No. 113,267

In the Supreme Court of the State of Kansas

Luke Gannon, *et al.*,

Plaintiffs-Appellees,

v.

State of Kansas, *et al.*,

Defendant-Appellants.

Appeal From Appointed Panel
Presiding in the District Court of Shawnee County, Kansas

Honorable Franklin R. Theis
Honorable Robert J. Fleming
Honorable Jack L. Burr

District Court Case No. 10C001569

RESPONSE BRIEF OF APPELLANT STATE OF KANSAS

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Oral Argument: One Hour

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Appendix A, *Montoy v. State*, No. 92-032, Order at 1 (Kan. filed Feb. 12, 2010)

ARGUMENT

I. Kansas Students Are Doing Well Despite Doomsday Hyperbole

For years, one of the most fervently debated issues in the Legislature and by citizens throughout the State has been funding of K-12 public schools. During these debates, whether the Governor was a Republican or Democrat, there have been dire predictions about how allegedly inadequate funding would shortchange students, compromise their education, and eventually hurt the State. *E.g.*, Brief of Appellees, at 32-33. The plaintiff Districts repeat these exaggerated claims in their opening brief, in which they seek immediate judicial action and unending judicial management of the school system as well as the legislative and executive branches of government.

The doomsday predictions, however, have proven to be pure hyperbole. Just in the last few weeks, the Kansas Association of School Boards ("KASB") *ranked Kansas number 5 in the country* based on an overall average ranking on fourteen national indicators. *See* "Kansas Progress Report and Fact Sheet, September 2015 Brochure," https://kasbresearch.wordpress.com/publications/. And the Kansas State Department of Education ("KSDE") reported that Kansas high school students scored better this year than their peers across the country on the ACT college entrance exam. "More Kansas Students Meeting ACT College Readiness Benchmarks," http://www.ksde.org/Home/QuickLinks/NewsRoom/tabid/586/aid/127/Default.aspx. The report added that a higher percentage of Kansas students appear ready for college courses than the national average. *Id. See* K.S.A. 60-409.

The National Assessment of Educational Progress ("NAEP") statistics tell a similar story of relative success. NAEP administers nationwide assessments that aim to

gauge students' progress over time. Vol. 41, at 2673-74. It is often called the Nation's Report Card. *Id.* Because each state uses different assessment tests, scores on the NAEP tests are the only way to judge how Kansas schools are performing compared to other states. Vol. 38, at 2214-15.

For the years 2003, 2005, 2007, 2009, 2011 and 2013, Kansas test scores on the NAEP were higher than the national average; and the scores generally have improved over those years. Vol. 25, at 3216. The 2013 NAEP results—the latest reported—demonstrate that Kansas students continue to perform well in comparison to other states:

- Only 4 states scored better on the 2013 NAEP 4th grade math test for all students.
- Only 5 states scored better on the 2013 NAEP 8th grade math test for all students.
- Only 9 states scored better on the 2013 NAEP 4th grade reading test for all students.
- Only 15 states scored better on the 2013 NAEP 8th grade reading test for all students.

Vol. 25, at 3217.

In addition, Kansas has been addressing achievement gaps. "Gap" is a term used to describe the difference in scores on assessment tests between subgroups of students, usually between non-free or reduced lunch white students, and other subgroups, *e.g.*, free or reduced lunch students, Hispanic students or African American students. Vol. 34, at 1396. Achievement gaps have always existed and are a national problem. Vol. 37, at 2123; Vol. 35, at 1524-26. No school district anywhere has been able to fully close the gaps. *Id.* This fact is not surprising since students' social and family backgrounds can affect a student in ways that are beyond a school's ability to control. *Id.*

However, Kansas has been addressing these gaps. For example, in 2006, every major subgroup was below 65 percent proficient in math; by 2011, every major subgroup

was above 65 percent and had an average increase of 15 percentage points from 2006. Vol. 69, at 2734-36; Vol. 33, at 1126; Vol. 37, at 2123. In 2006, every major subgroup was below 70 percent proficient in reading; by 2011, every major subgroup was above 70 percent and had increased at least 10 percentage points from 2006. *Id.* The Kansas Report Card for 2011-12 shows that by 2012 the proficient percentages of every major subgroup remained above 65 percent in math and 70 percent in reading. Vol. 25, at 3215-16; *see also* Vol. 33, at 1127-28; Vol. 69, 2734, 2737-38 (showing that in 2012, KASB ranked Kansas public education in the top 10 of all states in the all-student and free-and-reduced-lunch categories for reading and math based on NAEP scores).

II. The Court Must Decide The Issues By Applying The Law, Not By Following The Districts' Exaggerated Rhetoric

Clearly Kansas high school students are doing well. Yet, the Districts repeatedly attack and attempt to demonize the Legislature. After electing representatives, lobbying, campaigning, and editorializing, those who could not persuade the Legislature to provide more state funding for education may well be disappointed. That disappointment, however, does not justify ad hominem attacks (particularly in a legal brief) that the Kansas Legislature and its members have "continued . . . efforts to thwart compliance" with constitutional obligations. Brief of Appellee, at 31. In their opening brief alone, the Districts have accused the Legislature of "never wholeheartedly accept[ing]" its constitutional obligations, "mislead[ing]" the courts and the public, and purposely providing inadequate funding to Kansas schools "to sacrifice the education of Kansas schoolchildren." Brief of Appellee, at 3, 6, 17, 21, 31, 32, 52.

The Districts' overblown rhetoric aside, there is no evidence that Kansas parents, teachers, and schools lack a full and fair opportunity to pursue their objectives through

the democratic process. Indeed, Kansas legislators are Kansans, Kansans who themselves have children, grandchildren, other family members, friends and neighbors who attend or have children who attend Kansas public schools. Every Kansas legislator is elected in free and open elections by constituents who have all sorts of connections to Kansas public schools, as well as interests in the very children currently attending those schools. There are few if any state legislative races in which the candidates' views and positions on school funding and other support for public education are not squarely presented to voters.

The Districts' suggestion that multiple Governors and Legislatures have sought to harm generations of Kansas kids has no basis in fact, and no connection to reality; their hyperbole borders on paranoia. There should be no question that all those with an interest in this litigation want each Kansas school to be a good school, and want each Kansas child to receive a quality education. We may debate or have competing visions about how best to accomplish these goals, but we do share these important objectives.

