitutionally inadequate education.²¹

The same rationale applies to evaluating funding as an element of a constitutionally adequate education. In its opening brief, the State pointed out the dangers of relying on studies that attempt to calculate the cost of providing an adequate education. *See* State Appellants’ Br. at 71-72. Even the WOC Districts, who introduced cost studies as evidence in the trial court, admit in their brief that these studies are not meant to be “precise.” WOC Br. at 112. This admission reinforces the problems presented by attempting to measure constitutional adequacy through inputs—such inputs are inherently imprecise and an unreliable metric.

21. The districts claim that schools with certified librarians, more certified teachers, more library books, and more money also happen to have better performance. Even if that were true, it would not necessarily establish a causal relationship between those inputs and improved performance. *See Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 718 (Tex. 1997). For instance, the Districts provided no evidence that hiring a certified librarian would lead to better student performance.

Moreover, there is no evidence that more money—or any other input—would lead to better performance. For instance, the Districts rely heavily on the achievement gap between economically disadvantaged students and other children to demonstrate, in their view, inadequate funding in the system. No State has managed to definitively close this gap, and experts in the field of education disagree on how to attack the problem. Dr. Armor, for instance, concluded that the school system can do very little to close the gap, and that the only potential solution is to reduce poverty. 27.RR.124-27. The Districts, on the other hand, believe that they can close the gap if only they are given more money.²² In this regard, the WOC Districts launch an unjustified attack on and attempt to discredit Dr. Armor, mischaracterizing him as “the lone dissenter.”²³ WOC Br. at 114 n.73. But the Districts

22. The Districts rely on three witnesses to demonstrate their argument: Dr. Andrew Reschovsky, Lynn Moak, and Dr. Grissmer. See WOC Br. at 114. Dr. Reschovsky is an economist—not an expert on education, and his cost study is not an appropriate tool for determining constitutional issues, as explained in the State’s opening brief. State Appellants’ Br. at 71-72. Mr. Moak, a former TEA employee, testified that the achievement gap present under the TAAS test closed over the course of the 1990s, a period during which districts consistently raised their tax rates and spent more money. 7.RR.190-93. However, what Mr. Moak describes is at most an association between spending and achievement and does not amount to a causal link. See *Havner*, 953 S.W.2d at 718. That the achievement gap narrowed over the course of the TAAS may have been in part a reflection of the TAAS test’s having become too easy for the highest achieving students, which contributed to the need to develop a new curriculum and a new test. Moreover, the gains in performance in the 1990s could just as easily be attributed to the initial implementation of the accountability system, which the parties’ experts agreed improves performance. 27.RR.46-47, 75; State Ex. 15864 at 38. Finally, the Districts rely on the testimony of Dr. Grissmer, who believes that “money and *how you spend it* can make a significant difference.” WOC Br. at 113 (emphasis added). Obviously, Dr. Grissmer and Dr. Armor, both experts in the education field, disagree on this issue (although Dr. Grissmer had considerable praise for Texas’s accountability system, see Part II.B.6, *supra*). If there is no agreement among the experts, it is likewise beyond the competency of the judiciary to determine the answer.

23. In their brief, the WOC Districts mischaracterize the testimony of Dr. Armor, the State’s witness and a national expert in the educational field. See WOC Br. at 114 n.73. They misrepresent his testimony as concluding that academic achievement is determined by race. See *id.* Although during cross-examination the Districts repeatedly attempted to elicit such testimony from Dr. Armor, he never departed from his opinion that family characteristics are the primary determining factor in academic achievement, stating “the strongest influences on academic achievement are definitely from the family.” 27.RR.54; see also 27.RR.25, 55, 62-63. Indeed, the Districts’ witnesses agreed that the achievement gap arises before children even reach

ignore Justice Cornyn’s opinion in *Edgewood III*, which, relying on a large body of educational research, echoed Dr. Armor’s view: “[A]ny correlation between funding and educational results is tenuous at best.” 826 S.W.2d at 531 (Cornyn, J., concurring and dissenting). In fact, as Justice Cornyn noted, the Districts—not Dr. Armor—hold the minority view: “[M]ost educational experts agree that there is no direct correlation between money and educational achievement.” *Id.* at 530.

There is undoubtedly disagreement among experts in the field of education about the effect of money—and other inputs—on educational achievement. But it is beyond the competency of the judiciary to resolve this issue. Rather, the Legislature is the proper body to examine the research and determine whether the appropriate course of action involves making changes to the school system.²⁴

The Court has already approved the output-based accountability system selected by the Legislature as the presumptive measure of constitutional adequacy, *see West Orange-*

school age. 5.RR.22-23; 20.RR.10-11; State Ex. 16302 at 57. Because the family characteristics associated with lower achievement largely correlate with poverty and—to a lesser degree—race, those two factors are sometimes used as proxies for those family characteristics. 27.RR.30-31. Thus, although Dr. Armor recognized that there is an achievement gap between racial groups, he never remotely testified that race in any way contributed to the gap. In fact, he said, “there’s nothing intrinsic about race that explains differences.” 27.RR.31.

24. Indeed, the Legislature might rationally conclude that the best means for continuing to improve performance in public schools, especially for low-income and minority children, is not through simply spending more money, but rather is through fundamental reform, such as introducing competition into the system. Thus, the Legislature could consider and assess the substantial empirical evidence that competition through school choice programs, in addition to providing additional educational options to low-income children, can result in dramatic improvements in educational performance in the public schools themselves. *See, e.g.,* Jerry Ellig & Kenneth Kelly, *Competition and Quality in Deregulated Industries: Lessons for the Education Debate*, 6 TEX. REV. L. & POL. 335 (2002) (collecting studies); *see also* William G. Howell & Paul E. Peterson, *THE EDUCATION GAP: VOUCHERS AND URBAN SCHOOLS* (Brookings Institution Press 2002). Of course, that policy judgment, as with the plethora of other educational policy judgments challenged by the Districts, is entrusted by the Texas Constitution to the wisdom of the Legislature.

Cove, 107 S.W.3d at 571, 579-81, and has necessarily rejected inputs as an independent constitutional element. Because, as the State has demonstrated, the accountability system is rational, the Court need not revisit its decision, grounded in Justice Cornyn's opinion in *Edgewood III*, to judge adequacy by the rationality of the accountability system. Accordingly, the Court should reverse the trial court's judgment and hold that the system is constitutionally adequate as a matter of law.

III. FUNDING FOR SCHOOL FACILITIES IN TEXAS IS CONSTITUTIONALLY EFFICIENT AS A MATTER OF LAW.

The State has demonstrated that the school finance system is presumptively efficient because it is adequate. *See* Part II, *supra*. To rebut this presumption with respect to facilities funding, the Edgewood and Alvarado Districts were required to show a gap based on the Districts' comparative facilities needs on the order of the gross disparity in access to revenue that the Court found unconstitutional in *Edgewood I*. The evidence provided by the Districts failed to meet that standard, and none of their arguments can support the trial court's judgment.

