

No. 15-113,267-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

LUKE GANNON, *et al.*,
Plaintiffs-Appellees,

v.

STATE OF KANSAS, *et al.*,
Defendants-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. 2010-CV-1569

BRIEF OF APPELLANT STATE OF KANSAS

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Oral Argument: One Hour

TABLE OF CONTENTS

	Page
INTRODUCTION	1
NATURE OF THE CASE	1
<i>Gannon v. State</i> , 298 Kan. 1107, 319 P.3d 1196 (2014) (<i>Gannon I</i>)	1
<i>Gannon v. State</i> , 305 Kan. 850, 390 P.3d 461 (2017) (<i>Gannon IV</i>).....	2
STATEMENT OF THE ISSUES	2
STATEMENT OF FACTS	3
2017 Senate Bill 19 (“SB 19”).....	3, 4, 5, 6
K.S.A. 2016 Supp. 72-1127	5
ARGUMENT	6
<i>Montoy v. State</i> , 282 Kan. 9, 138 P.3d 755 (2006) (<i>Montoy IV</i>).....	7
I. SB 19 Is Reasonably Calculated to Address the Constitutional Violations Identified in <i>Gannon IV</i> and Meets the Adequacy Requirement of Article 6.	7
<i>Gannon v. State</i> , 305 Kan. 850, 390 P.3d 461 (2017) (<i>Gannon IV</i>).....	7, 8
<i>Montoy v. State</i> , 279 Kan. 817, 112 P.3d 923 (2005) (<i>Montoy III</i>)	7
<i>Gannon v. State</i> , 303 Kan. 682, 368 P.3d 1024 (2016) (<i>Gannon II</i>).....	7
<i>Gannon v. State</i> , 298 Kan. 1107, 319 P.3d 1196 (2014) (<i>Gannon I</i>)	7, 8
<i>Montoy v. State</i> , 282 Kan. 9, 138 P.3d 755 (2006) (<i>Montoy IV</i>).....	7, 8

<i>Gannon v. State</i> , 304 Kan. 490, 372 P.3d 1181 (2016) (<i>Gannon III</i>)	8
A. SB 19 targets additional funding for at-risk students to address the student performance issues identified in <i>Gannon IV</i>	8
<i>Gannon v. State</i> , 305 Kan. 850, 390 P.3d 461 (2017) (<i>Gannon IV</i>).....	8
SB 19	8, 9
B. The Legislature employed a “successful schools” analysis to ensure that funding levels are reasonably calculated to satisfy Article 6	10
<i>Montoy v. State</i> , 279 Kan. 817, 112 P.3d 923 (2005) (<i>Montoy III</i>)	13
<i>Gannon v. State</i> , 305 Kan. 850, 390 P.3d 461 (2017) (<i>Gannon IV</i>).....	13
C. The SB 19 funding increases align with the LPA cost study’s estimates when all sources of revenue are considered	14
<i>Gannon v. State</i> , 298 Kan. 1107, 319 P.3d 1196 (2014) (<i>Gannon I</i>)	14
<i>Gannon v. State</i> , 305 Kan. 850, 390 P.3d 461 (2017) (<i>Gannon IV</i>).....	14, 15
<i>Montoy v. State</i> , 282 Kan. 9, 138 P.3d 755 (2006) (<i>Montoy IV</i>).....	14
K.S.A. 2016 Supp. 46-1226.....	15
II. SB 19 Does Not Violate the Article 6 Equity Requirement	16
<i>Gannon v. State</i> , 303 Kan. 682, 368 P.3d 1024 (2016) (<i>Gannon II</i>).....	17
<i>Gannon v. State</i> , 305 Kan. 850, 390 P.3d 461 (2017) (<i>Gannon IV</i>).....	17

<i>Gannon v. State</i> , 298 Kan. 1107, 319 P.3d 1196 (2014) (<i>Gannon I</i>)	18
A. SB 19’s expansion of LOB authority does not raise equity concerns because all LOB funding is fully equalized under the formula this Court previously approved.	18
SB 19	18
<i>Gannon v. State</i> , 298 Kan. 1107, 319 P.3d 1196 (2014) (<i>Gannon I</i>)	19
B. Allowing districts to use capital outlay funds for utilities, property insurance, and casualty insurance does not raise equity concerns because capital outlay is fully equalized under the formula this Court previously approved.	19
K.S.A. 2016 Supp. 72-8801	19
SB 19	19
K.S.A. 72-8801(b)(2).....	19
Order, <i>Gannon v. State</i> (June 28, 2016)	19
C. The use of a three-year average AVPP for supplemental general state aid and capital outlay aid provides predictability for both school districts and the State.	19
<i>Gannon v. State</i> , 303 Kan. 682, 368 P.3d 1024 (2016) (<i>Gannon II</i>)	20
SB 19	20
K.S.A. 72-8814	20
K.S.A. 72-6434	20
D. The 10% floor for at-risk funding rationally recognizes that districts with extremely low numbers of free lunch students may have much higher numbers of truly at-risk students.	21