To say that "[h]istory shows the State has been unwilling to meet its burden under the Constitution for almost as long as the burden has existed," Brief of Appellees, at 49, is fantasy—an attempt to ignore and rewrite history, a history which is far more complicated and nuanced, and in which there are no Black Hats and White Hats. *See U.S.D. No. 229 v. State*, 256 Kan. 232, 243, 885 P.2d 1170 (1994) (summarizing the history through 1992). The Districts' brash claim that for almost half a century popularly elected governors and legislators of both political parties and all philosophical stripes have consistently "been unwilling" to comply with Article 6 reveals more about the Districts' unrealistic demands made under the minimalist language of Article 6 than

about the shortcomings of elected officials and the voters who continue to choose them. Even when district court judges found Kansas school funding unconstitutional on grounds ultimately rejected by the United States Supreme Court, the Legislature responded by amending and passing new finance laws. *Compare Caldwell v. State*, No. 50616, slip op. (Johnson Cnty. Dist. Ct. Aug. 30, 1972), at Vol. 46, at 77-80, *and Knowles v. State*, 219 Kan. 271, 272-73, 547 P.2d 669 (1976) (district courts found that reliance upon local funding for Kansas' K-12 education violated the equal protection clause of the Fourteenth Amendment of the United States Constitution), *with San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (decided after the district court decisions in *Caldwell* and *Knowles*, concluding there was no equal protection violation because local control provided the rational basis for the local funding in Texas' school finance system). Further, the Legislature replaced school finance statutes and significantly increased funding in response to *Montoy*, to the satisfaction of the Court as part of the "remarkably direct communication between the state's three branches of government" concerning "the Kansas Constitution's mandate that school financing be 'suitable.'" *Petrella v. Brownback*, 787 F.3d 1242, 1268 (10th Cir. 2015).

Now, in response to the decision in *Gannon v. State*, 298 Kan. 1107, 319 P.3d 1196 (2014), the State provided and distributed to local districts $140 million *more* in supplemental general state aid ("LOB") and capital outlay ("Outlay") aid in the 2014-2015 school year ("FY2015") than districts had received the previous year. The LOB aid totaled $448,973,840 and the Outlay aid totaled $27,126,700, inclusive of forgiven overpayments. Brief of Appellee, Appendix A, at 1. This aid was well above the amounts

provided before FY2015 and roughly aligned with the amount of aid the KSDE had estimated would be necessary to fully fund LOB and Outlay aid following *Gannon*.

Once one side of a public policy debate resorts to litigation, the courts must act within the settled framework for reviewing the constitutionality of the relevant legislative enactments. Courts are not an alternative political forum in which those disappointed by legislative outcomes get to rehash public policy debates. If a proper plaintiff brings a cognizable constitutional claim, and the court proceeds to the merits and finds a constitutional violation, any judicial remedy must respect the limits of the law (including appellate jurisdiction, the rules for the termination of litigation, and the scope of injunctive powers), the courts' co-equal branches of government, and the people of Kansas who have elected the other branches of government. The Court should look beyond the Districts' inflammatory rhetoric and instead focus on the actual facts and governing law.

III. The State Complied With This Court's Order To Cure The Inequities Identified In *Gannon*

The only issue before the Court is the question the Court posed in the mandate when it remanded this case to the Panel: "whether the State has cured the inequities initially found by the panel and affirmed by this court in *Gannon*." *See Gannon v. State*, No. 113,267, Order at 2 (Kan. filed July 24, 2015); *see also Gannon*, 298 Kan. 1107, 1198, 319 P.3d 1196 (2014) ("[T]he panel must apply our test to determine whether that legislative action cures the inequities it found and which we have affirmed."); *id.* at 1188-89.

The State has complied with this Court's mandate in *Gannon*. In arguing otherwise, the Districts (like the Panel) ignore the equity test this Court adopted and

instead demand that the Legislature provide full funding of equalization aid under the old formula. But *Gannon* held that the inequities found by the Panel and affirmed in *Gannon* could be cured in a number of ways; this Court did not mandate full funding of the old formula. The Legislature acted reasonably in providing millions of dollars in additional LOB and Outlay aid, amounts roughly equal to the amount of aid the KSDE had estimated and informed the Legislature would be necessary to fully fund LOB and Outlay aid following *Gannon*, before artificial inflations that had nothing to do with equity. The Panel's conclusion that this additional aid failed to comply with this Court's *Gannon* decision is not supported by substantial competent evidence. *Gannon v. State*, 298 Kan. 1107, 1175, 319 P.3d 1196 (2014) ("Insofar as any of the panel's factual findings are in dispute, the court applies a substantial competent evidence standard.")

A. The Panel Failed To Apply The Equity Test This Court Adopted In *Gannon*

In remanding this case to the Panel, the *Gannon* Court explained that the inequities it identified could be "cured in a variety of ways—at the choice of the legislature." *Gannon*, 298 Kan. at 1181, 1188-89. Any cure the Legislature chooses should "be measured by determining whether it sufficiently reduces the unreasonable, wealth-based disparity so the disparity then becomes constitutionally acceptable, *not whether the cure necessarily restores funding to the prior levels.*" *Id.* (emphasis added). The Court directed that if the Legislature acted to cure the inequities by a means other than full restoration of equalization funding to prior levels, the Panel must determine whether the Legislature's cure provides districts with "reasonably equal access to substantially similar educational opportunity through similar tax effort." *Id.* at 1175, 1198.

Like the Panel's opinion, the Districts' brief pays only lip service to this Court's equity test. Instead, the Districts demand that the State provide "full funding" of equalization aid under the old formulas, and harp on the fact that 2015 House Substitute for Senate Bill 7 ("SB 7"), does not provide this funding. *See* Brief of Appellees at 21 ("[U]nder the operation of S.B. 7, property-poor Kansas school districts will only receive a fraction of the full equalization funding that they expected to receive by operation of H.B. 2506 . . . ."); *id.* at 24 (arguing that Outlay aid under SB 7 is insufficient because this aid is not fully funded under the old formula); *id.* at 26-27 (same for LOB aid).

The Districts urge this Court to adopt the same zero-tolerance test the Panel applied. The Panel equated "equality" with "equity." It presumed that providing LOB or Outlay aid at less than "full funding" necessarily violates the equity component of Article 6 of the Kansas Constitution by increasing "inequity" between the districts that receive aid and the wealthier districts that do not. *E.g.*, Vol. 136, at 1454 ("[T]he legislature has, by not restricting the authority of wealthier districts to keep and use the full revenues of [an Outlay] levy, merely reduced, not cured, the wealth-based disparity."); Vol. 136, at 1470 ("[T]here already exists a 18.8 percentile disparity between the wealthiest districts' tax effort per mill and their choices for the budgeted uses of such revenues and the first eligibility level for USD [LOB] aid.").

This flawed premise is expressed in the Districts' proposed findings numbered 34 and 59, which were adopted by the Panel. They state:

> (34) The Panel finds that the adoption of S.B. 7 exacerbates already-existing inequities in the system because it only reduced the funding available to the State's most vulnerable school districts (i.e. – those districts that rely on [Outlay] equalization aid).

> (59) The Panel finds that the adoption of S.B. 7 exacerbates already-existing inequities in the system because it only reduced the funding available to the State's most vulnerable school districts (i.e. – those districts that rely on [LOB] equalization aid).

Vol. 140, at 13, 22 (findings 34 & 59). The "reduc[tion]" mentioned in both of these findings uses full funding of equalization aid under the old formulas as the baseline, demonstrating that the Panel, following the Districts' lead, applied a zero-tolerance test to any legislative solution that provided less than "full funding" under the old formulas. In these and all other findings, the Panel erroneously conflated the Panel's own standard—absolute equality—with this Court's standard—equity, *i.e.*, *reasonably equal* access to *substantially similar* educational opportunity through *similar* tax effort. *See* Vol. 140, at 10, 11, 14-18, 23-25 (findings 21, 25, 38, 40, 41, 43, 45, 63, 64, 65, 66, 69).

The remedy the Panel ordered confirms the Panel applied a zero-tolerance test for less than "full funding" under the old LOB and Outlay formulas. The Panel's temporary restraining order purports to require, among other things, that LOB and Outlay aid must be fully funded under the terms of the "before January 1, 2015" version of state aid statutes. Vol. 136, at 1486-89, 1494-95. Thus, the Panel believed that any amount of funding below those levels is unconstitutional.

The Panel's findings never addressed whether the State substantially complied with the Court's ordered cures of the inequities the Panel found and this Court affirmed. The Panel did not evaluate the specific infirmities found and affirmed in *Gannon*; nor did it receive evidence or—because it applied a zero-tolerance test—make findings of fact pertinent to the legal question of whether districts have reasonably equal access to substantially similar educational opportunity through similar tax effort. Rather, the Panel's demand that the Legislature provide "full funding" of equalization aid under the

old formulas conflicts with this Court's clear and emphatic holding that "full funding" is not the necessary, and certainly not the only, remedy for the inequities that violated Article 6. *Gannon*, 298 Kan. at 1181-83, 1188-89, 1198-99.

B. The Legislature Cured The Inequities Identified And Affirmed In *Gannon*

Applying this Court's equity test, the Legislature fully cured the inequities this Court identified in *Gannon*. Immediately after *Gannon*, the Legislature passed 2014 Senate Substitute for House Bill 2506 ("HB 2506") to fully fund LOB and Outlay aid based on estimates the KSDE provided. Vol. 138, at 125-28; Vol. 142, at 77-87. The Legislature made appropriations for an additional $109,265,000 in LOB aid and an additional $25,200,786 in Outlay aid. *Id.*; *see also* Vol. 24, at 3051-53 (concluding HB 2506 complied with this Court's order regarding LOB and Outlay aid).

Then circumstances changed. First, as a result of a precipitous increase in the Average Valuation Per Pupil ("AVPP") of the hypothetical 81.2 percentile district and local districts' opportunistic increases in capital outlay levies, the State would have been required to distribute approximately $35 million more in LOB aid and $17 million more in Outlay aid in FY2015 than it had budgeted based on the KSDE's estimates. Vol. 143, at 2177, columns 3, 4, 9, 10; Vol. 142, at 1568. *See also* Brief of Appellant, at 4-6. Second, many months after HB 2506 became law, allotments were necessary because of revenue shortfalls. Vol. 142, at 170-82. On February 5, 2015, an allotment reduced the general state funding for K-12 by 1.5%, effectively reducing the base state aid per pupil from $3,852 to $3,810.50. Vol. 142, at 174.

In part as a result of these changed circumstances, the Legislature passed 2015 House Substitute for Senate Bill 7 ("SB 7"), 34 Kan. Reg., No. 14, at 267 (Apr. 2,

2015), which provided LOB and Outlay aid in line with the KSDE's estimates that approximately $135 million in additional equity aid was needed for FY2015 in order to comply with *Gannon*. *See* Brief of Appellant, at 4-5, 7-11 (describing aid provided by SB 7 and the details of the new aid formulas).

SB 7 was an appropriate adjustment in light of changed circumstances unrelated to any equity concern. *See* Brief of Appellant, at 5-7, 23-32. The undisputed evidence presented to the Panel showed that LOB and Outlay formulas were changed in response to the spike in AVPP—unrelated to operating or maintenance costs—and opportunistic districts' increased levies for Outlay monies. *Id.* No evidence supports a finding that the aid provided became insufficient thereafter because of the artificial inflations under the old formula. And the Panel made no such finding. Further, it cannot be claimed that districts had to increase mill levies because of SB 7. Any local district LOB tax for this year has already been levied. In fact, the increased LOB aid allowed local districts to reduce their LOB mill levies in FY2015 even after local districts generally voted for larger LOBs. *Id.*

C. Any Contrary Conclusion Cannot Be Supported By Substantial Competent Evidence

The Panel did not evaluate the specific infirmities found and affirmed in *Gannon*, and because it applied a zero-tolerance test it did not receive evidence or make any findings of fact pertinent to the legal question of whether districts have reasonably equal access to substantially similar educational opportunity through similar tax effort. Thus, the Panel's conclusions that the State failed to comply with *Gannon* are not supported by substantial competent evidence in the record or otherwise.

In its opinion and order, the Panel did not differentiate between its conclusions of law, its reasons for its conclusions, and its findings of fact. Vol. 136. Likewise, the Districts' proposed findings, which the Panel adopted verbatim, are numbered paragraphs of intermixed legal conclusions, reasoning and fact findings. Vol. 140. These "findings" are in large part the by-product of the Panel's adherence to its zero-tolerance standard in the place of this Court's equity test; no substantial competent evidence was presented to the Panel to quantify any alleged impact or provide any other analysis of local districts' access to substantially similar educational opportunity. *Gannon*, 298 Kan. at 1175 (applying substantial competent evidence standard to panel's factual findings).

"Substantial competent evidence possesses both relevance and substance. It furnishes a substantial basis of fact from which the issues can reasonably be resolved. Moreover, substantial evidence is such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion." *In re J.M.E.*, 38 Kan. App. 2d 229, 232, 162 P.3d 835 (2007) (*citing State v. Gray*, 270 Kan. 793, 796, 18 P.3d 962 (2001)); *accord State v. Brown*, 300 Kan. 542, 546, 331 P.3d 781 (2014).

The testimony and exhibits introduced at the May 2015 equity hearing did not provide evidence that a reasonable person might accept as being sufficient to support a conclusion that districts were denied substantially similar educational opportunity because they received "only" a $140 million dollar increase in LOB and Outlay aid in FY2015. Likewise, no evidence presented at that hearing supported a conclusion that districts, through similar tax effort, are unable to provide reasonably equal access to substantially similar educational opportunity.

Three witnesses testified at the May 2015 hearing, Vols. 138 & 139, and the parties introduced several exhibits, Vol. 135. The Kansas City district's superintendent and the Hutchinson district's superintendent each testified that their respective districts lost funding under SB 7. Vol. 142, at 1459-68. These two administrators compared all the funding their districts hoped to receive under the laws in place before HB 2506 for FY2015-17 with funding under SB 7. *Id.*; Vol. 138, at 26-33, 85-86, 92-96, 99-102; Vol. 139, at 291-92, 295-98, 319-22, 328-31. Any reductions, which they described as "cuts," were not linked to FY2015 or loss of LOB or Outlay aid alone.

Importantly, neither witness testified that these alleged "cuts" prevented their districts from providing reasonably similar educational opportunities to those provided across the State. Vol. 138, at 115-16; Vol. 139, at 343. Their testimony only supported their own definition of Article 6 "equity"—that there is a constitutional violation if their districts do not receive *all* the resources that their administrators believe are desirable in an ideal world, while still maintaining large cash reserves. Vol. 138, at 25-27, 31-36, 82-109, 113-14; Vol. 139, at 286, 291-99, 309-10, 326-31, 333-40. In fact, no evidence purporting to show any impact on any other district was submitted from any source, including any alleged impact on plaintiff districts Wichita and Dodge City.

Actually, when the Districts and the Panel refer to "cuts" allegedly caused by SB 7, they are comparing funding under SB 7 to the funding that the Districts had hoped to receive in FY2015 or hoped to receive thereafter. *See, e.g.*, Vol. 140, at 29 (finding 84) (comparing funding expected under HB 2506 in FY2015, not actual FY2015 funding, to estimated FY2016 funding). But these "cuts" are not reductions in the level of equity aid this Court addressed in *Gannon*. The Districts cannot dispute the *fact* that, after *Gannon*,

the Legislature provided millions of dollars in additional equity aid, including $140 million more aid in FY2015.

Dale Dennis, the KSDE's Deputy Commissioner for Administrative and Financial Services, also testified. Vols. 138 & 139. His testimony mostly addressed the estimates KSDE provided to the Legislature for HB 2506 and the change in circumstances due to a precipitous increase in the AVPP of the hypothetical 81.2 percentile district and local districts' opportunistic increases in capital outlay levies. Vol. 138, at 125-71. He also discussed 2015 allotments, Vol. 138, at 172-73; Vol. 139, at 217-21, and spreadsheets prepared by the KSDE to show estimated changes in state funding of K-12 because of the 2015 allotments and adoption of SB 7, Vol. 138, at 171-88, 194-96; Vol. 139, at 211-17. Dennis did not testify about the educational opportunities of any local district. He did not testify about any impact on districts' access to substantially similar educational opportunity because the districts received "only" a $140 million dollar increase in LOB and Outlay aid in FY2015.

This Court is in the same position as the Panel in its ability to review and analyze the exhibits the Panel received. These exhibits show district LOB mill levies were reduced, while LOB usage increased and districts increased Outlay mill levies. *See* Brief of Appellant at 6-7, 20, 25-26, 31-32. However, districts set FY2015 mill levies before SB 7 was enacted. *Id.* at 37; Vol. 138, at 57-62, 70-71. The tax effort they selected assumed "full funding" of the old aid formulas. Therefore, the exhibits do not support the assertion that districts' "tax effort" was unconstitutionally dissimilar in FY2015, even under the Panel's reasoning.

The Districts point out that the amounts of Outlay and LOB a district can raise per each mill levied varies substantially. *See* Brief of Appellees, at 25, 27 (citing Vol. 140, at 15-18, 23, 25-26 (findings 41-43, 64, 68, 69). While this is true, even fully funding the old aid formulas would not change the fact that the variances exist. Demonstrative exhibits 620, 621 and 622, Vol. 142, at 265-77, (*see* Appendix to Brief of Appellees), illustrate the variance for Outlay levies even though the enrollment data used to prepare the exhibits is slightly different than that found in the later audited data. The exhibits show districts with the highest AVPP can raise more Outlay revenue and often levied the maximum 8 mills in FY2015. However, as the colored portions of the bars on the chart depict, the variance between the districts continues to exist at "full funding" of Outlay aid under the old formula. Furthermore, the exhibits show this variance is not significantly worsened by provision of aid under SB 7 instead of under the old formula. Likewise, demonstrative exhibits 630 and 631, Vol. 142, at 293-302 (*see* Appendix to Brief of Appellees), show both the variance under SB 7, the continued variance under the old formulas, and the absence of any significant change or worsening variance under SB 7.

The salient point, which the Districts' demonstrative exhibits support, is that by itself variance in local taxing power does not answer whether a district has reasonably equal access to substantially similar educational opportunity through similar tax effort. The variance is not substantial competent evidence to support or contradict the State's position that the Legislature cured the infirmities found and affirmed in *Gannon*.

Although the question before the Court is whether the State has complied with the Court's direction to cure the inequities found by the Panel and affirmed in *Gannon*, the Districts try to interject adequacy of K-12 funding into the discussion. They state that no

school district will receive more money under operation of SB 7, Brief of Appellees, at 20, and point out the Panel's position that KPERS funding is irrelevant to Article 6's adequacy analysis. *E.g.*, Vol. 136, 1429-31. But inadequacy of funding was not one of the inequities found and affirmed in *Gannon* that this Court tasked the State to cure.

Moreover, the Districts' assertion that the State has "falsely" claimed it is spending more money, *see, e.g.*, Brief of Appellees, at 33, is belied by the evidence, which demonstrates that SB 7 increases annual funding *from the State*:

Fiscal Year	Funding	Increase	Funding excluding KPERS	Increase without KPERS
2014	$3,262,850,907		$2,950,583,742	
2015	$3,407,573,315	$144,772,408	$3,092,773,312	$142,189,570
2016	$3,491,873,449	$84,300,134	$3,097,273,451	$4,500,139
2017	$3,551,030,858	$59,157,407	$3,114,404,856	$17,131,405

Vol. 143, at 2177-78, totals from columns 12, 13, 19, 20, 26, 27; Vol. 143, at 2188, column 6. And, focusing on equity issues, the only "reductions" to LOB and Outlay aid by SB 7 were reductions to the *increased* LOB and Outlay aid provided by HB 2506. *See, e.g.*, Vol. 140, 21 (finding 56) (comparing *increases* in LOB aid to the plaintiff Districts under SB 7 and HB 2506). Even after these "reductions," districts still received millions of dollars more in LOB and Outlay aid for FY2015 than in the prior fiscal year, amounts that exceeded what *everyone* found acceptable in June 2014, including the Districts and the Panel.

The Districts contend, and the Panel emphasized, that the Legislature should have known the KSDE's estimates of monies needed to fully fund the old aid formulas could be too low. Brief of Appellees, at 50; Vol. 136, at 1147-48. But the State has never argued that the changes in circumstances, which necessitated the new aid formulas, were unforeseeable. Rather, the State has consistently contended that the change in

circumstances after the passage of HB 2506 and before SB 7 became law is unrelated to any Article 6 equity concern, much less any inequity found and affirmed in *Gannon*. Thus, the Legislature's imputed knowledge is not relevant evidence from which a reasonable person could conclude the infirmities found and affirmed in *Gannon* were not cured by the additional $140 million in aid provided in FY2015.

In summary, whether school districts were provided reasonably equal access to substantially similar educational opportunity through similar tax effort is a question of law. Brief of Appellant, at 14. The Districts concede this. Brief of Appellees, at 47. Attempting to answer the question, the Panel, at the Districts' invitation, steered off course by applying its zero-tolerance test. This mistake produced the Panel's erroneous judgment which is unsupported by any evidence presented to the Panel. The Panel's June 2015 judgment must be reversed because the State substantially complied with the *Gannon* mandate.

IV. The Panel Should Not Have Adjudicated The Constitutionality Of SB 7 Beyond Its Application To FY2015

The Panel went beyond the Court's mandate by considering matters that were not essential to implementing the mandate. It decided whether SB 7, into years FY2016 and FY2017, complies with the equity piece of Article 6 on grounds that are different than the equity infirmities identified and affirmed in *Gannon*. For FY2016 and FY2017, SB 7 effectively distributes the FY2015 amounts of LOB and Outlay aid to local districts regardless of the districts' local levies for LOB or Outlay revenue and any change in the districts' enrollments. SB 7, § 6(a)(2) & (3). Naturally, the Panel's review of the claimed impacts on equity from this forward-looking legislation is unrelated to any of the

inequities which the Panel previously found and this Court affirmed. The "freeze" of aid to FY2015 levels was not in place before *Gannon* was decided.

Accordingly, under the procedural posture of this case, the Panel could only adjudicate the constitutionality of SB 7 beyond its application to FY2015 if it allowed amendment of the pleadings and provided the State with full due process. Even then, the Panel's ability to grant an amendment was constrained by the fact that the case was pending before it on remand *and* the State's appeal of the adequacy piece already had been docketed. Under these circumstances, it was unconscionable for the Panel to adjudicate the constitutionality of SB 7 after providing the State no notice of its intention to do so until the day of the May 2015 equity hearing. *See* Vol. 138, at 9.

The *Montoy* litigation is instructive. Denying a motion to reopen *Montoy*, this Court through Chief Justice Davis acknowledged that the *Montoy* litigation terminated when the Legislature enacted legislation in substantial compliance with the Court's prior remedial orders and the Court approved those efforts. *Montoy v. State*, No. 92-032, Order at 1 (Kan. filed Feb. 12, 2010) (*citing Montoy v. State*, 282 Kan. 9, 138 P.3d 755 (2006) (*"Montoy IV"*)) (Appendix A). The 2010 Order noted that in the final 2006 opinion in *Montoy* the Court did not review "whether the new legislation provided constitutionally suitable provision for finance of the public schools," but rather only whether the Legislature had complied with the Court's prior remedial orders. *Id.* at 2. The Order indicated that this refusal to review the legislation beyond the narrow issue of compliance was "based on the limits of our appellate function." *Id.* Finally, the Order quoted with approval the Court's *Montoy IV* opinion:

> The constitutionality of S.B. 549 is not before this court. It is new legislation and, if challenged, its constitutionality must be litigated in a new action filed in district

> court. . . . The school finance system we review today is not the system we reviewed in *Montoy II* or *Montoy III*. The sole issue now before this court is whether the legislation passed in 2005 and S.B. 549 comply with the previous orders of this court. If they do then our inquiry ends and this case must be dismissed. A constitutional challenge of S.B. 549 must wait for another day.

282 Kan. at 18-19.

In ending *Montoy*, this Court recognized that litigation is not indefinite and that courts do not retain continuing jurisdiction for years on end. Plaintiffs lose standing, the facts relevant to the legal claims change and evolve, the defendants and others take actions that alter and affect the situation. In *Montoy* the Court recognized the limits of both judicial power and the judicial role in complex public policy debates.

The Districts argue the Panel properly adjudicated the constitutionality of SB 7 because this Court directed it to do so. Brief of Appellees, at 39, 44. The Districts filed a motion for declaratory judgment and injunctive relief after the *Gannon* mandate was issued and the Panel had decided both the equity and adequacy issues remanded to it. Vol. 124; Vol. 130, at 12-43; *Gannon v. State*, Case No. 113,267, Court's Docket, February 18, 2015 entry. The State filed a supplemental docketing statement pertaining to its appeal of the adequacy issues and the Panel's refusal to substantively alter and amend its decision. *See Gannon v. State*, Case No. 113,267, Court's Docket, March 15, 2015 entry. On April 30, 2015, the Court issued an Order overruling the Districts' motion to strike the State's supplemental docketing statement. The Order provided, in part:

> The district court has jurisdiction to resolve all pending post-trial matters, including the Plaintiffs' January 27 motion to alter the December 30 order on the issue of equity and their March 26 motion for declaratory judgment and injunctive relief, and any additional motions filed after the date of this order.

Gannon v. State, No. 113,267, Order at 3 (Kan. filed April 30, 2015).

Jurisdiction to "resolve" the March 26 motion for declaratory judgment and injunctive relief is very different than a blessing from this Court to ignore the boundaries of the *Gannon* mandate, ignore case law limiting consideration of matters that were not essential to implementing the mandate, *see, e.g.*, *State v. Collier*, 263 Kan. 629, 632, 952 P.2d 1326 (1998), and jettison the due process owed to every litigant, including the State of Kansas.

Of course, the State does not dispute that the Panel had jurisdiction to evaluate and declare whether SB 7 substantially complied with *Gannon*'s mandate as it concerned equity. The State also does not challenge that the Panel had jurisdiction to evaluate any appropriate injunctive relief if the inequities found and affirmed had not been cured. This was, in fact, the main point for decision in the Districts' motion. Vol. 130, at 16-17. That aspect of the motion makes it understandable that the Court's April 30 order noted the Panel's jurisdiction to resolve the point.

This Court's April 30 order did not, however, overrule settled Kansas precedent limiting remand decisions, nor did this Court give the Panel license to do more than either (1) refuse to grant declaratory and injunctive relief pertaining to SB 7's application to FY2016 and FY2017 or (2) decide whether an amendment would be allowed to initiate complete litigation of SB 7's constitutionality. Ultimately, the conclusion is inescapable that this Court's order neither authorized nor excused the Panel's erroneous consideration of SB 7 beyond the confines of the *Gannon* equity mandate.

V. Even If It Were Appropriate For The Panel To Consider SB 7 Into FY2016 And FY2017, The Panel Incorrectly Concluded That SB 7 Fails To Satisfy This Court's Equity Test During Those Fiscal Years

Under SB 7—the Classroom Learning Assuring Student Success Act ("CLASS") —Kansas districts will receive block grants for FY2016 and FY2017 that include "General State Aid" equal to (1) what school districts were entitled to receive in general aid for school year 2014-15, as adjusted by virtual school aid calculations and a 0.4 percent reduction for an Extraordinary Need Fund; (2) LOB aid and Outlay aid as adjusted in 2014-15; (3) virtual state aid as recalculated for fiscal years 2016 and 2017; (4) amounts attributable to the tax proceeds collected by school districts for the ancillary school facilities tax levy, the cost of living tax levy, and the declining enrollment tax levy; and (5) KPERS employer obligations, as certified by KPERS. SB 7, §§ 4-22. Also, the balance from appropriations for general state aid that exceeds the FY2015 district funding, as modified by SB 7, will be disbursed in FY2016 and FY2017 "to each school district in proportion to such school district's enrollment." *Id.* § 6(f).

The Panel's June 2015 order concerned more than the LOB and Outlay aid aspect of SB 7. Setting aside its evaluation of Article 6 adequacy under SB 7, the Panel found distribution of State aid, including general state aid and LOB and Outlay state aid, at FY2015 levels without regard to changes in the districts' enrollments was unconstitutionally inequitable.

Concerning FY2016 and FY2017 LOB and Outlay aid, the Panel again applied its erroneous zero-tolerance test to amounts of funding less than "full funding," but it included a twist. For FY2016 and FY2017, the Panel held not only must the amount of aid generated equal "full funding" under the old aid formulas, but the LOB aid provided

must incorporate all of the adjustments under the January 2015 version of the School District Finance and Quality Performance Act ("SDFQPA") used to calculate the maximum that districts can raise in LOB or obtain in LOB aid. Vol. 136, at 1476-77, 1495-95. In short, the Panel enshrined both the old aid formulas and the January 2015 version of SDFQPA's state aid calculations as constitutional litmus tests for equity under Article 6.

There are numerous problems with the Panel's rulings concerning SB 7. At the most fundamental level, the Panel erred by substituting its own policy judgments for funding public education for the Legislature's, and by substituting its own zero-tolerance test for this Court's Article 6 equity test.

Deference must be given to legislative actions, including the Legislature's actual and presumed findings. Brief of Appellant, at 15-17. For example, the Legislature created an extraordinary need fund to address any inability of districts to provide educational opportunities, SB 7, §17, and appropriated for the fund $12,292,000 in FY2016 and $17,521,425 in FY2017, SB 7, §§2(b) and 3(b). The Legislature's actual and presumed finding concerning the fund's ability to better assure districts are able to provide substantially similar educational opportunities through similar tax effort cannot be ignored, but that is exactly what the Panel did. The presumption of constitutionality of legislative action must be enforced. The Panel did not engage in this analysis, but concluded that any variation from the SDFQPA must be unconstitutional.

Instead, SB 7 must be evaluated on its own terms, not by mechanistically comparing its outcomes to those under a now-repealed statutory formula. This requires asking, what deference is due to the Legislature's redesign of a school finance system?

What were the purposes behind the Legislature's choices and what was the Legislature attempting to accomplish? Did and could the Legislature conclude that the weightings in the SDFQPA were not operating fairly and as intended, such that a new approach might better serve a variety of valid legislative objectives? Ultimately, the Panel has no basis for finding the Legislature acted arbitrarily. It never even considered these questions.

Rather, the Panel found persuasive the calculations the Districts offered to illustrate how change in weighted full-time equivalents between FY2014 and FY2015, if repeated in FY2016, could result in certain districts receiving more LOB aid and some receiving less LOB aid because LOB aid was "frozen" at FY2015 levels. Vol. 136, at 1477-78. The Panel jumped to the conclusion that this is an unconstitutional inequity only on the basis of its zero-tolerance test.

The Panel most certainly did not apply this Court's test for equity in K-12 public education: "School districts must have reasonably equal access to substantially similar educational opportunity through similar tax effort." *First*, the Panel stated the LOB and Outlay aid provisions in SB 7 for FY2016 and FY2017 were "unconstitutional on their face." Vol. 136, at 1426. Yet "reasonably equal access" to "substantially similar educational opportunity" by "similar tax effort" cannot be determined on the face of SB 7.

Second, the Panel's remedy confirms it again applied its zero-tolerance test because it ordered "full funding" under the 2015 version of the now-repealed SDFQPA formulas. Vol. 136, at 1476-77, 1495-95.

Third, there is no substantial competent evidence from which the Panel could infer that the relatively minimal change in aid provided by SB 7 unconstitutionally

impacted educational opportunity at all. The Panel's concern about changes in enrollments is speculative and insubstantial. Changes in enrollments, including weighted enrollments, did not have a significant impact on equalization aid even under the old formula. These changes have *no* impact on Outlay aid because enrollment numbers were not part of that formula. But, even with LOB aid, the percentage change in FY2015 because of enrollment changes between 2013-14 and 2014-15 was only about one-third of one percent. Brief of Appellant, at 37. And, it was unreasonable for the Panel to overlook that funds earmarked for general state aid in FY2016 and FY2017 would be reduced if they are re-tasked for "full funding" of LOB and/or Outlay aid. Remembering equity is the only question here, under the Panel's logic, districts (particularly those with substantial enrollment weightings) would only have general aid taken from one pocket and placed in another pocket as LOB and/or Outlay aid.

The Panel was also persuaded that it would be unfair if districts do not receive LOB and Outlay aid on any increase in local taxes for LOB and Outlay above FY2015 levels. Vol. 136, at 1438. *First*, again, the Panel did not apply this Court's test for equity in K-12 public education. It jumped to the conclusion that the "loss" of a small amount of additional aid if local districts were to increase LOB and Outlay usage in FY2016 or FY2017 because of its zero tolerance to anything less than full funding of the old aid formulas.

Second, there is no reason to believe districts that did not raise their maximum LOB and Outlay in FY2015 will do so in FY2016 or FY2017. The decision on what taxes to levy was made by the districts when they assumed "full funding" of aid under the old formulas. Vol. 138, at 57-62, 70-71.

Third, no admissible evidence was presented to the Panel that districts will be unable to tax and raise LOB or Outlay funds above the FY2015 levels if any additional taxing authority exists and they make that choice. Only an unauthenticated, third-party's summary of local election results, without any foundation, was offered as support that some districts might be unable to increase LOB or Outlay usage. Vol. 142, at 41-71. And the Panel was wrong to take judicial notice of the exhibit. *See Razey v. Unified Sch. Dist.*, 205 Kan. 551, 555, 470 P.2d 809 (1970) (holding under the doctrine of judicial notice that courts do not take cognizance of particular facts not of common notoriety, of which they have no constructive knowledge, or which may be disputed by competent evidence). But even if such evidence had been presented, any possible problem predated SB 7 and was present under the statutes in place as of January 1, 2015.

In summary, the Panel failed to apply the equity test this Court adopted and instead applied a zero-tolerance test that constitutionalizes previous statutory school finance schemes. The Panel also failed to grant appropriate deference to the Legislature's judgments, and no evidence supports a conclusion the Legislature was arbitrary in enacting SB 7. Even if the Panel could have considered and adjudicated equity issues beyond those found and affirmed in *Gannon*, the Panel's erroneous judgment, which cannot be supported by any evidence presented to the Panel, must be reversed.

VI. The Panel's Remedy Was Improper And Unconstitutional

The Districts contend the State is hiding behind Article 2 of the Kansas Constitution to avoid compliance with Article 6. Not so. The State has never argued that Article 2 trumps Article 6. Rather, the State has simply echoed this Court's caution in

Gannon that courts must "carefully consider" the separation-of-powers constraints on their remedial powers. *Gannon v. State*, 298 Kan. 1107, 1197, 319 P.3d 1196 (2014).

The Districts invite the Court to ignore these constraints. Remarkably, the Districts argue the Panel's remedy is appropriate "*even if it means encroaching upon the Legislature's appropriations power*" under Article 2. Brief of Appellees at 40 (emphasis added). The Panel evidently shared this belief. Both are wrong.

Not only is it inappropriate (and unconstitutional) for the courts to violate one provision of the Constitution in an attempt to remedy a violation under another, but it is also unnecessary here. The Districts maintain that this Court must allow the Panel to unconstitutionally order the Legislature to enact appropriations and school finance laws because otherwise "the Legislature will be given . . . the judiciary's power to review the constitutionality of the laws that the Legislature enacts." Brief of Appellees, at 3. But the Districts cite no authority for their argument, and it may be presumed that none exists. In fact, courts may enter declaratory judgments and prohibitive injunctive relief where appropriate and within parameters that provide necessary recognition of the powers and responsibilities of the co-equal branches of government. Articles 1 and 2 do not need to be written out of the Kansas Constitution to protect this Court's authority to interpret Article 6.

The Districts also argue that the Panel's remedy does not offend Article 2 because the Panel did not compel appropriations. Brief of Appellees, at 40 (*citing* Vol. 136, at 1479-1502). However, the Panel's remedy orders payment of millions of dollars more aid to school districts, requiring monies to be drawn from the treasury and the treasury to be

replenished if it runs dry. And these payments are not authorized by any law, except the "law" the Panel unconstitutionally purported to create.

If this Court finds an Article 6 violation, the appropriate remedy would be to issue a declaratory judgment, allowing the Legislature an opportunity to address any violation. *See* Brief of Appellants, at 42-46. The Districts claim that a declaratory judgment would be an improper advisory opinion, citing *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 879, 179 P.3d 366 (2008). Brief of Appellees, at 34. The Districts misread *Morrison v. Sebelius*, which offers no support for their argument. *Sebelius* acknowledged the constitutional validity of the declaratory judgment statute (K.S.A. 60-1701) in general, *see* 285 Kan. at 897 (discussing *State ex rel. Hopkins v. Grove*, 109 Kan. 619, 201 P. 82 (1921), but concluded that unusual legislation directing the attorney general to file a lawsuit seeking a ruling on the constitutionality of the Kansas Funeral Picketing Act as a precondition to the act becoming legally operative amounted to an effort to obtain an advisory opinion. This case is a live dispute, one this Court already has heard once. *Morrison v. Sebelius* is irrelevant here.

The Panel also erred in imposing a remedy that extends to and affects every local school district, rather than just the plaintiff Districts. The Districts have claimed that they "represent all districts and children." Brief of Appellee (Case No. 113,908), at 9. They do not, and this Court recently concluded the Districts *cannot and do not* adequately represent the interests of the Shawnee Mission district, which sought to intervene. *Gannon v. State*, Case No. 113,908, Order at 6 (Kan. filed Sept. 21, 2015). No Kansas student or parent of a Kansas student is now a party in this case. *Gannon*, 298 Kan. at

1124-27. No class action certification was sought or ordered regarding the four Districts' Article 6 claims.

There is little reason to expect that the Districts' and the Panel's sentiments about SB 7 are shared by all 285 Kansas school districts. In fact, the Panel's remedy inherently pits district against district. By rewriting the school finance statutes to require calculation of general state aid under FY2016 and FY2017 enrollments and weightings, the Panel's remedy takes from some districts in order to give to others. Most, or all, of the negatively affected districts are not parties to this suit. The divergent interests of various districts illustrates the impropriety of imposing a specific remedy instead of allowing the Legislature, after hearing from all interested parties (instead of just the four plaintiff Districts), to make policy choices from among the numerous possible solutions.

Finally, the Districts argue that the Panel was justified in rewriting the school finance law and reviving repealed statutes because the State would not have repealed the SDFQPA without providing a substitute school finance system. Brief of Appellees, at 42. Although it is correct the *Legislature* and the *Governor* certainly would want an alternative school funding system in place if SDFQPA or SB 7 were judicially invalidated, it does not follow that the *Panel or the Court* gets to rewrite a system of its choosing. The non-severability clauses in both the SDFQPA and SB 7 indicate the political branches' intent to reserve their authority to respond to any adverse judicial decision. K.S.A. 2014 Supp. 72-6405(b); SB 7, § 22(a).

The Districts rely on two readily distinguishable cases in an attempt to justify the Panel's decision, *Sedlak v. Dick*, 256 Kan. 779, 805, 887 P.2d 1119 (1995), and *Topeka Cemetery Ass'n v. Schnellbacher*, 218 Kan. 39, 542 P.2d 278 (1975). In *Sedlak*, the

petitioners challenged two sections of the Workers Compensation Act as revised in 1993. The Court found the Legislature had unconstitutionally delegated appointive powers to private organizations. 256 Kan. at 803. But that Act, unlike SB 7, stated in part that the "invalidity [of any provision] shall not affect other provisions or applications of the act." *Id.* The Court nonetheless concluded that because the unconstitutional provisions in the 1993 amendments were not separate and independent from other provisions, the statutes in their entirety would be invalid. *Id.* at 803-04. Under this unusual circumstance, *i.e.*, a finding of unconstitutionality, a severability clause, and statutes so intertwined that severance was not possible, the Court concluded the Legislature would not have repealed the previous statutes unless it knew there would be a constitutional replacement. *Id.* at 805.

Likewise, *Schnellbacher* provides no support for the Districts here. In that case, a taxpayer successfully challenged a tax exemption as a violation of equal protection (because the provision exempted cemetery property held by individuals but not by entities). The Court then concluded it was highly questionable that the Legislature would have completely wiped out statutory exemptions provided for land used exclusively as graveyards on the basis of its previous legislation. 218 Kan. at 45. Unlike here, there was no non-severability clause. Furthermore, a particular tax exemption is far less significant than the school funding system over which the Legislature has made very clear its intention to maintain control of the multiple and complex public policy decisions involved.

Here, the Districts urge this Court to follow the Panel's lead and ignore the Legislature's clearly expressed desire to retain control and authority over the policy

judgments made in forming the systems and structures of school finance. How could the Legislature have been any clearer on this point than in the non-severability clauses it included SB 7 and the SDFQPA? No one wants to leave Kansas schools unfunded. History proves the Legislature will respond to any decision as quickly as possible to assure funding. But the Legislature will not, and should not, cede its policy making authority and appropriations power to the courts in violation of the Kansas Constitution.

VII. The Districts Are Not Entitled To Attorneys' Fees

As they did in *Gannon*, the Districts ask the Court to exercise its equitable powers to award the Districts attorneys' fees and to sanction the State for acting in bad faith. The Panel has not ruled on this request, but in any event, it is without merit and should be denied for the same reasons the Court denied the Districts' similar request in *Gannon*. *See Gannon v. State*, 298 Kan. 1107, 1195-96, 319 P.3d 1196 (2014).

Moreover, as discussed above, the Districts' outrageous claims that the Legislature, the Governor, and the State's counsel have acted in bad faith are baseless. Far from acting in bad faith, the Legislature has been responsive to this Court's decisions, increasing funding for education after the Court's *Montoy* and *Gannon* decisions. Indeed, nationwide assessments show that Kansas students beat the national average in both math and reading, and that Kansas students' performance is on the rise. This is hardly a picture of the State acting in bad faith.

CONCLUSION

The Legislature acted reasonably and in good faith in response to this Court's opinion in *Gannon* by providing more than $140 million in additional equity funding based on the estimates the KSDE provided. The Panel erred applying a zero-tolerance test in granting the Districts' motion to alter or amend the Panel's previous judgment, which

found equity concerns had been cured. Ultimately, the Legislature provided substantial new equity funding. But as is the Legislature's prerogative, it decided as well to consider alternative approaches to school finance. The Panel erred in effectively declaring that the Legislature could not alter the prior finance system, apparently constitutionalizing that statutory scheme. At the very least, the remedies the Panel purported to order cannot stand, and must be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2nd day of October 2015, a true and correct copy of the above and foregoing RESPONSE BRIEF OF APPELLANT STATE OF KANSAS was mailed, postage prepaid, to:

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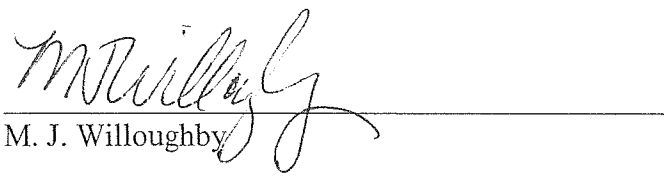

M. J. Willoughby

APPENDIX A

Montoy v. State, No. 92-032, Order (Kan. filed Feb. 12, 2010)

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 92,032

RYAN MONTOY, *et al.*,
Appellees,

v.

STATE OF KANSAS, *et al.*,
Appellants.

ORDER

The plaintiffs, Ryan Montoy, *et al.*, have filed a motion to reopen *Montoy v. State of Kansas*, Case No. 92,032. The defendants, the State of Kansas and the Kansas State Board of Education, have each filed a response. The plaintiffs have filed a reply to the defendants' responses.

Having fully considered the motion, the responses, and the reply, the court denies the motion.

On July 28, 2006, in the fifth and final decision in this case, this court concluded that the legislature's efforts in enacting 2005 H.B. 2247, modified by 2005 S.B. 3, and 2006 S.B. 549 constituted substantial compliance with our prior remedial orders. *Montoy*

v. State, 282 Kan. 9, 138 P.3d 755 (2006). Our decision was limited to determining compliance; we refused to address the question of whether the new legislation provided constitutionally suitable provision for finance of the public schools as required by Article 6, § 6 of the Kansas Constitution.

Our refusal was based on the limits of our appellate function. After reviewing S.B. 549, we determined that it had so "materially and fundamentally" altered the school funding formula that it had essentially replaced the funding scheme at issue in the case. 282 Kan. at 16, 25. While the extensive record before us contained volumes of evidence concerning the financial operation and effect of the prior funding formula, we had "no facts and figures in the record from which we could determine how [the new funding formula of S.B. 549 would] operate over the next 3 years." 282 Kan. at 25. Accordingly, we held:

> "[T]his court is an appellate court and not a fact-finding court. The constitutionality of S.B. 549 is not before this court. It is new legislation and, if challenged, its constitutionality must be litigated in a new action filed in the district court. We have already made the determination that the school finance formula which was before this court in *Montoy II* [*State v. Montoy*, 278 Kan. 769, 120 P.3d 306 (2005)] was unconstitutional. The school finance system we review today is not the system we reviewed in *Montoy II* or *Montoy III* [*State v. Montoy*, 279 Kan. 817, 112 P.3d 923 (2005)]. The sole issue now before this court is whether the legislation passed in 2005 and S.B. 549 comply with the previous orders of this court. If they do then our inquiry ends and this case must be dismissed. A constitutional challenge of S.B. 549 must wait for another day." 282 Kan. at 18-19.

Although we recognized that we could have remanded the case to the district court to allow the plaintiffs to amend their pleadings to challenge the new legislation, we chose

not to do so, "electing instead to end this litigation" by dismissing the case. 282 Kan. at 25. The decision to dismiss the case was not unanimous; nonetheless, it was the decision of a majority of the members of this court that dismissal was necessary to achieve finality in this case.

Now, over 3 years later, the plaintiffs ask us to reopen this case. Although the plaintiffs' motion was captioned as a motion to reopen the appeal, procedurally, it is more properly characterized as a motion to recall the mandate. The mandate on our July 28, 2006, decision dismissing this case was issued on August 21, 2006. Upon issuance of the mandate, our decision became final and our appellate jurisdiction ended. See K.S.A. 60-2106(c); Supreme Court Rule 7.06 (2009 Kan. Ct. R. Annot. 60).

Although issuance of an appellate mandate generally terminates appellate jurisdiction, an appellate court retains the inherent power to recall its mandate. However, because recalling a mandate disturbs the finality of a judgment, the power to recall a mandate is to be exercised only in extraordinary circumstances. "In light of 'the profound interests in repose' attaching" to a mandate, the power to recall a mandate "can be exercised only in extraordinary circumstances" and is thus a power "of last resort, to be held in reserve against grave, unforeseen contingencies." *Calderon v. Thompson*, 523 U.S. 538, 550, 140 L. Ed. 2d 728, 118 S. Ct. 1489 (1998) (quoting 16 Wright, Miller & Cooper, Federal Practice and Procedure § 3938, p. 712 [2d ed. 1996]); see also *Greater Boston Television Corporation v. F.C.C.*, 463 F.2d 268, 278 (D.C. Cir. 1971) (To recall a mandate, "[t]here must be special reason, 'exceptional circumstances,' in order to override the strong policy of repose, that there be an end to litigation.").

The context of this case at this time underlines the good reasons for the strong policy against recalling mandates. There are obvious standing issues. For example, it is

likely that the named plaintiff, Ryan Montoy, may no longer have standing as a plaintiff in this case. An issue has been raised as to whether all of the same school districts that participated in this case as named plaintiffs would continue in future litigation. There are other issues regarding necessary party defendants that have been raised in the responses to the motion to reopen this case.

Last, and most important, the plaintiffs' request would have this court recall its mandate and reassert its appellate jurisdiction in this case solely for the purpose of remanding it to the district court. On remand, the case would go through essentially the same process as a new case: the filing of an amended petition with substituted parties and new claims, discovery, and trial. Thus, there is nothing the plaintiffs are seeking that they cannot accomplish by filing a new lawsuit.

The power to recall a mandate is an extraordinary power to be used as a last resort. It should only be used to accomplish something that, without it, cannot otherwise be remedied. That is not the situation here. We conclude that the circumstances do not warrant recalling the mandate dismissing this case.

This decision denying the plaintiffs' motion to reopen this case is a procedural ruling, not a decision on the merits of any issues raised in the motion, responses, or reply.

BY ORDER OF THE COURT, this 12th day of February, 2010.

ROBERT E. DAVIS
Chief Justice

NUSS, J., and BILES, J., not participating