The Districts erroneously argue that the trial court correctly found funding for school facilities is unconstitutionally inefficient because: (1) the system is not adequate; (2) the disparity between property-wealthy and property-poor districts' access to revenue for facilities is substantially unequal; and (3) the means chosen by the Legislature to distribute school-facilities funding allows vast disparities in districts' access to such funding. Because none of the Districts' arguments can withstand scrutiny, the Court should reject them.

First, Texas’s system of accountability meets or exceeds what is required to provide a general diffusion of knowledge, and therefore, is adequate. And because the Edgewood and Alvarado Districts are meeting the State’s accountability system with current levels of funding, the school finance system is presumptively efficient. Second, the Districts cannot, as a matter of law, defeat that presumption because they failed to prove that districts have similar *needs* statewide such that any disparity in access to facilities funding is relevant. And third, because the Districts have not, in any event, demonstrated that the facilities-funding system allows gross disparities in access to facilities funding similar to those that existed at the time of *Edgewood I*, the system cannot be invalidated based on the trial court’s and the Districts’ disagreement with its rationally chosen elements.

A. Because Texas’s Educational System Is Constitutionally Adequate, It Is Presumptively Constitutionally Efficient.

The State has conclusively proven that its accountability system more than adequately provides for a general diffusion of knowledge. *See* Part II, *supra*; State Appellants’ Br. at 44-75. It is also undisputed that the Edgewood and Alvarado Districts, as a whole, are meeting the State’s accountability measures with current levels of funding. Nevertheless, the Edgewood and Alvarado Districts maintain that they lack sufficient funding to provide a general diffusion of knowledge, and, therefore, that the State’s system for providing facilities funding is inefficient. *Edge. Appellees’ Br.* at 58; *Alv. Appellees’ Br.* at 35.²⁵ Their

25. The Edgewood Districts ignore the Court’s most recent standard for measuring the efficiency of the school finance system and assert that the Court can measure the system’s efficiency without considering whether the system provides a general diffusion of knowledge. *Edge. Appellees’ Br.* at 59 (citing *Edgewood I*, 777 S.W.2d at 397). Although a specific cost of providing a general diffusion of knowledge is not necessary to the Court’s measurement of the system’s efficiency, the Court has made clear

argument, like the trial court’s conclusion, ignores the fact that efficiency in funding is required only up to the level necessary to provide a general diffusion of knowledge. *Edgewood IV*, 917 S.W.2d at 729-30. Because all districts are providing a general diffusion of knowledge within the current funding system, the system is presumptively efficient. *See* Part II, *supra*; State Appellants’ Br. at 44-75; *Edgewood IV*, 917 S.W.2d at 746.

B. The Edgewood and Alvarado Districts Failed to Point to Any Evidence in the Record on the Necessary Element of Comparative Need.

The Alvarado Districts effectively concede that they were required to demonstrate comparative need for facilities among districts. Alv. Appellees’ Br. at 36. By contrast, the Edgewood Districts urge the Court to evaluate their facilities-efficiency claim with no regard for comparative need, using instead a pure “gap” analysis. Edge. Appellees’ Br. at 58-59, 64. Taken to its logical conclusion, the Edgewood Districts’ argument would entitle them to equal access to *all* revenue, even that which is not necessary to achieve a general diffusion of knowledge. The Court should reject the Edgewood Districts’ argument because it could eventually lead to the “leveling down” of the system—a consequence the Court has expressly held would be unacceptable. *Edgewood IV*, 917 S.W.2d at 729-30.

As the State demonstrated in its opening brief, the Court should not assume that all districts have similar facilities needs. *See* State Appellants’ Br. at 83-85. Indeed, the evidence establishes the contrary: there are wide disparities statewide in districts’ needs for facilities. *See* Alv. Ex. 9008 at 2. Because similar need for facilities funding—unlike

that the qualitative aspect of the system (adequacy) is the focus of an efficiency analysis. *Edgewood IV*, 917 S.W.2d at 733.

maintenance and operations (M&O) funding—cannot be assumed, any disparity in access to *facilities* funds is meaningless without a statewide comparison of actual district needs.

To meet their burden of proof, the Districts were required to provide evidence of facilities needs among districts statewide and give the Court some frame of reference for evaluating any disparity in access to revenue. The Districts provided no such evidence, depriving the Court of a necessary tool for evaluating the relevance of any gap in access to facilities funds. Accordingly, the Edgewood and Alvarado Districts' facilities claim fails for lack of proof.

The Edgewood and Alvarado Districts point to anecdotal and conclusory evidence that some school districts need to construct new facilities or make improvements to already-existing school facilities. Edge. Appellees' Br. at 65-66; Alv. Appellees' Br. at 36. But whether some districts have facilities needs or desires is not the relevant question. The relevant question is comparative need statewide, which would enable the Court to evaluate any gap in access to facilities funding.

The Edgewood Districts also cite examples of property-wealthy and property-poor districts' bond packages and compare the tax-rate increases those districts would have to incur to pay for the bonded debt. *Id.* at 66. This comparison fails to satisfy the Districts' burden to compare their facilities *needs* because it neglects to differentiate between actual need for an educational facility, *i.e.*, a facility that contributes to the provision of a general diffusion of knowledge, and a locally-desired capital project that is not necessary for a general diffusion of knowledge.

The Edgewood and Alvarado Districts cannot carry their heavy burden to prove the school finance system is constitutionally inefficient with anecdotal or conclusory evidence of need or with evidence that some districts may have more or better facilities than others. Because the Edgewood and Alvarado Districts did not meet their burden, their claim fails for lack of proof, and the trial court's judgment holding the system inefficient with regard to facilities should be reversed.

C. Even Absent a Showing of Comparative Need, the Disparity in Access to Revenue for Facilities Does Not Render the Entire School Finance System Unconstitutionally Inefficient.

Even if the Court were to conclude that the Edgewood and Alvarado Districts can maintain their facilities-efficiency claim without evidence of comparative need, the trial court's judgment on this claim should still be reversed because the disparities in access to revenue identified by the Districts are insufficient to render the school finance system unconstitutionally inefficient. The Edgewood and Alvarado Districts introduced three experts to prove the alleged inefficiency of the system. Because none of them provided evidence to establish a tax-rate disparity similar to that in *Edgewood I*, the Districts failed to prove their claim.²⁶

26. In the Edgewood and Alvarado Districts' cross-appeal, the Districts challenge the trial court's conclusion that the school finance system with respect to maintenance and operations is constitutionally efficient. Edge. Appellants' Br. at 23; Alv. Appellants' Br. at 11. To support their claim, the Districts point to, among other measures, a 17-cent tax-rate gap that was identified by the State at trial. Edge. Appellants' Br. at 32; Alv. Appellants' Br. at 14. In its appellee's brief in the cross-appeal, the State recognized that the Court has relied in the past on the tax-rate gap to measure the system's efficiency, but cautioned the Court from relying exclusively on the 17-cent gap developed at trial because it could not be directly compared to the 1995 gap identified by the Court in *Edgewood IV*, 917 S.W.2d at 731 & n.12. State Appellees' Br. at 26, 29. Instead, because today's M&O revenue gap and the revenue gap that existed in 1995 were calculated based on the same method, the State suggested that consideration of that measure might be more helpful to the Court. *Id.* at 30-31. Because the Court did not calculate a funding gap with regard to *facilities* in

One expert, Craig Foster, calculated an 8-cent tax-rate disparity. 28.RR.109. To reach this conclusion, Foster assumed that all districts are assessing the full 29-cent interest and sinking (I&S) tax rate, which would in turn entitle the districts to the maximum yield under the Existing Debt Allotment (EDA) of \$1,015 per student in average daily attendance.²⁷ 28.RR.109. Foster’s assumption is facially incorrect, as undisputed evidence demonstrates that only a small percentage of districts are actually accessing the full 29-cent I&S tax rate, 14.RR.77; 27.RR.199, and that approximately 25% of districts assess no I&S taxes at all. State Ex. 16060 at 27; 14.RR.77; 27.RR.199. Because Foster relies on a demonstrably false assumption, his testimony is no evidence of a gap in facilities funding.