SB 19	20
E. Stare decisis and the law of the case doctrine preclude the Districts from challenging the ancillary facilities, cost of living, and declining enrollment weightings.....	22
SB 19	23
K.S.A. 72-6407, -6441, -6449, -6541	23
<i>Gannon v. State</i> , 305 Kan. 850, 390 P.3d 461 (2017) (<i>Gannon IV</i>).....	23
<i>State v. Finical</i> , 254 Kan. 529, 532, 867 P.2d 322 (1994).....	23
III. If this Court Finds that SB 19 Does Not Substantially Comply with <i>Gannon IV</i>, the Court Should at Most Issue Declaratory Relief, Allowing the Legislature to Address any Remaining Issues.....	23
K.S.A. 60-2106	24
A. Any remedy should be limited to declaratory relief.....	24
<i>Gannon v. State</i> , 305 Kan. 850, 390 P.3d 461 (2017) (<i>Gannon IV</i>).....	24
<i>Gannon v. State</i> , 304 Kan. 490, 527-28, 372 P.3d 1181 (2016) (<i>Gannon III</i>)	24
<i>Gannon v. State</i> , 303 Kan. 682, 368 P.3d 1024 (2016) (<i>Gannon II</i>).....	24
<i>Gannon v. State</i> , 298 Kan. 1107, 319 P.3d 1196 (2014) (<i>Gannon I</i>)	24
<i>Montoy v. State</i> , 278 Kan. 769, 120 P.3d 306, 310 (2005) (<i>Montoy II</i>).....	24
Richard E. Levy, <i>Gunfight at the K-12 Corral: Legislative v. Judicial Power in the Kansas School Finance Litigation</i> , 54 U. Kan. L. Rev. 1021 (2006)	24

<i>Abbeville County School District v. State</i> , 410 S.C. 619, 767 S.E.2d 157 (2014)	24
<i>DeRolph v. State</i> , 78 Ohio St. 3d 193, 677 N.E.2d 733 (1997).....	24
<i>Claremont School Dist. v. Governor</i> , 142 N.H. 462, 703 A.2d 1353 (1997)	24
<i>Leandro v. State</i> , 346 N.C. 336, 488 S.E. 2d 249 (1997)	24
<i>Brigham v. State</i> , 166 Vt. 246, 692 A.2d 384 (1997)	24, 25
<i>Bismarck Public School Dist. No. 1 v. State</i> , 511 N.W.2d 247 (1994)	25
B. At bare minimum, the Court should allow the first year of SB 19 to remain in effect.	25
C. In no event should any “remedy” involve closing the schools.	26
CONCLUSION	27

APPENDICES

- Appx. 1
- Appx. 2
- Appx. 3

INTRODUCTION

In formulating 2017 Senate Bill 19 (“SB 19”), the Legislature went back to the drawing board, starting with the School District Finance and Quality Performance Act (“SDFQPA”) as the basic structure for a school finance system. But the Legislature did not simply re-adopt the SDFQPA. Instead, it vastly improved on the SDFQPA and provided more than \$290 million in new funding to be phased in over two years.

Of particular note, the Legislature took great pains not only to address but to prioritize this Court’s concerns about at-risk students. Further, the Legislature took into account cost-related evidence, inputs and outputs, and provided for meaningful and continual review and monitoring of the system to ensure its effectiveness going forward. Finally, the Legislature has carefully “shown its work.” SB 19 is a dramatic, positive step for Kansas, its students, and its schools. Constitutional compliance has been achieved, and the Court should dismiss this case.

NATURE OF THE CASE

This school finance case was brought against the State by four school districts, which remain as the only plaintiffs: U.S.D. 259 in Wichita, U.S.D. 308 in Hutchinson, U.S.D. 443 in Dodge City, and U.S.D. 500 in Kansas City, Kansas (“Districts”).

On December 30, 2014, after this Court’s opinion in *Gannon v. State*, 298 Kan. 1107, 319 P.3d 1196 (2014) (*Gannon I*), a three-judge panel released a Memorandum Opinion and Order on Remand declaring that the Kansas public education financing system provided by the Legislature for grades K-12 violated the adequacy component

of Article 6 of the Kansas Constitution. Vol. 24, p. 3047. The Legislature subsequently passed the Classroom Learning Assuring Student Success Act of 2015 (“CLASS”). Vol. 130, p. 12. On June 26, 2015, the panel entered another Memorandum and Order declaring that CLASS did not correct, but worsened, the constitutional infirmities about adequacy described in its December 2014 Order. Vol. 136, p. 1420.

The State appealed, and on March 2, 2017, this Court affirmed the panel’s judgment, although not fully accepting the panel’s reasoning. *Gannon v. State*, 305 Kan. 850, 390 P.3d 461, 494, 504 (2017) (*Gannon IV*). The Court stayed its mandate to allow the Legislature to cure the identified constitutional violations. *Id.* at 503-04.

In response to this Court’s decision, the Legislature passed SB 19, which includes the Kansas School Equity and Enhancement Act (“KSEEA”). The Governor signed SB 19 into law on June 15, 2017.

STATEMENT OF THE ISSUES

1. Is SB 19 “reasonably calculated to address the constitutional violations identified” in *Gannon IV* and thus in compliance with the adequacy requirement of Article 6?
2. Should any new equity challenges by the Districts to SB 19 be rejected as improperly raised at this time and as without merit?
3. If the State has failed to substantially comply with *Gannon IV*, despite the Legislature’s good faith and significant response, should the Court at most issue declaratory relief, allowing the Legislature adequate time and opportunity to address any remaining constitutional issues identified by the Court?

STATEMENT OF FACTS

The Legislature responded to *Gannon IV* by passing SB 19, which provides hundreds of millions of dollars in additional school funding and targets additional funding to aid the underperforming subgroups identified in this Court's decision.

To comply with the structure requirement of the *Gannon I* adequacy test, SB 19 returns the Kansas school finance system to formulas materially identical to those in the SDFQPA, which were approved by this Court in *Montoy*, found constitutional by the panel, Vol. 14, 1948-50, and endorsed by the Districts as "a dynamic school funding formula that had evolved over time, consistently being evaluated and fine-tuned by the Court and the Kansas Legislature," Response Brief of Appellees (filed Jan. 12, 2016), p. 1.

Under SB 19, local school districts will continue to have access to multiple sources of revenue. SB 19 provides for the distribution of State Foundation Aid to local school districts, local option budget ("LOB") funding, and state supplemental general and capital outlay aid. State Foundation Aid is calculated by multiplying the base aid for student excellence ("BASE") by the "adjusted enrollment" of the district and deducting the local foundation aid of the district. SB 19, § 5.

To comply with the implementation requirement of the adequacy test, SB 19 sets the BASE at \$4,006 for school year 2017-18 and \$4,128 for school year 2018-19. SB 19, § 4(e). The BASE will be adjusted thereafter according to the average percentage increase in the Midwest region consumer price index. *Id.* The artificial base for calculation of LOB remains the same as under previous law until FY20, but

SB 19 allows any district to adopt an LOB up to 33% of the product of the artificial base and adjusted enrollment by simple resolution of its board, requiring an election only if a protest petition is filed. SB 19, § 16.

By the Kansas State Department of Education's ("KSDE") estimates, SB 19 provides an additional \$194 million above last year's level in state foundation education money for the 2017-18 school year. Appx. 2, p. 2. In the 2018-19 school year, the increased BASE will raise State Foundation Aid to an estimated \$292 million above last year's state aid. *Id.* The KSDE estimates LOB revenue (a combination of local property tax proceeds and state supplemental aid) will increase \$32 million for 2017-18. Appx. 3, p. 2 (column 5). In theory, if all districts raise their budgets to 33%, LOB could provide approximately \$89 million in additional operating revenue. Appx. 3, p. 2 (column 2 times 33% minus column 3).

In addition to the return to pre-CLASS formulas and the provision of hundreds of millions of dollars in more funding, SB 19 targets funding for the educational opportunities of the underperforming subgroups of students this Court identified in *Gannon IV*. Specifically, SB 19 applies the recognized "at-risk" student definition and increases the at-risk weighting from 0.456 (the weighting approved in *Montoy*) to 0.484 (the weighting recommended by the "Elementary and Secondary Education in Kansas: Estimating the Costs of K-12 Education Using Two Approaches," dated January 2006 ("LPA study"), Vol. 81, 3954), with a 10% of enrollment minimum. This provides about \$23 million more in aid for at-risk students during the next school year. *See Minutes of March 18, 2017, Senate Select Committee on Education Finance*

at p. 2.¹ Starting in the 2018-19 school year, at-risk education funds must be used for implementing best practices identified by the State Board of Education. SB 19, §§ 23(a), 23(b), 25(d)-(f). Additionally, SB 19 provides approximately \$2 million for early education of four-year-old at-risk programs, SB 19, §§ 4(ii)(2)(B), 26; Minutes of May 10, 2017, Senate Select Committee on Education Finance at p. 1, attachment 3 (Testimony of Dr. Randy Watson, State Commissioner of Education) (“Watson Testimony”), p. 58 (serving close to 35,000 children over 5 years), and fully funds all-day kindergarten by counting a kindergarten student as 1 FTE in the adjusted enrollment formula as opposed to ½ FTE under former acts. SB 19, §§ 4(m)(1) & (m)(4), 26. SB 19 also restores previous SDFQPA weightings applicable to bilingual, high-density at-risk, and preschool-aged at-risk students. SB 19, §§ 22, 23(b), 26.

Further, SB 19 reaffirms that the State Board of Education’s accreditation system must be based upon improvement in performance that equals or exceeds the educational goals set forth in K.S.A. 2016 Supp. 72-1127(c) (the *Rose* standards). SB 19, § 42. The Board is tasked to prepare and submit annual reports on the school district accreditation system and school district funding to the Governor and the Legislature. SB 19, § 43.

¹ The legislative committee minutes and attachments cited in this brief are included in Appendix 1. In addition, all of the minutes of the Senate Select Committee on Education Finance may be found online at: http://www.kslegislature.org/li/b2017_18/committees/tte_spc_select_committee_on_education_finance_1/documents/. The House Committee on K-12 Budget minutes have not all been posted yet, but will be available at: http://www.kslegislature.org/li/b2017_18/committees/ctte_h_k12_education_budget_1/documents/.

Finally, the Legislature committed to rigorous review of the efficacy of the funding formulas and funding levels. SB 19 directs Legislative Post Audit to audit and provide reports to the Legislature within stated deadlines concerning transportation services, at-risk education funding, bilingual education funding, and state-wide virtual school programs. SB 19, § 45. The Legislature also directed Legislative Post Audit to provide performance audits to “provide a reasonable estimate of the cost of providing educational opportunities for every public school student in Kansas to achieve the performance outcome standards adopted by the state board of education” on or before January 15, 2019, January 15, 2022, and January 15, 2025. *Id.* The Legislature also set statutory deadlines for its own continued evaluation of the KSEEA and the implementation of several of its important features: by July 1, 2023, all provisions of the KSEEA; by July 1, 2018, the low enrollment and high enrollment weightings; by July 1, 2020, virtual school programs and aid; by July 1, 2021, the at-risk student and high-density at-risk weightings; by July 1, 2023 and again by July 1, 2026, the successful school model; and by July 1, 2024, the bilingual student weighting. *Id.*

ARGUMENT

The Legislature responded to this Court’s decision in *Gannon IV* by targeting additional funding to address the at-risk student performance issues this Court identified and by providing hundreds of millions of dollars in additional overall funding based on a successful schools model. When all sources of funding are considered, this funding is in line with the amounts specified in the LPA cost study.

SB 19 also comports with the equity prong of Article 6 by continuing to fully fund the equalization formulas previously approved by this Court. This Court should hold that SB 19 complies with *Gannon IV* and Article 6 and dismiss this case. *See Montoy v. State*, 282 Kan. 9, 24-25, 138 P.3d 755 (2006) (*Montoy IV*) (finding “substantial compliance” with the Court’s order).

I. SB 19 Is Reasonably Calculated to Address the Constitutional Violations Identified in *Gannon IV* and Meets the Adequacy Requirement of Article 6.

Following this Court’s decision in *Gannon IV*, the State has the burden of demonstrating “that its proposed remedy is reasonably calculated to address the constitutional violations identified, as well as comports with previously identified constitutional mandates such as equity.” *Gannon IV*, 390 P.3d at 469. As this Court has stated many times, the question is not whether the Legislature has enacted an ideal school finance system. *See Montoy v. State*, 279 Kan. 817, 847, 112 P.3d 923 (2005) (*Montoy III*) (acknowledging the approved “remedy is far from perfect”). Rather, the “test for adequacy is one of minimal standards. Accordingly, once they have been satisfied, Article 6 has been satisfied.” *Gannon IV*, 390 P.3d at 503 (citation omitted).

The Legislature has “considerable discretion in satisfying the requirements of Article 6.” *Gannon IV*, 390 P.3d at 485. As this Court has recognized, the “constitutional infirmities ‘can be cured in a variety of ways—at the choice of the legislature.’” *See, e.g., Gannon v. State*, 303 Kan. 682, 743, 368 P.3d 1024 (2016) (*Gannon II*) (quoting *Gannon I*, 298 Kan. at 1181, 1188-89); *Gannon I*, 298 Kan. at

1151 (“[O]ur Kansas Constitution clearly leaves to the legislature the myriad of choices available to perform its constitutional duty.”); *see also Gannon IV*, 390 P.3d at 502-03 (“Our adequacy test, as described in *Gannon I*, rejects any litmus test that relies on specific funding levels to reach constitutional compliance.”). In determining compliance, this Court looks to the record and to the remedial legislation’s history to decide whether the State has carried its burden. *See Gannon v. State*, 304 Kan. 490, 499, 372 P.3d 1181 (2016) (*Gannon III*); *Montoy IV*, 282 Kan. at 18-21.

A. SB 19 targets additional funding for at-risk students to address the student performance issues identified in *Gannon IV*.

This Court’s decision in *Gannon IV* relied on its conclusion that the Districts “have shown through the evidence from trial—and through updated results on standardized testing since then—that not only is the State failing to provide approximately one-fourth of all its public school K-12 students with the basic skills of both reading and math, but that it is also leaving behind significant groups of harder-to-educate students.” *Gannon IV*, 390 P.3d at 469.

SB 19 addresses this violation by targeting additional funding for at-risk students in a manner that is reasonably calculated to improve student success generally and among subgroups. The law adopts the at-risk weighting recommended by the LPA study, raising the weighting from 0.456 to 0.484. SB 19 § 23(a); Vol. 81, 3954. SB 19 thereby provides additional at-risk aid of about \$23 million each year. *See Minutes of March 18, 2017, Senate Select Committee on Education Finance at p. 2* (contrasting Senate with House version ultimately accepted). The law also provides about \$2 million for preschool-aged at-risk students and fully funds all-day

kindergarten. SB 19, §§ 4(m)(1) & (2), 4(ii)(2)(B), 26. This substantial new funding benefits underperforming subgroups directly and also frees up additional at-risk funding for other purposes because many districts have been using at-risk money to fund all-day kindergarten. *See* Testimony of Mark Desetti, Kansas National Education Association, Attachment 13 to Minutes of March 18, 2017, Senate Select Committee on Education Finance; Minutes of March 14, 2017, House Committee on K-12 Budget at p. 2 (discussion on the “importance of fully funding all-day kindergarten, noting how evidence has shown it (along with early childhood education) is the most efficient and effective way to help under-performing students and would free up at-risk funds to help under-performing students in more targeted ways”). Undeniably, SB 19 targets *more* aid for the education of at-risk students than what this Court found constitutionally sufficient in *Montoy*.

Moreover, SB 19 requires that the at-risk state aid and funding raised under the LOB attributable to the at-risk weightings be used for at-risk students. Starting with the 2018-19 school year, at-risk education funds must be spent on the best practices to be developed and identified by the BOE. *See* SB 19, §§ 23(a)(3), 23(b)(4), 25(c)-(f). Dale Dennis, Deputy Commissioner of the KSDE, testified that this provision strengthens a preexisting requirement that specific funds be used for their intended purpose, and he stated that the KSDE will have no problem providing a list of best practices. Minutes of May 24, 2017, Senate Select Committee on Education Finance at p. 5. By providing additional at-risk funding and requiring that this

funding be used to help the underperforming subgroups identified in *Gannon IV*, SB 19 is more than reasonably calculated to satisfy the adequacy component of Article 6.

B. The Legislature employed a “successful schools” analysis to ensure that funding levels are reasonably calculated to satisfy Article 6.

SB 19 provides additional overall funding based on a “successful schools” analysis conducted by the Kansas Legislative Research Department (“KLRD”), an analysis that is reasonably calculated to address the constitutional violations this Court identified and to meet the adequacy requirement of Article 6.

The first step in the successful schools model was based on KSDE research on student achievement, as described by Dr. Randy Watson, the Kansas Commissioner of Education. He testified that KSDE has identified risk factors that may limit student success and explained that KSDE uses these risk factors to come up with a “predictive effective rate” for every school and district. Minutes of May 10, 2017, Senate Select Committee on Education Finance, attachment 3 (“Watson Testimony”), p. 35. KSDE then compares actual performance to the predicted effective rate to identify schools and districts that are “out-performing what we would predict them to do.” *Id.* at 37. By studying these successful schools and districts, KSDE hopes to learn more about the factors that contribute to student success. *Id.* at 38.

KLRD employed a similar methodology in its successful school analysis. KLRD began by identifying 41 school districts that most out-perform how KLRD predicted they would perform based on their at-risk levels. Minutes of March 12, 2017, Senate Select Committee on Education Finance at pp. 3-4 & attachment 3. KLRD used four

critical accountability measures of student performance: “the percent of students at grade level on state math and English language arts assessments, the percent of students at college and career ready level on state math and English language arts assessments, the average composite ACT score, and the 4-year graduation rate.” Minutes of March 12, 2017, Senate Select Committee on Education Finance at pp. 3-4 & attachment 3. For each measure, the metric was graphed opposite the percentage of students in that district eligible for free lunch under the National School Lunch Program for every district with 500 or more students. Those graphs were used to identify a “line of best fit,” and the formula associated with that line was used to set the expected results, as determined by KSDE’s studies, of a district at any given percentage of students eligible for free lunch. The districts’ actual results were then compared to the expected results of districts with the same percentage of students eligible for free lunch. *Id.*; Watson Testimony, p. 35.

Once the 41 successful school districts were identified, KLRD calculated these districts’ expenditures from their general fund, supplemental general fund (LOB), at-risk funds, and bilingual fund, excluding flow-through-aid and transportation funding. *Id.* The analysis then applied the adjusted enrollment weightings recommended by the LPA study, Vol. 81, 3931 *et seq.*, and divided that sum by 1.4 (as LOB funding has been approximately 40% of general fund spending) to determine that the average spending by successful school districts was \$4,080 *per weighted student. Id.*

The Augenblick & Myers study also used a successful schools methodology. See “Calculation of the Cost of a Suitable Education in Kansas in 2000-2001 Using Two Different Approaches,” dated May 2002 (“A&M study”), Vol. 82, p. 4151. But the KLRD’s successful schools approach is different—and better—than that employed in the A&M Study in that the KLRD used *current* measures for accreditation—measures developed by the KSDE—for selection of the 41 successful districts. Minutes of May 12, 2017, Senate Select Committee on Education Finance at p. 3, attachment 3. By contrast, the A&M study looked mostly at student performance on tests for reading and math given in both 2000 and 2001. Vol. 82, p. 4151. Dr. Watson testified that the new KSDE accreditation system reviews student performance and success against a different standard than what had been in place when the now-repealed No Child Left Behind Act drove the Kansas standards. Minutes of May 10, 2017, Senate Select Committee on Education Finance at p. 1 & attachment 3, p. 2-3.

A second difference from the A&M study is that the KLRD considered LOB funding in determining the appropriate base for the foundation education. KLRD reduced the average spending by the successful districts by 40% to reflect their LOB revenue. Minutes of May 12, 2017, Senate Select Committee on Education Finance at p. 3, attachment 3. This reflects the Legislature’s rational recognition that local spending should be included as part of the funding of K-12 public education.

As noted above, KLRD calculated the BASE of \$4,080 using the successful schools methodology. But rather than increasing the BASE to this level in one fell swoop, SB 19 phases in additional funding, providing a BASE of \$4,006 in FY18,

\$4,128 in FY19, and indexing the BASE to inflation in subsequent years. Dr. Watson emphatically supported a decision to phase in funding increases over time, as he explained the problems of waste arising from an immediate, one-time influx of additional funding. He testified that “the most significant disadvantage of a large single-year funding increase is that the most pressing need of most schools is to hire new personnel, many of which would not be available in such a short period of time regardless of new funding.” Minutes of May 22, 2017, Senate Select Committee on Education Finance at p. 3. This Court also has previously recognized the rationality of phased funding: “We are mindful of the Board’s argument that there are limits on the amount the system can absorb efficiently and effectively at this point in the budget process.” *Montoy III*, 279 Kan. at 845.

Thus, the Legislature reasonably decided to phase in additional funding. Moreover, the \$4,128 BASE for FY19 *exceeds* the \$4,080 BASE the Legislature determined would be reasonably calculated to ensure compliance with Article 6 using the successful schools methodology. The Legislature also indexed the BASE to inflation thereafter in accordance with a recognized CPI. On this point, the Legislature accepted testimony from the Kansas Association of School Boards that keeping the formula in line with inflation is the most important aspect of ensuring adequate funding for schools. Minutes of March 18, 2017, Senate Select Committee on Education Finance at p. 4.

Given the Legislature’s eminently rational decisions and its “considerable discretion in satisfying the requirements of Article 6,” *Gannon IV*, 390 P.3d at 485,

this Court should accept the Legislature’s successful schools methodology and the conclusions drawn therefrom. SB 19 satisfies Article 6.

C. The SB 19 funding increases align with the LPA cost study’s estimates when all sources of revenue are considered.

The 2006 LPA cost study provides further support for the Legislature’s conclusion that SB 19 is reasonably calculated to remedy the constitutional violations identified in *Gannon IV*. In preparing the LPA cost study in 2006, the Legislative Division of Post Audit did not consider LOB funding. *See* Minutes of March 21, 2017, Senate Select Committee on Education Finance at p. 3 (testimony of Scott Frank, one of the study’s authors); Minutes of March 30, 2017, House Committee on K-12 Budget at p. 2 (same). But this Court has since clarified that *all sources* of funding should be considered in determining compliance with Article 6. *See Gannon I*, 298 Kan. at 1171. And when all sources of funding are considered, the funding increases in SB 19 exceed the amounts specified in the LPA cost study.

The “adequacy test, as described in *Gannon I*, rejects any litmus test that relies on specific funding levels to reach constitutional compliance.” *Gannon IV*, 390 P.3d at 502. Thus, this Court has recognized “that the estimates of the various cost studies are just that: estimates.” *Id.* at 502-03; *see also Montoy IV*, 282 Kan. at 24 (“The legislature is not bound to adopt, as suitable funding, the ‘actual costs’ as determined by the A&M and LPA studies.”).²

² Likewise, the authors of the LPA Study cautioned:

It’s important for the reader to understand that any study involving the estimation of costs for something as complex as K-12 education involves

But this Court also directed that the Legislature should not ignore the cost studies in creating a remedy. *Gannon IV*, 390 P.3d at 502-03. And it has not. See Minutes of March 23, 2017, House Committee on K-12 Budget, Attachment 1 (noting that the Legislature considered the cost studies in drafting the KSEEA).

With LOB considered, SB 19 provides \$118,297,424 more funds in FY18 than if the LPA study's base—as calculated by the panel—were applied without LOB funding (which was not considered in the LPA cost study). The LPA consultant's study, according to the panel, determined that a base aid of \$5,119 was required in 2011-12 dollars. Vol. 14, pp. 1821-22. Inflated to May 2017, that is \$5,468. See https://www.bls.gov/data/inflation_calculator.htm (July 2012 to May 2017). With SB

a significant number of decisions and assumptions. Different decisions or assumptions can result in very different cost estimates. For example, in the input-based cost study, the estimated cost of funding enough teachers in all school districts to achieve an average class size of 20 students is significantly more expensive than funding enough teachers to achieve an average class size of 25 students. Our goal was to make decisions and assumptions in both cost studies that were reasonable, credible, and defensible. Because K-12 education funding levels ultimately will depend on the Legislature's policy choices, we designed the input-based cost study to allow different what if scenarios. For the outcomes-based cost study, we can adjust certain variables, such as the performance outcome standards, to develop other cost estimates. In either study, we could adjust assumptions about the level of efficiency at which districts are expected to operate. *In other words, it's important to remember that these cost studies are intended to help the Legislature decide appropriate funding levels for K-12 public education. They aren't intended to dictate any specific funding level, and shouldn't be viewed that way.*

Vol. 81, p. 3836 (emphasis added). In fact, the Legislature expressed its intent not to be bound by the studies' recommendations with the passage of K.S.A. 2016 Supp. 46-1226.

19's BASE of \$4,006 in FY 18, KSDE estimates that \$2,801,381,770 in State Foundation Aid, excluding special education funds, will be provided to local districts in FY18 and that local districts will raise \$1,099,865,497 by their LOB authority. Appx. 2, p. 4 (column 11); Appx. 3, p. 2 (column 3). By these estimates, together the State Foundation Aid and LOB for the 2017-2018 school year will be \$3,901,247,267. Thus, the *effective* BASE for FY18, with LOB considered, is \$5,639 ($\$3,901,247,267$ divided by a weighted enrollment, special education excluded, of 691,797.8, *see* Appx. 2, p. 4 (column 1 plus column 10)).

Furthermore, SB 19's BASE increases in FY19 from \$4,006 to \$4,138 and by inflation thereafter. In FY19, the effective base, with LOB included, will be roughly \$5,728 ((weighted FTE, special education excluded, of 691,797.8 times \$4,138, plus LOB of \$1,099,865,497) divided by 691,797.8). This is approximately \$180 million more for FY19 than if the LPA consultant's study's base, adjusted for inflation, were used without LOB funding (($\$5,728$ minus $\$5,468$) times 691,797.8). And this amount does not even include federal funding, which accounts for about 7% of local districts' revenue and which this Court has held must be considered in determining compliance with Article 6.

II. SB 19 Does Not Violate the Article 6 Equity Requirement.

The Districts indicated in the parties' scheduling conference call with the Chief Justice that they will argue SB 19 violates the equity requirement of Article 6. The State recognizes that, in the remedial stage, the State has the burden of demonstrating legislation cures the constitutional violations identified by the Court.

See Gannon II, 303 Kan. at 709. When it comes to equity challenges unrelated to violations previously found by this Court, however, SB 19 should be entitled to a presumption of constitutionality, and the Districts should have the burden of demonstrating that the law violates Article 6, assuming they are allowed to raise new equity challenges at all.

Any new equity challenges the Districts may raise at this stage by definition have never been litigated before. Thus, there is no evidence introduced by the parties, no lower court record, and no findings or conclusions of a lower court. Further, there would be serious separation of powers questions if this Court ignored presumptions of constitutionality and deference to legislative judgments when the plaintiffs are asserting *newly alleged* constitutional infirmities for the first time in this Court.

In *Gannon IV*, this Court held that the panel could not impose on the State the burden to prove adequacy when this Court itself had found only an equity violation: “The State correctly notes that the burden shifts to the State only in the remedial phase of the litigation, and unlike the issue of equity in *Gannon I*, this court had not yet ruled on the constitutionality of adequacy—the issue before the panel on remand. So the burden remains on the plaintiffs to show noncompliance.” *Gannon IV*, 390 P.3d at 486 (citation omitted). Here, this Court has not ruled on any *new* equity challenges the Districts may raise. Thus, the burden of establishing that SB 19 violates the Article 6 equity requirement, if properly before the Court at all, lies with the Districts.

Regardless of who bears the burden, however, SB 19 satisfies the equity requirements of Article 6. *Gannon IV*, 390 P.3d at 503. The equity component requires

that “[s]chool districts must have reasonably equal access to substantially similar educational opportunity through similar tax effort.” *Gannon I*, 298 Kan. at 1175. The test “does not require the legislature to provide equal funding for each student or school district”; “wealth-based disparities should not be measured against such mathematically precise standards.” *Id.* at 1173, 1180.

Although the Districts’ precise equity challenges are not yet known to the State, their arguments may well reflect concerns raised by Democratic leaders in the Legislature. The available information demonstrates that those concerns are unfounded, and thus SB 19 satisfies the equity component of Article 6.

A. SB 19’s expansion of LOB authority does not raise equity concerns because all LOB funding is fully equalized under the formula this Court previously approved.

SB 19 allows districts to adopt a 33% LOB, but any LOB over 30% is subject to protest petition (as opposed to an election requirement under the old law). SB 19, § 15. SB 19 also provides that LOB is calculated using an artificial base of \$4,490, increasing with inflation beginning with the 2019-2020 school year. SB 19, § 16.

Previously, the Districts complained that requiring an election to raise LOB to 33% was unconstitutional because they claimed voters in poorer areas would be less likely to approve an LOB increase. *See, e.g.*, Response Brief of Appellees (filed April 25, 2016) at 17. Yet, this Court found that law satisfied the equity component of Article 6. Because an election requirement is constitutional, there is no plausible argument that a protest petition provision is not.

Likewise, any concerns with the “artificial” base are meritless. If the actual base rises to \$4,490, there is no reason to believe that LOB funding would violate the equity component of Article 6. Equity concerns only arise if local funding is not equalized, and SB 19 continues to fully equalize *all* LOB funding up to the 81.2 percentile. *See Gannon I*, 298 Kan. at 1198-99.

B. Allowing districts to use capital outlay funds for utilities, property insurance, and casualty insurance does not raise equity concerns because capital outlay is fully equalized under the formula this Court previously approved.

SB 19 amended K.S.A. 2016 Supp. 72-8801 to include “utility expenses” and “property and casualty insurance” among the expenses a district’s capital outlay revenue can fund. SB 19, § 89. These property maintenance expenses logically and obviously relate to the purposes of capital outlay. This aspect of SB 19 applies in the same way to every district, and in no way affects the districts’ relative tax efforts. Further, the legal limit on the capital outlay levy remains at 8 mills. SB 19, § 89. *Cf.* K.S.A. 72-8801(b)(2). No district is given additional authority to raise such funds.

Finally, SB 19 continues to fully fund capital outlay equalization aid, which the Districts stipulated was constitutional and which this Court approved. *See Order, Gannon v. State* (June 28, 2016).

C. The use of a three-year average AVPP for supplemental general state aid and capital outlay aid provides predictability for both school districts and the State.

Beginning with FY19, SB 19 calculates supplemental aid and capital outlay aid by identifying a district’s assessed valuation per pupil (“AVPP”) and then ranking districts based on the average AVPP over the previous three years. For FY18, SB 19

uses the assessed valuation from only the previous year, as has been the practice. *See Gannon II*, 303 Kan. at 690. Thus, for the upcoming school year, there is no change at all in the calculation method, which has never used “current” year assessed values because those figures are not available until about halfway through the school year. *See* Vol. 138, pp. 53-55; 55-61, 129-41; 151, 308-09.

For FY19 and after, the calculation changes to use average AVPP for the preceding *three* years. But it does so to bring greater predictability in the budgeting process, which is to the benefit of both the Districts and the State. This future change does not deny districts reasonably equal access to substantially similar educational opportunity through similar tax effort. Instead, an average over time necessarily smooths out temporary peaks and valleys in data for any district.

Predictability in funding greatly facilitates the ability of districts to identify the required level of local tax levies, as well as to better plan their future staffing, operational, and maintenance expenditures. Secondly, such predictability permits the Legislature to better estimate the amount of state aid necessary to satisfy Article 6 and ensure that Kansas schools are operating in a constructive and optimal fashion.

Annual variations in AVPP are inevitable and unavoidable. Each district’s AVPP is determined by dividing assessed taxable property values by a head count of students. *Cf.* SB 19, § 50 with K.S.A. 72-8814; *cf.* SB 19, § 17 with K.S.A. 72-6434. These numbers will vary each year, in either direction. Thus, aid calculations based on only one year’s data are subject to potentially dramatic variations year-to-year, particularly among smaller school districts. Vol. 138, pp. 144, 150-51.

In striking contrast, districts' overall costs will not vary much from year to year. For example, in many districts a change of even 100 FTE spread over 12 grades might not require hiring or laying off even one teacher, depending on class sizes. Maintenance costs, which are addressed by capital outlay, are certainly even less variable.

Any challenge to the three-year average boils down to an impossible (as a practical matter) attempt to impose mathematically precise standards every single school year, rather than follow this Court's *Gannon I* standard of ensuring that districts have "reasonably equal access" to funding based on "similar tax effort."

D. The 10% floor for at-risk funding rationally recognizes that districts with extremely low numbers of free lunch students may have much higher numbers of truly at-risk students.

Under the KSEEA, any school district maintaining kindergarten through 12th grade classes may substitute 10% of the district's enrollment multiplied by 0.484 for the purposes of the at-risk pupil weighting. SB 19, § 23(a)(3). The Districts may complain that this additional funding is unequal because it only benefits districts with less than 10% at-risk students.

But this additional funding addresses the very adequacy issues central to this Court's conclusion that the CLASS system was unconstitutional. The 10% floor is based on testimony in the Legislature that the free lunch measure for at-risk funding is a good proxy for most districts when measuring underperforming students, but it fails to work for districts with extremely low numbers of free lunch students. *See* Minutes of May 19, 2017, Senate Select Committee on Education Finance at p. 4,

attachment 23. In other words, districts with extremely low numbers of free lunch students have higher numbers of truly at-risk students than the free lunch proxy would indicate. *Id.* (testimony that the Blue Valley School District has only 1,215 free lunch students but 4,346 underperforming students that qualify for at-risk services); *see also* Testimony of Mark Desetti, Kansas National Education Association, Attachment 13 to Minutes of May 18, 2017, Senate Selection Committee on Education Finance (“We believe the 10% base is important as it addresses the fact that while funding is generated by poverty, at-risk programs are not exclusively for students in poverty. Districts with a low percentage of student in poverty still need funding to address the needs of their at-risk population.”). The Legislature, both rationally and admirably, carefully considered this situation.

In addition, common experience demonstrates that there is a minimum expense for districts to provide at-risk programs and services. Application of the at-risk pupil weighting, .484, against one student next year is \$1,938.904. How many at-risk students does it take to hire an additional learning coach, for example? The Legislature reasonably selected a minimum 10% enrollment level for at-risk funding to accommodate minimum expenses of at-risk programs.

E. Stare decisis and the law of the case doctrine preclude the Districts from challenging the ancillary facilities, cost of living, and declining enrollment weightings.

The Districts are precluded from challenging three weightings about which they may express concern: ancillary facilities, cost of living, and declining enrollment. The ancillary school facilities weighting provides additional funding for costs

attributable to commencing operations of new school facilities. *See* SB 19, §§ 4(b) & 30. The cost of living weighting provides additional funds to districts with higher costs of living. *See* SB 19, §§ 4(j) & 31. The declining enrollment weighting counterbalances moderate reductions in revenue due to declining enrollment. *See* SB 19, §§ 4(l) & 32.

Any challenges to these weightings are precluded by the stare decisis and law of the case doctrines. First, each of these weightings was in the SDFQPA and was in place when this Court found the State had substantially complied with the Court's orders to cure the constitutional violations in *Montoy IV*. *See* K.S.A. 72-6407(m), (l) & (q), -6441, -6449, -6541. Second, in this very case, the panel rejected the Districts' challenges to these weightings, and the Districts *did not appeal*. Vol. 14, pp. 1948-50. Thus, both stare decisis and the law of the case doctrine preclude the Districts from challenging the constitutionality of these weightings *now*. *See Gannon IV*, 390 P.3d at 473-74; *State v. