

No. 04-1144

IN THE SUPREME COURT OF TEXAS

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

Appellants,

v.

WEST ORANGE-COVE CISD, ET AL.,

Appellees

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

**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, NATIONAL ASSOCIATION
FOR THE ADVANCEMENT OF COLORED PEOPLE, AND LEAGUE OF
UNITED LATIN AMERICAN CITIZENS AS AMICI CURIAE SUPPORTING
AFFIRMANCE IN PART AND REVERSAL IN PART OF THE DECISION BELOW**

Sylvia Ann Mayer (State Bar No. 00787028)
Sergio Garza (State Bar No. 24015145)
WEIL, GOTSHAL & MANGES LLP
700 Louisiana, Suite 1600
Houston, Texas 77002
Tel: (713) 546-5000
Fax: (713) 224-9511

John Greenman (State Bar No. 24012731)
FLORIDA COASTAL SCHOOL OF LAW
7555 Beach Blvd.
Jacksonville, FL 32216
Tel: (512) 289-5979

ATTORNEYS FOR AMICUS CURIAE
AMERICAN CIVIL LIBERTIES UNION, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF
COLORED PEOPLE, AND LEAGUE OF UNITED LATIN AMERICAN CITIZENS

July 1, 2005

IDENTITY OF PARTIES AND COUNSEL

Edgewood Appellants:

Edgewood ISD, Ysleta ISD, Laredo ISD, San Elizario ISD, Socorro ISD, South San Antonio ISD, La Vega ISD, Kenedy ISD, Harlandale ISD, Brownsville ISD, Pharr-San Juan-Alamo ISD, Sharyland ISD, Monte Alto ISD, Edcouch-Elsa ISD, Los Fresnos ISD, Raymondville ISD, Harlingen CISD, Jim Hogg County ISD, La Feria ISD, Roma ISD, San Benito ISD, and United ISD.

Counsel for Edgewood Appellants:

David G. Hinojosa

Trial and Appellate Counsel

State Bar No. 24010689

Nina Perales

State Bar No. 24004056

Hector Villagra

Trial Counsel

CA State Bar No. 177586

Leticia Saucedo

State Bar No. 00797381

Norma Cantu

State Bar No. 18826900

Mexican American Legal Defense and Education Fund, Inc.

140 E. Houston Street, Suite 300

San Antonio, TX 78205

Roger Rice

MA State Bar No. 418340

Jane Lopez

MA State Bar No. 556864

META, Inc.

240 "A" Elm Street, Suite 22

Somerville, MA 02144

David H. Urias

NY State Bar No. 4135729

NM State Bar No. 14718

Fried, Frank, Harris, Shriver and Jacobson, LLP

One New York Plaza

New York, NY 10004-1980

Alvarado Appellants:

Abbott ISD, Academy CISD, Aldine ISD, Alpine ISD, Alvarado ISD, Amarillo ISD, Anna ISD, Anthony ISD, Aspermont ISD, Athens ISD, Aubrey ISD, Avalon ISD, Avery

ISD, Axtell ISD, Balmorhea ISD, Bangs ISD, Beeville ISD, Bells ISD, Belton ISD, Big Sandy ISD, Blanket ISD, Blooming Grove ISD, Boles ISD, Boling ISD, Bonham ISD, Booker ISD, Borger ISD, Bowie ISD, Brock ISD, Brownfield ISD, Bruceville-Eddy ISD, Bryson ISD, Buckholts ISD, Burkburnett ISD, Burkeville ISD, Cameron ISD, Campbell ISD, Canton ISD, Canutillo ISD, Canyon ISD, Central Heights ISD, Central ISD, Chapel Hill ISD, Childress ISD, China Spring ISD, Chireno ISD, Cisco ISD, City View ISD, Cleburne ISD, Clint ISD, Coleman ISD, Collinsville ISD, Commerce ISD, Community ISD, Como-Pickton ISD, Connally ISD, Cooper ISD, Copperas Cove ISD, Corpus Christi ISD, Cotton Center ISD, Covington ISD, Crandall ISD, Crawford ISD, Crosby ISD, Dalhart ISD, Desoto ISD, Detroit ISD, Diboll ISD, Dickinson ISD, Dilley ISD, Dime Box ISD, Dimmitt ISD, Dodd City ISD, Douglass ISD, Driscoll ISD, Early ISD, Ector ISD, El Paso ISD, Electra ISD, Elkhart ISD, Elysian Fields ISD, Ennis ISD, Era CISD, Etoile ISD, Everman ISD, Falls City ISD, Fannindel ISD, Ferris ISD, Forney ISD, Fort Davis ISD, Fort Worth ISD, Frost ISD, Gainsville ISD, Ganado ISD, Garrison ISD, Gilmer ISD, Godley ISD, Grandview ISD, Gregory-Portland ISD, Gunter ISD, Hale Center ISD, Hamlin ISD, Harleton ISD, Hart ISD, Haskell CISD, Hawley ISD, Hearne ISD, Hemphill ISD, Hereford ISD, Hico ISD, Hidalgo ISD, High Island ISD, Holland ISD, Honey Grove ISD, Hubbard ISD, Hudson ISD, Huffman ISD, Huntington ISD, Hutto ISD, Itasca ISD, Jacksboro ISD, Jasper ISD, Joaquin ISD, Karnes City ISD, Kermit ISD, Kirbyville ISD, Knox City-O'Brien CISD, Kountze ISD, Kress ISD, Krum ISD, La Joya ISD, La Pryor ISD, Lake Worth ISD, Lamesa ISD, Lasara ISD, Latexo ISD, Leverett's Chapel ISD, Linden-Kildare CISD, Lingleville ISD, Lipan ISD, Lockhart ISD, Lorena ISD, Louise ISD, Lyford ISD, Lytle ISD, Mabank ISD, Magnolia ISD, Martinsville ISD, McGregor ISD, Meadow ISD, Megargel ISD, Mercedes ISD, Meridian ISD, Merkel ISD, Mesquite ISD, Mildred ISD, Millsap ISD, Mission CISD, Montague ISD, Morton ISD, Motley County ISD, Muenster ISD, Nederland ISD, New Boston ISD, New Castle ISD, New Home ISD, New Summerfield ISD, Newton ISD, Nocona ISD, Nueces Canyon CISD, Olfen ISD, Olton ISD, Orange Grove ISD, Paint Creek ISD, Pampa ISD, Panhandle ISD, Paradise ISD, Paris ISD, Perrin-Whitt CISD, Petersburg ISD, Pflugerville ISD, Poteet ISD, Pottsboro ISD, Prairiland ISD, Premont ISD, Presidio ISD, Princeton ISD, Quanah ISD, Ranger ISD, Redwater ISD, Ricardo ISD, Rice CISD, Rice ISD, Rio Vista ISD, Rivercrest ISD, Robinson ISD, Robstown ISD, Roby CISD, Rochester County Line ISD, Rocksprings ISD, Rogers ISD, Roosevelt ISD, Rosebud-Lott ISD, Rusk ISD, Sam Rayburn ISD, Samnorwood ISD, San Augustine ISD, San Perlita ISD, Sands CISD, Sanford ISD, Santa Anna ISD, Santa Fe ISD, Santa Maria ISD, Seagraves ISD, Seguin ISD, Seymour ISD, Shallowater ISD, Shelbyville ISD, Shepard ISD, Shiner ISD, Sierra Blanca ISD, Sinton ISD, Slaton ISD, Smyer ISD, Socorro ISD, Southside ISD, Splendora ISD, Springtown ISD, Spur ISD, Stamford ISD, Sulphur Bluff ISD, Sulphur Springs ISD, Sunray ISD, Tahoka ISD, Taylor ISD, Tenaha ISD, Texline ISD, Thorndale ISD, Throckmorton ISD, Timpson ISD, Tolar ISD, Tornillo ISD, Trenton ISD, Trinidad ISD, Troup ISD, Troy ISD, Tulia ISD, Uvalde CISD, Valley View ISD, Van Alstyne ISD, Van ISD, Venus ISD, Vernon ISD, Warren ISD, Weatherford ISD,

Wellman-Union ISD, Wells ISD, West Hardin County CISD, White Oak ISD and Whitesboro ISD.

Counsel for Alvarado Appellants:

Randall B. Wood

Trial and Appellate Counsel

State Bar No. 21905000
Doug W. Ray
State Bar No. 16599200
Ray, Wood & Bonilla, LLP
2700 Bee Caves Road #200
Austin, TX 78746

State Appellees:

Shirley Neeley, Texas Commissioner of Education; the Texas Education Agency (“TEA”); Carole Keeton Strayhorn, Texas Comptroller of Public Accounts; and the Texas State Board of Education.

Trial and Appellate Counsel for Appellees:

R. Ted Cruz, Solicitor General

Appellate Counsel

State Bar No. 24001953
Edward D. Burbach, Deputy Attorney General for Litigation
State Bar No. 03355250
Jeff L. Rose, Assistant Attorney General
State Bar No. 00791571
Amy Warr, Assistant Solicitor General
State Bar No. 00795708
Danica Milios, Assistant Solicitor General
State Bar No. 00791261
Merle Hoffman Dover, Assistant Attorney General
State Bar No. 00787706
Joseph Hughes, Assistant Solicitor General
State Bar No. 24007410
Shelley Dahlberg, Assistant Attorney General
State Bar No. 24012491
Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, TX 78711

Edward D. Burbach, Deputy Attorney General for Litigation

Trial Counsel

State Bar No. 03355250

Jeff L. Rose, Assistant Attorney General

State Bar No. 00791571

Robert O'Keefe, Assistant Attorney General

State Bar No. 15240850

Merle Hoffman Dover, Assistant Attorney General

State Bar No. 00787706

William T. Deane, Assistant Attorney General

State Bar No. 05692500

Linda Halpern, Assistant Attorney General

State Bar No. 24030166

Linda Shaunessey, Assistant Attorney General

State Bar No. 10382920

Kalli Smith, Assistant Attorney General

State Bar No. 24043928

West Orange Cove Plaintiffs:

West Orange-Cove Consolidated Independent School District ("CISD"), Coppell Independent School District ("ISD"), La Porte ISD, Port Neches-Groves ISD, Dallas ISD, Austin ISD, Houston ISD, Alamo Heights ISD, Allen ISD, Argyle ISD, Beckville ISD, Carrollton-Farmers Branch ISD, Carthage ISD, College Station ISD, Cypress-Fairbanks ISD, Darrouzet ISD, Deer Park ISD, Fairfield ISD, Graford ISD, Grapevine-Colleyville ISD, Hallsville ISD, Highland Park ISD, Humble ISD, Katy ISD, Kaufman ISD, Lake Travis ISD, Lewisville ISD, Lubbock ISD, Marble Falls ISD, McCamey ISD, Miami ISD, Northeast ISD, Northside ISD, Northwest ISD, Palo Pinto ISD, Pearland ISD, Plano ISD, Pringle-Morse Consolidated ISD, Richardson ISD, Round Rock ISD, Round Top-Carmine ISD, Spring Branch ISD, Spring ISD, Stafford Municipal ISD, Sweeny ISD, Terrell ISD, Texas City ISD.

Counsel for West Orange Cove Plaintiffs:

George W. Bramblett, Jr.

Trial and Appellate Counsel

State Bar No. 02867000

Nina Cortell

State Bar No. 04844500

Mark R. Trachtenberg

State Bar No. 24008169

Charles G. Orr

State Bar No. 00793749

Kirk Worley
State Bar No. 00797696
Haynes & Boone, LLP
One Houston Center
1221 McKinney Suite 2100
Houston, TX 77010

J. David Thompson, III
State Bar No. 19950600
Philip Fraissinet
State Bar No. 00793749
Warren Harris
State Bar No. 09108080
Bracewell & Giuliani, LLP
711 Louisiana Street, Suite 2900
Houston, TX 77002-2781

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STATEMENT OF AMICUS IDENTITY AND INTEREST

The American Civil Liberties Union (ACLU) is a national, non-profit, public-interest organization that exists to defend and preserve the individual rights and liberties guaranteed to all people in this country by the Constitution and laws of the United States. The ACLU maintains that every child in this society has the right to a free public education, and that education must be made available to all children on equal terms. The ACLU is currently involved in litigation in several states challenging inadequate state funding of public education to ensure that students are entitled to receive quality equal and adequate educational opportunities regardless of their race or the wealth of their communities. The ACLU has over 16,000 members in the State of Texas. The ACLU Foundation (ACLUF) of Texas is the state affiliate of the national organization.

The National Association for the Advancement of Colored People (NAACP) works to ensure the political, educational, social and economic equality of rights of all persons and to eliminate racial hatred and racial discrimination. The fundamental goals of the NAACP's education advocacy agenda are to provide all students access to quality education and to prevent racial discrimination in educational programs and services. The Texas State Conference of NAACP Branches is composed of over 70 branches in the State of Texas, with an estimated average membership level in recent years of 19,000.

The League of United Latin American Citizens (LULAC), the oldest and largest Latino civil rights organization in the United States, undertakes to advance the economic condition, educational attainment, political influence, health and civil rights of the Hispanic population. LULAC's education agenda includes increasing funding for public

schools and ensuring that Latino schoolchildren and Limited English Proficient (LEP) schoolchildren receive adequate and equal access to educational opportunities. LULAC also works with community-based organizations that assist school systems servicing the Latino population. LULAC has increased educational opportunities for thousands of deserving young Latino students throughout the country, operating one of the largest Latino scholarship programs in the nation and providing academic enrichment programs to elementary, middle, and high school students.

The amici affirm that this brief has been filed on their behalf, and that they have paid all fees charged, if any, for preparation of the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Sixteen years ago, the Court was asked to give meaning to the people’s constitutionally voiced desire to provide every Texas child an adequate and efficient education.¹ The rule announced then, and developed in further cases—that art. VII, §1 requires equity in school funding, but only in some degree, and only up to point—has guided the Legislature in every later attempt to design a school funding system. Under this rule of limited equity, the Legislature created a system that was constitutionally inefficient,² then briefly efficient, but only “minimally” so,³ and then, through a series of

¹ See generally *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989) (*Edgewood I*); see also TEX. CONST. art. VII, §1. (“A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.”).

² *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491, 498 (Tex. 1991) (*Edgewood II*).

³ *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 726 (Tex. 1995) (*Edgewood IV*).

changes that hurt already low-funded property-poor districts, allowed the system to lapse into unconstitutional inefficiency again.⁴ Now, more than a decade and a half after the Court first took up the issue, it is clear that the limited-equity rule developed in *Edgewoods I-IV* does not work. For the Court to effectuate the people’s mandate that every Texas child have a chance at an adequate and efficient education, it must hold that Art. VII, §1 requires full-funding equity: equalized funding at equal tax effort for every public dollar spent on education in Texas.⁵

Only full-funding equity can create a system that is enduringly constitutional. It is by now apparent that without intervention from this Court, the Legislature will always unconstitutionally underfund certain districts. This observation is not based on conjecture or political hypothesis. It is, instead, a matter of historical fact. It is a fact proven not only by the litigation that has surrounded school funding since *Edgewood I*, but also by the history of the state in its entirety, a history of racial and economic discrimination that has caused ongoing inequities both in school funding and in the legislative power that would allow property-poor districts to remedy that inequity through

⁴ CR.3.842-44.7:120-32.

⁵ The right to a publicly financed education is recognized not only in the Texas Constitution but also in international law. *See* Universal Declaration of Human Rights, General Assembly Resolution 217 A (III) (December 10, 1948); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR (No. 16), U.N. Doc. A/6316 (1966), 993 UN.T.S. 3, *entered into force* January 3, 1976, Article 13; Convention on the Rights of the Child, G.A. Res. 44/25, Part 1, Article 28; American Declaration of the Rights and Duties of Man (1948), Chapter 1, Article XII; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, “Protocol of San Salvador”, Article 13; The American Convention on Human Rights, Chapter III, Economic, Social and Cultural Rights, Article 26 (requires legislation or other appropriate means to achieve the rights set out in the Additional Protocol).

the legislative process. It is proven, also, by the trial court’s findings, which show how the Legislature—guided by the Court’s rule of limited equity—directed revenue away from property-poor districts and toward property-rich ones until the system reached its current unlawful state.

In the face of the Legislature’s systemic tendency to underfund property-poor districts, the Court’s rule of limited-funding equity ensures that the system will always eventually fall short of its constitutional requirement. The existing rule does not meaningfully bind the Legislature. It allows for an unarticulated degree of inequity in school funding above the practically indeterminate level of “adequate” school funding. Even below that level, it permits inequity so long as the inequity is not “substantial.” The rule of limited equity thus has no clear top, an uncertain middle, and only partial effect where it even applies. In sum, it is not much of a rule at all. If it leaves the limited-equity rule in place, the Court can be sure of one thing—that it will be presiding over a school-funding case again soon, perhaps on different facts, but with the same finding below: that students in property-poor districts have not received their constitutional due.

Full-funding equity is also consistent with Texas’s constitutional system. Indeed, it was precisely because the framers and ratifiers of the 1876 Constitution understood that the legislative process could not provide an adequate and efficient educational system that they wrote §1. Contrary to the State’s position, this provision is not “hortatory.”⁶ The framers and ratifiers intended the judiciary to enforce §1 through judicial review,

⁶ State’s Appellants’ Reply Br. at 13.

knowing that a law is not a law unless it can be enforced. Indeed, the people's desire to have the Court enforce §1 through judicial review has been demonstrated by their continuing decision not to repeal this provision, even after the Court's holdings have repeatedly caused the Legislature to change school funding policy in Texas because of it.

Full-funding equity is not, moreover, incompatible with a testing-based approach to accomplishing statewide adequacy. It is, instead, a necessary complement to the testing-based educational reforms instituted in Texas, and an indispensable step towards statewide adequacy. Full-funding equity will ensure that when the new reforms identify problems, the resources will be available to fix those problems. Without full-funding equity, the system will only return to its historical state of inequity, inevitably resulting in standards that are manipulated in order to cover the fact that property-poor districts are failing. Indeed, this process has already begun.

Full-funding equity is also, now more than ever, the right standard. Texas's Latino, African-American, and LEP student populations are growing faster than the Anglo population; more than 50% of all Texas students are non-Anglo, and in the not-so-distant future Texas will be a majority non-Anglo state.⁷ This presents both a challenge and an opportunity, a chance to redress old injustices by creating a system that gives equal opportunity to all Texas children. In response to this challenge, the state and country have reached a new, bipartisan consensus, enacted through development of the TAKS system and the passage of laws qualifying it for federal No-Child-Left-Behind

⁷ PX543:41.

(NCLB) funds, that the best way to address the historic disparity in educational opportunity is to enforce strict testing and accountability provisions.⁸ But this effort will mean nothing unless it is accompanied by the funding equity that would allow property-poor districts to make meaningful changes. The Court has recognized that closing the gap between rich and poor districts—achieving what it has called “qualitative” efficiency⁹—is the constitutionally enacted desire of the people. What is now clear is that full-funding equity is the only rule through which that shared goal can be achieved.

ARGUMENT

I. ONLY FULL-FUNDING EQUITY CAN EFFECTUATE THE WILL OF THE PEOPLE AND CREATE AN ENDURINGLY CONSTITUTIONAL SYSTEM.

A. Statement and History of the Rule of Limited Equity.

The rule of limited equity was first articulated in *Edgewood I*, and has evolved since. In *Edgewood I*, the Court held that “districts must have substantially equal access to similar revenues per pupil at similar level of tax effort,” but also concluded that local communities could “supplement[] an efficient system” if that supplementation was derived “solely from local tax effort.”¹⁰ The Court later construed the words “solely from local tax effort” in *Edgewood I* to mean not that all funding inequality would be due

⁸ No Child Left Behind Act, 115 Stat. 1425 (2001) (codified as amended at 20 U.S.C.A. §6301 et seq. (West 2002)).

⁹ *West-Orange Cove v. Alanis Indep. Sch. Dist.*, 107 S.W.3d 558, 571 (Tex. 2003) (*WOC I*).

¹⁰ 777 S.W.2d at 397, 398. The cases recognize a distinction between 1) “equal” revenue—the idea that every district would get the same amount of revenue per weighted pupil in average daily attendance (WADA) regardless of that districts’ tax effort; and 2) “equalized” revenue—the idea that the system would be set up so that districts taxing at the same rate would receive equal funding, but that their actual revenues could differ if their tax efforts differed.

to differences in local tax effort, but rather the opposite—that some revenues need not be equalized, and different districts could have different revenues at equal tax effort.¹¹ These inequities were constitutional, the Court held, so long as these unequalized differences existed only above the point necessary to achieve a “general diffusion of knowledge,”¹² which is the same as the constitutional point of adequacy.¹³

The Court has thus clearly held that substantial equalization need only occur up to the point where funding is sufficient to provide an adequate education. It is not clear, however, what the total limit on inequity in the system is. In *Edgewood II*, the Court noted that “local supplementation” is permissible “so long as efficiency is maintained.”¹⁴ The last phrase—“so long as efficiency is maintained”—is meant to limit the amount of “local supplementation,” which we now know means unequalized funding above the adequacy level.¹⁵ Because funding below the adequacy level need only be “substantially” equalized, we can guess that the system-wide inequity permitted by the Constitution is more than “insubstantial,” but beyond that the cases do not say what the limit is.

It still exists, however. Both *Edgewood IV* and *WOC I* approvingly quote the “so long as efficiency is maintained” language of *Edgewood II*, and *Edgewood IV* holds “that

¹¹ *Edgewood IV*, 917 S.W.2d at 729-30.

¹² *Edgewood IV* at 730.

¹³ *WOC I*, 107 S.W.3d at 566.

¹⁴ *Edgewood II*, 804 S.W.2d at 500.

¹⁵ *See Edgewood IV*, 917 S.W.2d at 730.

the amount of ‘supplementation’ in the system cannot become so great that it, in effect, destroys the efficiency of the entire system.”¹⁶ Although *WOC I* might be read to imply that there is no longer a limit on total inequity in the system, this conclusion does not follow logically from the Court’s prior decisions, which were explicit affirmed by the Court in *WOC I*.¹⁷ And in any case *WOC I*’s long summary of the history of the rule of limited equity is dicta.

The current rule of limited equity thus requires that 1) districts have substantially equal access to similar per-pupil revenues at similar levels of tax effort up to the amount of funding required to produce an adequate system; and 2) that the disparity between the per-pupil revenue of property rich and property-poor districts not exceed an unarticulated level of disparity that would make the whole system inefficient; but 3) any other kind, or lesser degree, of inequity is constitutionally permissible.

B. Under the Rule of Limited-Funding Equity the System Will Always Be Constitutionally Inefficient.

The years after *Edgewood I* and the findings of the trial court demonstrate two things: the systemic tendency of the Legislature to create unconstitutionally inefficient school funding, and the ineffectiveness of the rule of limited equity as a curb on that tendency.

¹⁶ *Edgewood IV*, 917 S.W.2d at 729, 732.

¹⁷ *WOC I*, 107 S.W.3d at 565-72.

1. During the Last Sixteen Years, the Rule of Limited Equity Has Not Kept the System from Reverting to Its Historic State of Constitutional Inefficiency.

The last sixteen years show that the rule of limited equity has not worked. In 1989—and for presumably long before—the school funding system was grossly and unconstitutionally inequitable.¹⁸ In response to *Edgewood I*, the Legislature, acting under the earliest articulation of the rule, created a system that was little better than the one condemned in *Edgewood I*.¹⁹ The system was changed again in 1993.²⁰ The only time that the Court held that the system was constitutionally efficient—and then only minimally so—was in 1995.²¹ The trial court in this case found that the system has lapsed into unconstitutional inefficiency once again.²²

As shown by this history, the current unconstitutionality of the system is not an aberration. It is only the reversion of the system to its typical state. This systemic failure is caused by the division of the state into racially gerrymandered²³ school districts, resulting in a direct conflict of interest between property-poor and property-rich districts. When combined with the disproportionately limited ability of historically disenfranchised

¹⁸ There were “glaring disparities in the abilities of the various school districts to raise revenues from property taxes because taxable property wealth varie[d] greatly from district to district.” *Edgewood I*, 777 S.W.2d at 392.

¹⁹ *Edgewood II*, 804 S.W.2d 491 (Tex. 1991).

²⁰ Act of May 28, 1993, 73rd Leg., R.S., ch. 347, 1993 Tex. Gen. Laws 1479.

²¹ *Edgewood IV*, 917 S.W.2d 717 (Tex. 1995).

²² CR.3.842-44.

²³ RR.19:15-20

property-poor districts to protect their constitutional share through the legislative process, this conflict inevitably results in unconstitutional inefficiency. Indeed, it is the State that has made this point most succinctly while arguing for complete non-justiciability of §1, noting that “the financial interests of property-wealthy and property-poor districts are naturally-divergent.”²⁴ Ultimately, we agree with the State that, so long as the school-funding system is based on existing school districts and the Court does not adopt full-funding equity, there will always be a conflict between rich and poor districts. Given what we know from studying this conflict in the past, it is safe to say this conflict will always result in poor districts not receiving their constitutional due.

2. The Findings Below Show How The Legislature, Under the Rule of Limited Equity, Allowed the System to Return to Constitutional Inefficiency.

The trial court’s findings document the Legislature’s systemic inability to create an efficient system. There currently are at least six ways the Maintenance and Operations (“M&O”) budget alone is inequitable:²⁵

1. The gap in funding caused by the difference between the effective “equalized” wealth level of property-rich districts and the basic allotment under Tier 1, which was exacerbated by the 1999 increase in the wealth level without a proportional rise in the basic allotment;²⁶

²⁴ State Appellant’s Reply Br. at 9.

²⁵ See *Edgewood IV*, 917 S.W.2d at 728, 734; RR.14:64-65. The organizations represented by this brief believe that the current system is, as the trial court found, both inadequate and inefficient. We also believe, as the Edgewood districts argue persuasively in their cross appeal, that existing M&O funding is constitutionally inefficient, and accordingly urge the Court to grant the Edgewood District’s requested relief. See *generally* Edgewood Appellant’s Br. at 15-33.

²⁶ Edg. Ex. 409 at 14, RR.14:57-58.

2. The greater-than-three-dollar difference in yield per penny at equal tax effort in Tier 2;²⁷
3. The disparate treatment of Available-School-Fund money (it is an add-on for property-rich districts but a carve-out for property-poor ones), which increased the property-rich district's net additional revenue by \$313 per ADA;²⁸
4. The option-credit program, which in property-rich districts annually shields a combined \$43 million of revenue from recapture;²⁹
5. The hold-harmless laws, which allow some property-rich districts to have an effective "equalized" wealth level far above the already inequitable level of \$305,000;³⁰ and
6. The ten percent withholding of compensatory-education-allotment funds that applies only to property-poor districts.³¹

These inequities in M&O funding compound those caused by the lack of recapture and equalization in facilities funding,³² and the State's inadequate weighing formulas³³—inequities that, as the trial court found, rendered the system unconstitutionally inadequate and inefficient.³⁴

These findings document the school funding system's inevitable slide into unconstitutionality when guided by the rule of limited equity. The changes since 1993

²⁷ RR.14:57-58.

²⁸ RR28:126-27, RR.14:59.

²⁹ RR.14:61.

³⁰ RR.14:74-75.

³¹ CR.14:43-44; CR.28:46.

³² *See generally* CR.4.924-942, FF297-433 (trial court's review of facilities funding)

³³ *See generally* CR.4.876-77, 944-62, FF78-71, 437-578.

³⁴ CR.3.844.

have only increased total inequity. Of the mechanisms in the M&O portion of the budget that cause inequity, three were introduced or expanded after passage of Senate Bill 7: the 1999 rise in “equalized” wealth level without a corresponding rise in the basic allotment,³⁵ the introduction of option credits,³⁶ and the writing of the hold-harmless provisions—which were intended to be temporary—into permanent law, with a gradual increase of the “equalized” wealth level for those districts shielded under them.³⁷ The net effect of the post-1993 changes in the funding system is to decrease relative funding for the property-poor districts, and increase it for the property-rich ones. But these are only the latest examples of the trend that is visible throughout all the *Edgewood* litigation and the state’s entire past.

3. The Rule of Limited Equity, Which Provides Legislators Little Meaningful Guidance, Cannot Keep the System Constitutional.

The rule of limited equity will not reverse this trend. It provides no useful guidance to legislators who want to maintain a constitutional system. Each change described above, for instance, might have been approved by a legislator trying to comply with constitutional duties under the rule of limited equity. A legislator using the rule to assess whether raising the “equalized” wealth level without proportionately increasing the basic allotment or guaranteed yield, for instance, would first have to decide whether the decision not to increase the allotment or guaranteed yield dropped the total revenue of any property-poor districts below the financial “adequacy” level, and then, assuming it

³⁵ RR.14:57-60, Edg. Ex 409 at 14.

³⁶ RR.16.23-24.

³⁷ RR.14:61-75.

did not, whether the resulting disparity was enough to make the inequity with wealthier districts more than insubstantial. The legislator might worry that the change increased system-wide inequity to an unconstitutional point, but because that point is unarticulated, would never know if it had. In practice, the rule of limited equity will not help even legislators who are, in good faith, trying to design a constitutional system. Only full-funding equity—a bright-line rule—will help the Legislature fulfill its constitutional obligation to create an enduringly efficient system.

C. Full-Funding Equity Would Create an Enduringly Efficient System.

In contrast to the rule of limited equity, full-funding equity would create permanent constitutional efficiency in the school funding system.

1. Description of the Rule of Full-Funding Equity.

Full-funding equity would *not* mean that every district received equal revenue per weighted student. It would mean that districts could choose to increase their revenue, but only by increasing their tax effort. If, as seems inevitable, the Legislature will increase school funding by supplementing local property taxes with other revenues, giving districts actual discretion over their tax rates, then full-funding equity would extend this discretion to property-poor districts as well as property-rich ones.³⁸ This would be achieved by implementing full recapture and equalization of every dollar of revenue collected in the system, along with elimination of other aspects of the system that either 1) create a disparity in effective yield per penny of tax effort between districts; or 2) do

³⁸ See Jason Embry, *Critics Say Perry's Plan Doesn't Add Up*, Austin-American Statesman, June 28, 2005 at B1.

not effectively measure the per-student cost of providing an education (*e.g.* the current unconstitutional weighting formula).³⁹ It would also include a fully-funded, equalized, guaranteed form of facilities financing that allowed property-poor districts equal facilities financing at equal cost or tax effort. Stated more broadly, the rule would require that the only variable in the total resources (including facilities and facilities funding) available to each district per accurately weighted student would be that district's tax effort; everything else would be equalized. In effect, full-funding equity would ensure that—as the framers intended⁴⁰—the educational opportunity available to Texas children would be a function of their communities' willingness to support them, not the economic circumstances of their birth.

2. Full-Funding Equity Would Create an Enduringly Constitutionally Efficient System.

Imposing a rule of full-funding equity would, by itself, solve a problem that has not only come before the Court several times in the last sixteen years, but also plagued the state well before that: the school funding system's inability to create an efficient system. It would do so without eliminating local discretion over spending of equalized revenues, and would allow districts discretion to increase their local revenues by increasing their local tax effort. The difference between the two rules could not be more

³⁹ CR.3.844.

⁴⁰ *Cf.* S. McKay, DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875, at 198 (1920) (the floor comments of the chair of the Education Committee at the Constitutional Convention that education is “among the abstract rights, based on apparent natural justice . . . I boldly assert that it is for the general welfare of all, rich and poor, male and female . . . that the means of common school education should, if possible, be placed within the reach of every child.”).

stark. One has failed for over a decade and half; the other would make the state's school funding enduringly constitutionally efficient. The choice between full-funding equity and limited equity is simply between an option that will effectuate the Constitution, and one that will not.

II. THE COURT'S ROLE IN OUR CONSTITUTIONAL SYSTEM, AS ENVISIONED BY THE FRAMERS AND CONFIRMED BY THE PEOPLE TODAY, IS TO ENFORCE §1 THROUGH JUDICIAL REVIEW.

The framers and ratifiers of the Constitution envisioned a judicial branch that enforced the Constitution through judicial review, serving as complementary system for vindication of individual rights. The people have seconded this view by refusing to repeal §1. Enforcing full-funding equity would thus fulfill the Court's obligation under its role in our system.

A. The Texas Constitutional Structure Mandates Less Judicial Deference Than the Federal Structure.

The State argues, for the first time in this sixteen year battle, that financial inefficiency is non-justiciable because it is a political question.⁴¹ The Edgewood and West-Orange Cove districts refute this argument by pointing out that the great weight of *stare decisis* militates against this conclusion, as does application of the test in the State's preferred case, *Baker v. Carr*, which sets out the political-question doctrine in the federal system.⁴² But the federal government, in which unelected judges enforce a constitution that is notoriously difficult to amend, is radically different from Texas government, in

⁴¹ State's Appellant Br. at 30-39.

⁴² 369 U.S. 186 (1962); W.O.C. Appellee's Br. at 54-55; Edg. Appellee's Br. at 17-18.

which democratically accountable judges enforce a constitution that has been amended over four hundred times since ratification.⁴³

B. The Texas Constitution Was Designed to Limit the Power of the Legislature.

It was not judicial authority that the framers feared, but legislative authority, which the Texas constitutional system was self-consciously designed to limit.⁴⁴ The State is wrong when it suggests that the framers' intent was to give sole authority over public education to the Legislature, and it is telling that the State includes no statements from framers or ratifiers in its brief,⁴⁵ instead arguing that "the legislature has traditionally been considered the most representative branch."⁴⁶ While this may be true in general, it does not describe the views of the framers of the Texas Constitution, who were deeply distrustful of the legislature, and sought to control it. As one delegate put it, trying to fit in with the prevailing tone of the Convention: he too "was not willing to trust questions of morality and ethics to the Legislature."⁴⁷ This distrust was common among

⁴³ Legislative Reference Library of Texas, Constitutional Amendments <http://www.lrl.state.tx.us/legis/constAmends/lrlhome.cfm>.

⁴⁴ See Address by John Mauer, *State Constitution in Time of Crisis: the Case of the Texas Constitution of 1876*, Symposium on the Texas Constitution 27 (Oct. 6, 1989), published in 68 TEXAS L. REV. 1615, 1641 (1989).

⁴⁵ State Appellee's Br. at 32-35.

⁴⁶ State Appellant's Br. at 35 (citing Becky Stern, *Judicial Promulgation of Legislative Policy: Efficiency at the Expense of Democracy*, 45 SW. L. J. 977, 1001 (1991)).

⁴⁷ S. McKay, DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875, at 298.

the delegates.⁴⁸ Indeed, it was fear of legislative malfeasance that prompted the Convention, led by members of the deeply populist Grange party,⁴⁹ to write §1.⁵⁰ The delegates were aware of judicial review: in contemporaneous decisions, which was well-established by then, the Court expressed no doubt about its authority to overturn legislative enactments.⁵¹ There is therefore every reason to think that strong judicial oversight was precisely what the framers envisioned when they wrote §1.⁵²

⁴⁸ “The Constitution of 1876 followed the prevailing fashion in state constitution-making of its day, which was inspired by thorough distrust of legislatures and fear of their inadequacy and corruption, qualities which were all too common in the third quarter of the nineteenth century.” O. Douglas Weeks, *The Texas Legislature—A Problem For Constitutional Revision*, 21 TEX. L. REV. 5 (1943); *See also* Stuart A. MacCorkle & Dick Smith, TEXAS GOVERNMENT, at 6. (“Matters which were formerly left to the discretion of the legislature were now embodied in the constitution, and owing to the experience under the Reconstruction governments, many specific restrictions were placed on the legislature.”).

⁴⁹ The Grange had more members—thirty out of a total of ninety—elected to the Convention than any other party. Mikal Watts & Brad Rockwell, *The Original Intent of the Education of the Texas Constitution*, 21 ST. MARY’S L. J. 771, 785-86 (1990).

⁵⁰ *See generally* Watts & Rockwell at 781-806.

⁵¹ *See, e.g., Davey v. County of Galveston*, 45 Tex. 291, 299 (1876); *Blessing v. Galveston*, 42 Tex. 641, 653-657 (1874).

⁵² The fact that §1 contains phrase “it shall be the duty of the Legislature,” does not suggest that enforcement of §1 was relegated to the Legislature. This phrase locates the duty of *performance*—not enforcement—on the Legislature. Its purpose is to establish that Texas’s school system must be funded through the legislative process, and not privately or out of the executive budget. This assignment of duty, rather than suggesting that the provision was meant not to be enforced, suggests the opposite. Only after a duty is assigned can it be enforced.

Section 1, in fact, is drafted like most laws, and should be construed the same way. A provision that constrains behavior does not normally mention the party that is charged with enforcing the constraint—only the party constrained. Individual penal provisions, for example, do not mention the courts. Rather, they only mention the person bound by the law (*e.g.*, “a person who . . .”). But criminal provisions are not therefore construed to vest authority over the law in the people bound by them. Nor should §1 be construed to vest authority over the law in the legislature, the body bound by it.

In fact, an attempt to repeal §1 after *Edgewood I* never made it out of committee.⁵³ Section 1 stands unaltered one hundred and twenty-nine years after it was ratified, and sixteen years after the Court found that the school funding system was unconstitutional because of it.⁵⁴ It is wrong to insist that the judiciary owes deference to the legislature on this issue because the legislature more truly reflects the will of the people, when, in fact, the framers envisioned judicial review as a check on the legislature and the people—as shown by their decision not to repeal §1—very clearly want the Court to intervene. The Court’s decision not to impose full-funding equity is a frustration of the people’s will, not deference to it.

C. Constitutional Adjudication Is a Form of Democracy Complementary to Representative Democracy.

The judicial process is no less democratic than the legislative one. It is, instead, a parallel form of democracy, one that can vindicate rights that the legislative process cannot, and one that in Texas is enforced by officials held accountable through elections. Citizens come to court as individuals. The legislative process, by contrast, requires power in a voting block to effect change. If a group of citizens has proportionately less power to effect legislative outcomes than they should—as African-American and Hispanic citizens have had for at least most of the state’s history—then they cannot achieve equity through the legislative process. But in court, they can. As *Brown*⁵⁵ and

⁵³ Tex. H.J. Res. 10, H.J. of Tex., 73rd Leg., R.S. 184 (1993).

⁵⁴ *Edgewood I*.

⁵⁵ See generally *Brown v. Board of Educ.*, 349 U.S. 294 (U.S., 1955).

the country's other famous civil-rights cases prove, the power of courts to vindicate rights the legislature cannot is not hypothetical. It is what moved us ahead.

The organizations represented by this brief believe that Latinos and African-Americans are still effectively disenfranchised through many factors, including the relative poverty of minorities caused by centuries of discrimination (which results in disproportionately diminished political influence), the fact that the current system is, as all parties agree, based on racially gerrymandered districts,⁵⁶ and the continued existence of racial discrimination in society today. But it is not necessary for the Court to agree that *de facto* disenfranchisement still exists in order to see the need for constitutional adjudication as a parallel system through which citizens can vindicate their rights. The Court need only see that the legislative process has, in the past, failed to live up to its constitutional obligations to ensure the rights of members of minority groups, even when those minorities were legally enfranchised. If the legislative process has previously been susceptible to distortions in voting power that allowed grossly unconstitutional inequities in school funding to develop even between enfranchised populations, it is surely susceptible to those same distortions today. It is in this light—with the awareness that the judicial process has an ongoing role to play, not as a usurper of democracy but a coequal partner in achieving it⁵⁷—that the Court should consider ensuring an enduringly constitutionally efficient system by adopting the rule of full-funding equity.

⁵⁶ RR.19:15-20.

⁵⁷ See generally Lawrence Sager, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE*, at 205, Yale University Press (2004).

III. FULL-FUNDING EQUITY IS THE RIGHT STANDARD FOR TEXAS.

A. Full-Funding Equity, When Combined with Enforced Standards of Adequacy, Will Level the System Up.

The State argues that eliminating inequity in school funding will result in “leveling down” of the system, making every school mediocre.⁵⁸ This argument turns on the assumption that adequacy and full-funding equity are mutually exclusive standards, when they are not. These two standards are instead complementary: adequacy is the goal (and constitutional requirement), and full-funding equity is the only means to achieve it. If the system is to succeed, both standards must be independently enforced by the judiciary.

Enforcement of these two standards would level the system up, not down. The adequacy requirement would ensure that the total amount of revenue in the system was sufficient; full-funding equity would ensure that the distribution of funding did not revert to its grossly inequitable historical norm. Because the revenue under a fully equitable system would be spent locally, districts would be able to make innovative, district-specific budget choices. Because no district has a tax advantage in a fully equitable system, all districts would have equal incentive and meaningful discretion to increase their tax effort, which would bring more money into the system overall. Full-funding equity would thus create a truly level playing field, fostering healthy competition in the

⁵⁸ State Appellee’s Br. at 19.

system as a whole.⁵⁹ And full-funding equity is fully consistent with the requirement that local districts retain discretion over local tax rates.⁶⁰

In this way, full-funding equity would make “enrichment” a real possibility for property-poor districts. Our system is predicated in the belief that local spending discretion enhances education, and that, once the basics are covered, schools should have the opportunity to tailor their programs to the particular needs of their students. But in a system in which even the richest districts are not able to provide their students with an adequate education,⁶¹—and the poorer districts receive on average more than \$1000 less per student per year than the property-rich ones⁶²—actual enrichment for students in property-poor districts is impossible. Only full-funding equity would give property-poor districts the resources to actually enrich their students’ educations, instead of just struggling to keep up, or, as is too often the case, to keep from falling farther behind.⁶³

In the long run, full-funding equity will benefit the entire system by making Texas a stronger, wealthier state. The state demographer estimated that closing the educational attainment gap between Anglos and minorities would increase the state’s annual income by \$143 billion, increase annual consumer expenditures by more than \$100 billion,

⁵⁹ This stands in contrast to limited-equity funding, which has eroded the ability of poor districts to access enrichment funds. *See* Edg. Ex. 409 at 14.

⁶⁰ *See* TEX. CONST. art. VII, §3.

⁶¹ CR.3:842-49.

⁶² RR.20:110, 155; Edg. Ex. 543 (app. M); Edg. Ex. 410 at 1, 3.

⁶³ *See* RR25:153-54, documenting the school children in property-poor districts who live in rural communities without sewer or drainage systems.

reduce prison populations by almost a third, and reduce annual state expenses by \$2.8 billion.⁶⁴ The benefits of closing the attainment gap would enrich the entire school system, and the state at large.

B. Without Full-Funding Equity, Any Attempt to Achieve Adequacy Through Testing Will Fail.

The strict accountability and testing provisions that the Legislature has passed in the last decade have laid bare the shocking gaps in educational achievement between Anglo and non-Anglo students, and between English-proficient and LEP students.⁶⁵ Recognizing a problem is always the first step towards solving it; but it is only the first step. The next step is to actually solve it.

In a different system, one with a history of equitably funding the education of all students, it might be possible that implementation of testing and accountability procedures could, by itself, bring underperforming schools up to the point of constitutional adequacy. But in this state, where the legislature has presided over a system that denied property-poor districts their constitutional due for most of one hundred and twenty-nine years, and in which the only moment of constitutional efficiency produced by the legislature was as the result of repeated and direct judicial intervention, the idea that implementation of accountability provisions will bring about adequacy without a concomitant judicial mandate of full-funding equity is absurd. In

⁶⁴ CR.4.875, FF72 n.4.

⁶⁵ See generally WOC Br. at 17, summarizing data. Tenth grade whites passed all 2004 TAKS tests at more than two and a half times the rate of African-Americans, and more than ten times of LEP students.

other words: the Legislature is not now, just because of educational testing, going to do what it has always failed to do in the past. We shouldn't pretend that it will.

If testing provisions are left in place unaccompanied by a rule of full-funding equity, they will be hollowed out to the point of emptiness. Property-poor districts will receive their normal inequitable funding share, and the numbers will be massaged to show that failing districts have not failed. Indeed, what is most striking is not that this hollowing-out process has started, but that it is already more or less complete. The State argues that any district rated "academically acceptable" is conclusively constitutionally adequate.⁶⁶ But the standards have become so diluted that for low-achieving "required-improvement districts," which are primarily property-poor, an eighty-four percent failure rate on the TAKS science test could garner an "acceptable" accreditation.⁶⁷ As the trial court concluded: "These passing rates were set not to constitute a minimal level of adequacy but rather to ensure that most districts and campuses fell upon the 'academically acceptable' side of the line."⁶⁸

C. Full-Funding Equity Is the Standard Most Consistent with American Ideals.

In the end, the best reason to adopt full-funding equity is that it is the right standard. Our nation was founded on the belief that one's ability to succeed should depend on character, talent, and achievement, not on circumstances of birth. If people are

⁶⁶ State Appellant Br. at 72.

⁶⁷ RR.25:169-70; Edgewood Appellees' Br. at 30.

⁶⁸ CR.4:865.

to succeed for what they do, and not where they came, equality of educational opportunity is the one indispensable element.

Full-funding equity will not, by itself, provide equal educational opportunity to children born into disadvantaged circumstances. Children who live in neighborhoods without sewer systems, whose parents cannot afford cars or school supplies, and who are unable to help with schoolwork because they are working multiple jobs, will never compete on equal footing with children whose parents can afford supplemental materials and private tutoring. Given these facts, it is not so much to ask that the State, when distributing the limited resources it controls, give those resources out equally on a weighted basis.

For now, the rule of full-funding equity would help districts affected by racism and other forms of invidious discrimination. But the benefit of adopting the right rule is that it achieves the right outcome over time. None of us know what our state will look like one hundred years from now; we can only be sure that its composition will change. Groups that are now helped by the rule of limited equity may at some later date be hurt by it, and the reverse may be true as well. But we know, from everything our history tells us, that without a rule of full-funding equity some groups of students will be left without the education that is their constitutional entitlement. To prevent this outcome—for now, and for every future time—the Court should adopt full-funding equity as its constitutional rule.

CONCLUSION

For the reasons stated above, ACLU, NAACP and LULAC urge the Court to affirm the trial court's decision in part and reverse in part, and adopt a rule of full-funding equity.

Respectfully submitted,

By: _____

Sylvia Ann Mayer

(State Bar No. 00787028)

Sergio Garza (State Bar No. 24015145)

WEIL, GOTSHAL & MANGES LLP

700 Louisiana, Suite 1600

Houston, Texas 77002

Tel: (713) 546-5000

Fax: (713) 224-9511

John Greenman

(State Bar No. 24012731)

FLORIDA COASTAL SCHOOL OF LAW

7555 Beach Blvd.

Jacksonville, FL 32216

Tel: (512) 289-5979

ATTORNEYS FOR AMICUS CURIAE
AMERICAN CIVIL LIBERTIES UNION,
NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE, AND
LEAGUE OF UNITED LATIN AMERICAN
CITIZENS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Brief has been sent to the following counsel as indicated below, on the 1st day of July, 2005.

Via First Class Mail & Facsimile

Nina Perales
David G. Hinojosa
MEXICAN AMERICAN LEGAL DEFENSE
& EDUCATION FUND, INC.
140 E. Houston Street, Suite 300
San Antonio, TX 78205

Via First Class Mail & Facsimile

Roger Rice
Jane Lopez
META, INC.
240 "A" Elm Street, Suite 22
Somerville, MA 02144

Via First Class Mail & Hand Delivery

David H. Urias
FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON, LLP
One New York Plaza
New York, NY 10004-1980

Via First Class Mail & Hand Delivery

Randall B. Wood
Doug W. Ray
RAY, WOOD & BONILLA, LLP
2700 Bee Caves Road #200
Austin, TX 78746

Via First Class Mail & Hand Delivery

R. Ted Cruz, Solicitor General
OFFICE OF THE ATTORNEY GENERAL
300 W. 15th Street
10th Floor
Austin, TX 78701

Via First Class Mail & Hand Delivery

George W. Bramblett, Jr.
HAYNES & BOONE, LLP
One Houston Center
1221 McKinney Suite 2100
Houston, TX 77010

Via First Class Mail & Hand Delivery

J. David Thompson, III
BRACEWELL & GIULIANI, LLP
711 Louisiana Street, Suite 2900
Houston, TX 77002-2781

Sylvia Ann Mayer