The Edgewood and Alvarado Districts do not even attempt to refute the fact that Foster’s calculation relies on a false assumption. Instead, the Edgewood Districts contend that Foster’s calculation actually understates the gap between property-wealthy and property-poor districts. Edge. Appellees’ Br. at 69. Even if the Court accepts this bare contention, there is no evidence whether Foster’s calculation might understate the gap by merely a penny, five cents, or an even greater amount. In fact, it is just as likely that Foster’s calculation *overstates* the gap given that some districts do not assess I&S taxes at all. 14.RR.77;

Edgewood IV, the tax-rate gap—the Court’s chosen method in *Edgewood IV*—continues to be a helpful measure of a facilities-efficiency claim.

27. The Edgewood Districts incorrectly criticize the State for mischaracterizing Foster’s calculations as applying to both M&O and I&S, collectively. Edge. Appellees’ Br. at 70. The State did not make that contention regarding Foster. Rather, the State challenged Albert Cortez’s evidence on that ground. State Appellants’ Br. at 88.

27.RR.199. Thus, to the extent Foster’s analysis is any evidence of a gap, it is evidence of only an 8-cent tax-rate gap and cannot be expanded by mere speculation.

The Districts’ second expert, Paul Colbert, provided no evidence of a tax-rate gap. Instead he calculated two other gaps: a *revenue* gap and a *capital expenditures* gap. Alv. Ex. 9008 at 2. In an after-the-fact attempt to make Colbert’s testimony relevant, the Edgewood Districts now assert that his revenue-gap calculation is “representative” of the tax-rate gap. Edge. Appellees’ Br. at 70. But that assertion misrepresents Colbert’s study. Colbert assumed an I&S tax rate and then, based on districts’ property wealth, he calculated the tax *revenue* that districts would generate from this assumed tax effort. *Id.* From that revenue gap, Colbert concluded that the average property-wealthy district had a revenue advantage per student over the property-poor districts of \$786 per student in average daily attendance.²⁸ *Id.* The Court should reject the Edgewood Districts’ attempt to mischaracterize their own expert’s testimony. Colbert did not calculate a tax-rate gap, and his testimony is no evidence that such a gap exists.

Colbert’s other purported gap measure—a \$589 gap in average capital expenditures per student between property-wealthy and property-poor districts—is also insufficient to invalidate the system. Alv. Ex. 9008 at 2. Colbert examined the capital expenditures of all districts. 14.RR.112. In analyzing the districts’ expenditures, Colbert failed to distinguish between capital expenditures for personal property, *i.e.*, computers and copy machines, and

28. By contrast, Foster calculated a \$480 per student revenue gap. Alv. Ex. 9004 at 11; *see* 16.RR.8.

expenditures for construction or repair of school facilities. 14.RR.140. Because Colbert failed to distinguish between that portion of the expenditure gap attributable to maintenance and operations from that attributable to facilities, his opinion is no evidence of any *facilities* expenditure gap at all.

Even if the Court concludes that either Colbert’s revenue or expenditure gap amounts to some evidence of a facilities gap, neither amount is sufficient to render the entire system unconstitutionally inefficient. In *Edgewood I*, an average of \$2,000 more per year was spent on each student in the property-wealthy districts than was spent on each student in the property-poor districts. 777 S.W.2d at 392-93. Colbert’s expenditure gap amounts to \$589—approximately one quarter of the \$2,000 expenditure gap that existed in *Edgewood I*. 777 S.W.2d at 392-93. And, although Colbert’s \$786 revenue gap is slightly higher, it is still less than half the expenditure gap (approximately 40%) identified by the Court in *Edgewood I*.²⁹ Accordingly, even if the Court concludes that Colbert’s revenue or capital-expenditures gap calculations are helpful to the Court’s efficiency inquiry, neither disparity comes close to the gross disparities that existed in *Edgewood I*. Therefore, there is no evidence of a disparity in facilities funding that would render the entire system unconstitutionally inefficient.³⁰

29. The Court in *Edgewood IV* did not calculate a revenue gap. While this comparison is not exact, however, it is still a helpful demonstration that the disparity in funds that are available for districts to spend has decreased significantly since *Edgewood I*, given that a district’s revenue is at least a great as its expenditures.

30. In its opening brief, the State challenged the opinions of Albert Cortez, another of the Districts’ efficiency experts, because he failed to segregate that portion of the gap attributable to the Districts M&O tax effort from that attributable to their I&S tax effort. State Appellants’ Br. at 88. Although the Edgewood and Alvarado Districts do not dispute that Cortez failed to make a separate calculation for facilities, the

D. The Legislature’s Individual Policy Decisions in Creating the Facilities Funding System Cannot Render the Entire System of School Finance Constitutionally Inefficient.

Like the trial court, the Edgewood and Alvarado Districts attempt to demonstrate that the school finance system is unconstitutionally inefficient by focusing on the means by which the Legislature has chosen to provide facilities funding. In particular, the Edgewood and Alvarado Districts erroneously contend that (1) the removal of I&S tax revenue from Tier 2 of the FSP, (2) alleged uncertainty as to whether the Legislature will roll forward the EDA, and (3) reduced funding to the Instructional Facilities Allotment (IFA) have allowed the system to relapse to a level of inefficiency similar to what existed in *Edgewood I*. That the trial court and the Districts disagree with the Legislature’s policy choices is insufficient to invalidate the system because the means adopted by the Legislature to provide facilities funding are beyond the scope of the judiciary. *See Edgewood IV*, 917 S.W.2d at 759 (Hecht, J., concurring and dissenting). In any event, the legislative means are rational.

Districts’ I&S tax revenue is no longer subject to Tier 2 of the FSP and is, instead, equalized under the IFA and the EDA. Under the new facilities tier, districts with new instructional facilities apply for IFA funding, and those with the lowest property-wealth levels per student receive highest priority. TEX. EDUC. CODE §46.003; 19 TEX. ADMIN. CODE §61.1032(m) (2005). The EDA, by contrast, provides funding for already-existing facilities

Edgewood Districts nonetheless contend that Cortez’s opinion provides legally sufficient evidence that the system is inefficient. *Edge. Appellees’ Br.* at 71. But because Cortez failed to segregate the tax-rate gaps for M&O and I&S, his opinion amounts to no evidence that any disparity in access to I&S funding exists at all—much less evidence that a disparity in funding exists that is so great that it renders the school finance system unconstitutionally inefficient.

debt. TEX. EDUC. CODE §46.033; 19 TEX. ADMIN. CODE §61.1035(a)(2) (2005). At its inception, the EDA applied only to debt issued during the previous biennium. In each subsequent biennium, the Legislature has “rolled forward” the eligibility definition, ensuring continuous availability of EDA funding for existing facilities. 27.RR.215. Thus, currently, the debt for which EDA funding is sought must have been issued, and at least one payment made, in the 2002-03 school year. 27.RR.205; State Ex. 16429 at 25. This allows the Legislature to better estimate how much money to appropriate for districts’ existing facilities debt. 28.RR.151.

The Districts argue that the system is inefficient for the sole reason that I&S revenue is no longer included within the FSP and, thus, facilities funding is not subject to recapture. Edge. Appellees’ Br. at 53; Alv. Appellees’ Br. at 39. But the *method* of equalization creates no constitutional claim, as the Court has consistently refused to second-guess the Legislature’s methods. *Edgewood IV*, 917 S.W.2d at 759 (Hecht, J., concurring and dissenting). The facilities tier, like the FSP, equalizes districts’ access to facilities funding up to a level necessary to provide a general diffusion of knowledge—as demonstrated by the Districts’ satisfaction of the state accountability system. The Districts introduced no evidence to show that recapture is necessary to provide efficiency in facilities up to a general diffusion of knowledge. The only relevant question is whether the facilities tier meets that goal, not whether the Legislature could have chosen a different method to reach it. The Districts’ and the trial court’s criticisms of the Legislature’s chosen means are irrelevant to the system’s constitutionality.

Similarly, alleged “uncertainty” as to whether the EDA will be rolled forward each biennium does not render the system inefficient and is, in any event, overstated by the Districts. The Legislature has *never* failed to roll forward the EDA and has *never* failed to renew the funding necessary to the EDA’s operation. Neither does the reduction in funding to the IFA, for the 2003-04 biennium, invalidate the system with regard to facilities. A temporary reduction in funding, especially in the midst of a budgetary crisis, is not irrational. *Hancock*, 822 N.E.2d at 1155-56 (Marshall, C.J, concurring).

IV. NONE OF THE WOC DISTRICTS’ ARGUMENTS SUPPORTS THE TRIAL COURT’S ERRONEOUS CONCLUSION THAT THE SCHOOL FINANCE SYSTEM EFFECTS AN UNCONSTITUTIONAL STATE PROPERTY TAX.

In its opening brief, the State explained that the proper calculation of the tax “floor” includes the total cost to districts to comply with all state requirements, including (1) the accountability standards—*i.e.*, the provision of a general diffusion of knowledge—and (2) all other state requirements. The State further explained that the WOC Districts’ tax claims fail because the Districts did not provide proof of expenditures under these two categories segregated in any way from expenditures made to satisfy strictly local community preferences. And even if the Districts had attempted to make that showing, their tax claims would nonetheless have failed because every WOC District is meeting or exceeding state requirements—thus providing a general diffusion of knowledge—while also providing a wide variety of classes and programs far in excess of the state-required curriculum. Contrary to the trial court’s judgment, therefore, the Districts are providing a general diffusion of

knowledge and exercising meaningful discretion in setting their tax rates within the current system.

The WOC Districts do not deny that they are providing classes and programs that are not explicitly required by state law. Instead, they contend—in agreement with the trial court—that every class and program they offer, whether it is required by the State or not, should count toward the tax floor for one of three reasons: (1) they are necessary to meet the Districts’ expansive definition of a general diffusion of knowledge; (2) they are necessary to comply with state law; or (3) they are demanded by their communities and generally fulfill state requirements even though they are not required by state law. The trial court’s and the Districts’ definition of the tax floor to include local community desires is contrary to the Court’s precedent and would strip the State of any ability to control the floor—thus rendering it impossible for the State to place any cap on tax rates and prevent the development of an unconstitutional state property tax. The Court should reject the WOC Districts’ arguments and reverse the trial court’s judgment on this issue.

A. A “Third Layer” of Spending Is Not Necessary to Provide a General Diffusion of Knowledge.

The WOC Districts do not dispute that they failed to segregate expenses incurred in compliance with state law from expenses incurred to satisfy local preferences. They erroneously contend that they were not required to provide that level of proof because, according to the Districts, there is yet a “third layer” of spending that should be included in the tax floor: “[s]pending necessary to provide all students with a meaningful opportunity to learn state standards.” WOC Br. at 26. The Districts include in their “third layer” of

spending all extra-curricular activities and non-state-required classes, claiming that they are necessary to satisfy their expanded definition of a general diffusion of knowledge.

At the heart of the WOC Districts' argument is the incorrect assumption that the current accountability standards do not themselves provide for a general diffusion of knowledge and that the Districts must supplement those standards to meet their constitutional responsibilities. Although the Court has recognized that it could be possible for the Districts to rebut the presumption that the State's accountability system equates with a general diffusion of knowledge, *West Orange-Cove*, 107 S.W.3d at 581, the Districts failed to do so. *See* Part II, *supra*; State Appellants' Br. at 44-75. Accordingly, the Districts' erroneous definition of a general diffusion of knowledge cannot constitute the tax floor. The extra classes and programs each District offers are just that: extra. They are provided in the Districts' discretion and are not mandated by the State. Those expenditures are properly characterized as district decisions—based on local demands—to spend resources beyond what is necessary to comply with state requirements and, therefore, represent meaningful discretion.

Treating discretionary items as required by the State would allow districts to artificially drive up the cost of the tax floor—thus engineering their own state-property-tax claims. Rather, the Court should hold that the State's definition of the tax floor, which properly accounts for all items that districts are required by the State to provide and properly excludes items that districts exercise their own discretion to provide, is the proper measure of the tax floor.

B. A “Third Layer” of Spending Is Not Necessary to Capture Costs Associated With State Requirements.

The WOC Districts’ “third layer” is further flawed because it operates from the erroneous presumption that the State’s definition of the tax floor excludes some costs that are necessary to meet state requirements. For example, the WOC Districts claim that its “third layer” is necessary to capture costs associated with assisting students in passing through the “promotion gates,” and to provide qualified teachers, reasonable class sizes, staff development, remedial classes for students in danger of failing, and vocational and career classes. *See* WOC Br. at 28-29 (contending that the State’s tax floor measure excludes these items). But all of these are contemplated by and attainable within the accountability system and may be counted toward the tax floor upon a proper showing of proof.³¹ *See* Part IV.B.1, *infra* (describing required level of proof). Thus, the WOC Districts’ insistence that its “third layer” is necessary to account for all expenditures made in compliance with state law is incorrect.

The WOC Districts take particular issue with the State’s tax-floor formulation as excluding expenses districts incur to implement programs to assist students who are in danger of failing the TAKS test or dropping out of school. WOC Br. at 30-31 (citing TEX. EDUC. CODE §29.081(a), (b)). The Districts mischaracterize the State’s argument as excluding any cost of compliance with this statute from the tax floor on the ground that the statute does not

31. Of course, the districts are only required to provide career and technology classes in three out of eight available areas. 19 TEX. ADMIN. CODE §74.3(b)(2)(I) (2005). The cost to provide more than three categories should not be included in the cost of the tax floor because it exceeds state requirements.

directly mandate how districts must comply with it. Rather, it directs the ends to be achieved, leaving to districts' discretion the decision of how best to meet those ends.

The Districts' argument is flawed for two reasons. First, the State's tax-floor formulation would, upon a proper showing of proof, include legitimate expenses incurred to comply with state law, including Texas Education Code §29.081. Second, the WOC Districts' category of programs allegedly implemented to comply with §29.081 is far too broad, encompassing not just programs specifically designed to help failing students or prevent dropouts, but including all extra-curricular and co-curricular activities and the extensive lists of non-state-required classes offered by each of the Districts. *See* WOC Br. at 29-31.

- 1. Upon a proper showing of proof, legitimate expenses incurred to assist failing or dropout-prone students may be included in the tax floor.**

The WOC Districts incorrectly accuse the State of retreating to an argument that the Court rejected in *West Orange-Cove*: that nothing short of absolute State control can support an unconstitutional state-property-tax claim. WOC Br. at 25 (citing *West Orange-Cove*, 107 S.W.3d at 579). According to the Districts, because Texas Education Code §29.081 does not expressly require the particular means districts must use to comply with the statute, but only mandates the ends, the State seeks to exclude any costs incurred in compliance with the statute. WOC Br. at 30-33. The State has not made that argument, which would indeed erroneously limit the scope of the tax floor.

The State agrees that districts are required by §29.081 to implement programs to assist students in danger of failing the TAKS test or dropping out of school. TEX. EDUC. CODE §29.081(a), (b). The State recognizes that such programs cost money and accordingly provides districts with extra funding for these programs under Texas Education Code §42.152—the Compensatory Education Allotment. Thus, legitimate costs incurred to comply with §29.081 may be included in the tax floor. For example, it may be the case that after-school tutoring by teachers would benefit some students and be an option for districts to satisfy the requirements of §29.081.

A proper showing of *proof* is, however, required to include these expenses in the tax floor. It is not enough for the Districts to simply assert that some program or service is provided to attempt compliance with §29.081. Rather, to include such expenditures in the tax floor the Court should require the Districts to demonstrate that the chosen programs are, in fact, necessary to comply with the requirements of §29.081, *i.e.*, that the Districts cannot comply with §29.081 absent these programs, and if the cost exceeds the state-provided Compensatory Education Allotment, that there are no other, more cost effective, means available to satisfy those requirements. That proof, which is available only to the Districts, and not the State, would ensure that the tax floor includes costs truly expended in the fulfillment of state requirements.

The Districts admit that they offered no such proof at trial. Accordingly, these expenses, to the extent they may have been incurred, should be excluded from the cost of the tax floor.

2. Extra-curricular and co-curricular activities and the extensive lists of non-state-required classes cannot be considered “required” by the State under §29.081 of the Texas Education Code.

Even if the Court concludes that the WOC Districts have sufficiently proven that the programs they provide are necessary to comply with Texas Education Code §29.081 because they help students who are at risk of failing the TAKS or prevent dropouts, the Court should nonetheless reject the Districts’ attempt to shoe-horn into that category all extra-curricular activities (none of which are required by the State) and the exhaustive lists of non-state-required electives that they have chosen to offer. There is no dispute that extra-curricular activities and electives may be beneficial to students. But according to the Districts, those classes and programs should be considered *required* by §29.081 because they may “keep students interested in school” and thus prevent them from dropping out. WOC Br. at 29. That argument proves too much. Such an expansive interpretation of §29.081 is untenable and would render the State virtually powerless to prevent the development of an unconstitutional state property tax.

Every extra course, program, or activity should not be deemed “necessary” because it *might* encourage a student to stay in school. Instead, “necessary” must mean *necessary*. Otherwise, under the WOC Districts’ unlimited view of §29.081, districts could conceivably promise students \$1,000 in cash if they stay in school and graduate, and those costs would property be attributed to the state-mandated tax floor.

Moreover, the Districts offered no proof that their extra-curricular activities and extensive lists of elective classes actually do prevent dropouts, aside from their

superintendents’ stated belief that they do. The Districts presented no data as to the success rate of certain programs, nor did they present any other verifiable evidence of their programs’ effectiveness. A subjective belief that extra-curricular activities in general prevents dropouts is no *evidence* that a particular program actually has that effect. *Guadalupe-Blanco River Auth. v. Kraft*, 77 S.W.3d 805, 807-08 (Tex. 2002); *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 712-13 (Tex. 1997). Even if one assumes that there may be some students who would drop out of school but for an extra-curricular activity or an elective course (an assumption for which there was no proof at trial), the Districts did not even attempt to establish that there are no other, more cost effective ways to prevent dropouts.

The Court should reject the WOC Districts’ claim that essentially everything they provide in excess of explicit state law is actually “required” by Texas Education Code §29.081 based on no more than the Districts’ subjective belief that they might prevent students from dropping out of school.

C. The Cost of Items Provided by the Districts at the Behest of Their Local Communities—and Not at the Direction of *the State*—Should Not be Counted Toward the Tax Floor.

The WOC Districts also claim that their vast array of extra-curricular activities and non-state-required classes should count toward the tax floor because, according to the WOC Districts, “[n]early 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.” WOC Br. at 29-30. The Districts would also include

funds expended on teacher salaries in excess of the state-mandated minimum and the cost to maintain and operate community-demanded facilities. The WOC Districts misunderstand the elements of an unconstitutional state property tax. Even if their local communities and their own choices “force” districts to expend resources up to the tax cap, this action does not create an unconstitutional *state* property tax. As the Court has emphasized, “[t]he constitutional issue remains the extent of the *State’s* control.” *West Orange-Cove*, 107 S.W.3d at 583 (emphasis added). The Districts cannot claim that the State “forces” them to make these many and varied expenditures when they admit that these choices are driven by local demands.

1. The fact that the WOC Districts’ extensive lists of non-state-required classes may satisfy some element of the state curriculum should not lead to their inclusion in the tax floor.

The WOC Districts erroneously insist that classes not required by the state curriculum should count toward the tax floor because they are legitimate classes that may satisfy some element of the TEKS and because their communities have come to expect them. This purported tax-floor category is, for all practical purposes, unbounded, as demonstrated by the extensive lists of classes offered by the Districts.³² *See generally* State Appellants’ Br. at 105-22; *see also* Staff Responsibility Record (State Appellants’ Brief at App. T). This

32. The WOC Districts criticize the State for citing the Districts’ web sites as evidence of the various classes they are offering beyond those required by the State, WOC Br. at 48, even though, in the very same brief, they cite frequently to the TEA web site, *see, e.g., id.* at 14, 17 n.15 & n.16, 31 n.22, 32, 37, 38. The Districts go so far as to question whether the information on their own web sites and contained in their own course catalogues is correct. WOC Br. at 48. The State does not solely rely on the Districts’ allegedly unreliable web sites, however. It also provided TEA documentation of the Districts’ extensive class lists, which the Districts themselves provided to TEA. State Appellants’ Br. at App. T.

category would include any number or level of language classes that the Districts may choose to offer, an unlimited array of fine-arts or career and technology classes, and an array of extra- and co-curricular activities limited only by the imagination of the Districts and their communities. Under the Districts' formulation, the costs of all these extras would count toward the tax floor even though the State has taken care to define the required limits of all these categories—an action that should have the effect of preventing the creation of a state property tax. *See* 19 TEX. ADMIN. CODE §74.13(a)(1)(F) (2005) (requiring one language other than English through level III for the advanced high school program); *id.* §74.3(b)(2)(H) (2005) (requiring two out of four categories of fine arts classes); *id.* §74.3(b)(2)(I) (2005) (requiring three out of eight categories of career and technology classes); *see generally* 19 TEX. ADMIN. CODE chapter 74 (2005) (required curriculum and graduation requirements).

The WOC Districts' tax-floor definition would also include all AP classes and magnet programs, even though the State does not require them at all. One only has to look to Lubbock ISD's impressive magnet program—including magnet *elementary* schools with classes and activities extending far beyond the state-required curriculum—to understand the vast scope of possibilities that the Districts would like to include in the tax floor. *See* State Appellants' Br. at 117-19. The State has no interest in preventing districts from offering such programs if the local communities so desire. However, the State should not be held responsible for those local decisions by their being included in the tax floor.

The State does not dispute that many, if not all, of the classes offered by the Districts are legitimate, indeed helpful, and in most cases would satisfy some element of the state-required curriculum. *See* State Appellants' Br. at 104-05. But whether a district can choose to satisfy the curriculum in a very expensive way is not the test. The test is whether *state* requirements have left the Districts with no meaningful discretion in setting their tax rates. *West Orange-Cove*, 107 S.W.3d at 579-80.

Every WOC District chooses to offer classes well in excess of those required by the State in terms of whole subjects, categories, and levels of instruction. There is no evidence that those classes do not involve substantial additional costs, such as additional teacher salaries, curriculum development, and supplies. The WOC Districts attempt to argue that eliminating these classes would save no money because they would still have to provide a sufficient number of classes for their students to obtain the credits to graduate. WOC Br. at 48 & n.42 (citing superintendent testimony at 7.RR.117). But one superintendent's *ipse dixit* testimony to that effect is not evidence. *Guadalupe-Blanco River Auth.*, 77 S.W.3d at 807-08; *Havner*, 953 S.W.2d at 712-13. It is far from conclusive that a district would save no money by, for example, choosing to eliminate all foreign languages other than Spanish. While it is true that the district *may* need to increase the number of Spanish classes available to account for the extra students, it may not. And it is reasonable to expect that the district may realize some savings from economies of scale—in terms of number of teachers and curriculum-development costs—by focusing its foreign-language budget in one area.

Again, the State is by no means urging that districts must, or even should, make such reductions. The Districts' expansive programs and curricula are no doubt highly valued by their communities. But it is the *Districts' choice* to provide them, not any mandate from the State Legislature.

The sheer number and variety of the classes offered by the Districts above and beyond those required by the State casts considerable doubt on the Districts' conclusory claim that elimination of at least some of those classes would save no money. Common sense dictates that the Districts could save considerable money by judiciously examining their course offerings and paring them down.³³ There is certainly no evidence to the contrary—other than one superintendent's speculative belief that it is so. And, as they have made clear, the Districts do not want to pare down their offerings, because their local communities desire them.

More to the point, it was not the State's burden to prove that the Districts could save money by reducing their course offerings. It was not the State's burden to prove waste. It was the *Districts'* burden to show that, even if they eliminated the non-mandated classes and programs, they still would have no meaningful discretion in setting their tax rates. Because

33. The WOC Districts incorrectly claim that they have no control over the extent of their course lists because, according to the Districts, 19 Texas Administrative Code §74.3(b)(4) “requires that districts provide a course when requested by more than ten students.” WOC Br. at 48. But that provision only applies to courses that are *required by* the State for graduation, 19 TEX. ADMIN. CODE §74.3(b)(4) (2005), as is expressly made clear by the following subsection, which states: “Nothing in this chapter shall be construed to require a district to offer a specific course in the foundation and enrichment curriculum except as required by this subsection.” *Id.* §74.3(c). The Districts could, at any time, eliminate any class that is not *required* for graduation, and §74.3(b)(4) would be no impediment, regardless of how many students demanded it.

they did not even attempt to make any such showing, the cost of all the extra classes and programs should be excluded from the tax floor.

2. Teacher salaries in excess of the state-mandated minimum are discretionary expenses and should be excluded from the tax floor.

The WOC Districts erroneously maintain that the cost of teacher salaries over the state-mandated minimum should be included in the tax floor because, according to superintendent testimony, if the Districts paid teachers only the minimum salary, the Districts would not be able to hire and retain certified and highly qualified teachers “as required by the State and [the federal government under the No Child Left Behind Act].” WOC Br. at 49. The Court should reject this contention for two reasons. First, the Districts offered no evidence, other than their superintendents’ conclusory beliefs, to support their theory that they have no choice but to pay above the minimum salary schedule to attract highly qualified teachers.³⁴ Second, even assuming that were true, district decisions—and not state requirements—have driven up teacher salaries.

The Court should, at the outset, reject the WOC Districts’ premise that, if they do not pay above the state-mandated minimum—and in some cases well above—they have no

34. The WOC Districts give the incorrect impression that §21.402(d) of the Education Code entirely prevents some districts from ever paying teachers according to the minimum salary schedule. See WOC Br. at 49 n.43. Section 21.402(d) requires a district to pay a teacher *who was employed in the district in the 2000-01 school year* a salary at least equal to the salary the teacher received that year. TEX. EDUC. CODE §21.402(d). Thus, a district could not, today, decrease the salary of a teacher who has been employed by the district since the 2000-01 school year to a salary lower than what he or she received that year. However, the district could choose to decrease that teacher’s salary to the 2000-01 year salary, and it could choose to pay all new or transferring teachers according to the minimum salary schedule. In any event, the fact that the Districts may not now decrease the pay of teachers who qualify under §21.402(d) to an amount below their 2000-01 salary does not change the fact that it was the Districts, not the State, that elected to pay the higher salary in the first instance. And, in any event, the Districts’ proof on this issue is deficient because they did not make any attempt to demonstrate how many teachers fall into this category.

chance of attracting highly qualified teachers.³⁵ Similarly, the Court should not credit the Districts' suggestion that the NCLB requirement that districts employ "highly qualified" teachers will necessarily require ever-higher salaries in the future. Again, there is no evidence of this apart from the superintendents' subjective beliefs.³⁶

Even assuming that the Districts are correct in their assumption that they could not attract qualified teachers at the minimum salary schedule, they still cannot claim that the *State* forced them to go above the salary schedule. Although the WOC Districts argue that the cost to pay their teachers above the state-mandated minimum should be included in the tax floor, they readily admit that market forces (as opposed to the State) have driven them to pay above the minimum salary schedule. Indeed, one of the WOC Districts' superintendents admitted that teacher salaries are driven, in large part, by districts bidding against each other for teachers. *See* 7.RR.108-09. Because this district dilemma (assuming there actually is one) is one of their own creation, the Court should not punish the State for its effects by including the cost of these district decisions in the tax floor.

35. Curiously, the WOC Districts blame the shortage of qualified teachers on the State, claiming that the State has "fail[ed] to produce enough certified teachers, requiring districts to improvise by creating their own alternate certification programs." WOC Br. at 36. Obviously, the State cannot force people to become teachers, and the Districts have never made clear how the alleged shortage is the fault of the State. Moreover, districts are allowed by state law to employ alternate certification teachers, and there is no reason to assume that the graduates of these programs are less qualified than traditionally certified teachers, particularly those that districts themselves recruit and train through their own programs.

36. Furthermore, one of the Districts has raised doubts as to whether the NCLB requirements can ever be applied to the States absent federal funds that would pay for all of its mandates. The National Education Association, joined by several school districts, including Laredo ISD (one of the Edgewood Districts in this litigation), has filed suit against the U.S. Department of Education claiming that NCLB is not enforceable under the Spending Clause to the U.S. Constitution, the Tenth Amendment, and under the statute itself, which specifically does not require States, or their political subdivisions, "to spend any funds or incur an costs not paid for under this chapter." 20 U.S.C. §7907(a).

3. Funds expended on the maintenance and operation of community-demanded facilities should be excluded from the tax floor.

The WOC Districts criticize the State for taking issue with the elaborate facilities (such as professional-grade football stadiums and natatoriums) enjoyed by several of the Districts. They incorrectly claim that the State “fails to understand” that districts use I&S funds instead of M&O funds to “acquire real property or build facilities.” WOC Br. at 50. Thus, the Districts contend that their ownership of these facilities is irrelevant to whether they have meaningful discretion in setting their M&O tax rates. *Id.* at 50-51.

The State is quite familiar with the I&S and the M&O taxing structures and how the two operate, and the State is aware that I&S tax revenue funds the *construction* of new facilities. The State’s point is that M&O tax revenue must fund the *maintenance and operation* of facilities once districts acquire them. The WOC Districts do not even attempt to dispute the fact that a football stadium and track seating 11,000 people, with a full press box and AstroTurf,³⁷ could easily be much more expensive to maintain and operate than a basic football stadium with a grass field and no press box. Similarly, the Districts do not—and could not—contend that a natatorium is an inexpensive facility to operate.³⁸ It is common sense that a district having a natatorium will very likely have—at a minimum—a higher water bill than a district without one. Because the Districts are not required by the

37. <http://www.neisd.net/athletics/facilities.html>; State Ex. 16111 at 76-77 (Middleton Depo).

38. For a visual tour of North East ISD’s Josh Davis Natatorium, *see* http://www.neisd.net/camp/campipix/blossom/blossom-natatoirum-interior_lores.htm. Other districts with swimming complexes include Northside ISD, State Ex. 16256 at 107-08 (Folks Depo), and Lubbock ISD, State Ex. 16571 at 106-07 (Havens Depo); <http://www.lubbockisd.org/DistrictInfo/Demographics.htm>. Spring ISD is in the process of constructing one. State Ex. 15680 at 51-52 (Hinojosa Depo).

State to build such expensive facilities, all costs incurred in the maintenance and operations of these facilities should be excluded from the tax floor.

D. The Districts Have Meaningful Discretion in Setting Their Tax Rates.

Perhaps recognizing that the many classes and programs they offer in excess of state requirements demonstrate that they are exercising meaningful discretion in setting their tax rates, the WOC Districts attempt to save their tax claims by asserting that, even providing all the extra classes and programs, they are in danger of not meeting the state accountability standards. They decry the State's future elevation of the TAKS passing standard as making their situation even worse. And the Districts claim that evidence of the hard economic choices that they have been forced to make in the last few years, by itself, proves that the Districts lack meaningful discretion in setting their tax rates. The Court should reject the Districts' contentions.

1. The Districts' comparison of their students' current scores to future accountability standards is irrelevant and nothing more than a complaint about unfunded mandates.

As of 2003-04, seven of the nine WOC focus districts are rated "academically acceptable" and two are "recognized."³⁹ As discussed in the State's opening brief, the Districts' students continue to achieve improved test scores, as is expected by the State's accountability system. The Districts' 2005 TAKS test scores continue to prove this point. The eleventh graders in every WOC focus district improved their scores in nearly every

39. Of all forty-seven WOC districts, three are rated "exemplary," fourteen, or almost 30%, are rated "recognized," and the remaining thirty are rated "academically acceptable." None of the WOC Districts are rated "academically unacceptable." See <http://www.tea.state.tx.us/perfreport/aeis/2004/district.srch.html>.

subject over their tenth grade 2004 TAKS scores—even if the panel recommended score is applied instead of the 1 SEM measure by which those students are actually measured. *See* TAKS Phase-In Summary Reports (Attached at App. C).⁴⁰ The Districts cannot complain, therefore, that they are currently unable to meet state accountability standards.

The Districts, however, continue to assert that they are not meeting the current accountability standards by comparing their students *current* test scores to the standards *that will apply in future years*. As the State has explained, comparison of current test scores to future passing standards is neither appropriate from an educational standpoint (because it ignores the benefit the students will realize from the additional year of education) nor from an evidentiary standpoint (because it is speculative and assumes the students do not learn anything during the additional year of education). *See* Part II.B.4. The Court should not credit the WOC Districts’ mischaracterization of future standards to demonstrate present lack of meaningful discretion.

Furthermore, the Districts’ complaint that the State has elevated its standards without a concurrent increase in funding is nothing more than one concerning “unfunded mandates,” a claim the Court soundly rejected in *Edgewood IV*. 917 S.W.2d at 736. The system designed by the Legislature and implemented by TEA meets or exceeds what is necessary to provide a general diffusion of knowledge. And the Districts are more than just meeting those standards—they are providing significant educational services to their students above and

40. Notably, 93% of Northside ISD’s eleventh graders passed both English-language arts and mathematics, and 100% passed social studies, App. C6, while 90% of North East ISD’s eleventh graders passed the science portion of the exam, App. C8.

beyond what is required by the State. The gradual increase in standards that districts must meet to maintain the “academically acceptable” rating might eventually encroach on their ability to provide some of those extras. But the Districts provided only speculation on this issue—not proof.

2. Having meaningful discretion does not equate with having unlimited resources.

The WOC Districts highlight the plight of Austin ISD as representative of the challenges faced by their focus districts and, they claim, districts across the State.⁴¹ WOC Br. at 43-47. There is no dispute that Austin ISD, like many other districts, has had difficult budgetary decisions to make. School districts, like all governmental entities—and even businesses and individuals—do not have access to unlimited resources and must prioritize objectives and direct resources in the most efficient manner possible. It is unavoidable that districts will, especially in economic hard times, be forced to cut their budgets, even though the effect of those cuts might be to eliminate staff, classes, or programs that may have been beneficial to students.

But not being able to afford every educationally sound option does not mean that the Districts lack meaningful discretion. Indeed, in the midst of Austin ISD’s dire budgetary

41. The WOC Districts also reference Dallas ISD’s decision to maintain its 10% local option homestead exemption as another example of difficult choices faced by districts. WOC Br. at 47-48 n.41. The Districts claim that Dallas ISD had no meaningful discretion to eliminate its property tax exemption because, if it did, it might not garner sufficient support to pass its \$1.3 billion bond issue. Again, this district choice cannot be attributed to the State because the maintenance of a local option homestead exemption is an entirely local decision. Moreover, the Court should not credit the Districts’ implication that Dallas ISD could not eliminate the exemption for political reasons. That suggestion is severely undercut by the fact that Dallas ISD is the *only* WOC focus district to maintain the exemption.

straits of 2003-04, when the district “slash[ed] over \$42 million from its budget,” WOC Br. at 44, the district nonetheless chose to give its teachers a pay raise, State Ex. 15683 at 55-56 (Forgione Depo)—just as it had in the three previous years, raising its tax rate each time to pay for the raise.⁴² State Ex. 15683 at 73, 86, 95. Austin ISD also maintained its magnet programs, its wide variety of non-state-required classes and programs, full-day kindergarten, and all its extra-curricular activities. The State does not fault Austin ISD for making these choices. To the contrary—presumably, the district was acting in the best interests of its students and teachers, and, in its judgment and discretion, these were the best use of its resources. But, Austin ISD’s considerable discretion in making those choices was, at the very least, meaningful.

3. The Court has not held that “meaningful discretion” requires that all districts have 10% of their taxing capacity to spend on local enrichment; but even if the Court reaches that conclusion, the Districts have not demonstrated that they lack that capacity.

The trial court held, and the WOC Districts maintain, that they can have meaningful discretion in setting their tax rates only if they are able to spend an additional 10% of their taxing capacity on local enrichment items in excess of state requirements. COL 14; 4.CR.924; WOC Br. at 39-42. Of course, the Districts claim that everything they offer—or could ever offer—is already required by the State, so this extra 10% seems entirely redundant

42. The WOC Districts take issue with the State’s suggestion that districts have an incentive to tax at the maximum allowable rate to maximize state dollars. WOC Br. at 34 (citing State Appellants’ Br. at 99 & n.66). The Districts have no basis to deny this fact—several of their own witnesses candidly admitted that it is not uncommon for districts to tax at the \$1.50 M&O limit specifically to qualify for the maximum amount of state funds. *See* 9.RR.134; State Ex. 15680 at 131-32 (Hinojosa Depo). The WOC Districts’ expert, Lynn Moak, even testified that he has advised his client districts to raise their tax rates to \$1.50 for precisely this reason. 9.RR.134.

of the WOC Districts’ expansive view of a general diffusion of knowledge. Regardless, the Court should deny the Districts’ request for a “one-size-fits-all” definition of meaningful discretion. The Districts purport to derive their 10% threshold from the Court’s decision in *Edgewood IV*. But the Court in *Edgewood IV* did not declare any such mandatory threshold, and the Court should not take that step here.

In rejecting the property-poor districts’ contention that the system was unconstitutionally inefficient, the Court in *Edgewood IV* compared the tax rates that it believed were required for the property-poor and property-wealthy districts to provide a general diffusion of knowledge. 917 S.W.2d at 731. The Court noted that the property-wealthy districts could tax at \$1.22 to provide a general diffusion of knowledge, while the property-poor districts had to tax at \$1.31. *Id.* By implication, then, the WOC Districts assert that the balance of tax revenue was available for local enrichment—28 cents for the property-wealthy districts and 19 cents for the property-poor districts. WOC Br. at 41. And, because the Court also concluded that the system did not effect an unconstitutional state property tax, the WOC Districts maintain that “the definition of ‘meaningful discretion’ has to lie somewhere between a penny of tax effort and 19 cents of tax effort.”⁴³ *Id.*

The Court should not rely on a comparison of the *Edgewood IV* figures to determine how much funding is necessary to provide districts with meaningful discretion. The numbers

43. The WOC Districts also identify draft language in House Bill 2 as indicating that the Legislature believes “meaningful discretion” requires an enrichment level of either 13.6% or 15%. While House Bill 2, if it had passed, would have indicated the amount of funding that the Legislature had chosen to allocate to school districts, it has nothing to do with what constitutes “meaningful discretion.” The issue in this case is the constitutional baseline, not what the Legislature may chose to provide above the baseline.

calculated in *Edgewood IV* were based on TEA documents that the Court believed quantified the cost to provide an accredited education. *Edgewood IV*, 917 S.W.2d 731 & n.12. As the State has explained, those documents did not, in fact, represent any assessment of cost by any of the parties. As such, the Court should be hesitant to base the constitutionality of the system on those numbers.

More fundamentally, however, the Court should not assign an arbitrary level of revenue to which all districts must have access in order to have meaningful discretion in setting their tax rates. A district's claim that it must assess an unconstitutional state property tax is an individual claim, one that must be based on the district's individual needs and abilities. It would not be surprising for one district to have significant discretion with a certain level of tax revenue, while another—either due to demographics or other forces beyond the district's control—may not. The Court should not generalize that all districts must have a talismanic level of funds, but should require each district to prove that it lacks meaningful discretion in setting its tax rate.

The record demonstrates that none of the WOC Districts has met that level of proof. Each of the WOC Districts meets, and in many cases exceeds, state requirements, while still exercising meaningful discretion, whether in the area of extra classes and services, teacher salaries, or the maintenance and operation of non-state-required facilities. *See* State Appellants' Br. at 105-22.⁴⁴ The exact percentage of the Districts' budgets spent on these

44. Some of the Districts also continue to use block scheduling, *see, e.g.*, http://classroom.springisd.org/webs/whs.campus/about_westfield.html; State Ex. 16256 at 81-82 (Folks Depo); State Ex. 16111 at 158 (Middleton Depo), or refuse to consider outsourcing certain services, *see, e.g.*, State Ex. 15683 at 65-68 (Forgione Depo); State Ex. 15680 at 84; State Ex. 16256 at 149; State Ex. 15678

items is, of course, unknown because the Districts did not choose to provide that evidence. Accordingly, even if the Court concludes that the Districts must each have 10% of tax revenue to spend on local enrichment to prevent an unconstitutional state property tax, the Districts failed to establish that they lack that percentage of funds. Indeed, given the variety and extent of the extra classes and programs, it is not surprising that the Districts did not even attempt to provide that proof.

The Court should reverse the trial court's judgment and hold that the school finance system does not violate Article VIII, §1-e of the Texas Constitution.

CONCLUSION

For the foregoing reasons, and the reasons explained in the State Appellants' Brief, the Court should reverse the trial court's judgment and render judgment dismissing the Districts' adequacy, suitability, and efficiency claims, or render judgment in the State's favor.

at 46 (Wood Depo), even though elimination of block scheduling and outsourcing has provided significant cost savings to other Districts. *See, e.g.*, State Ex. 16225 at 68 (testifying that outsourcing transportation saved the district \$1 million dollars), 86 (eliminating block scheduling saved \$1.5 million) (Griffin Depo).

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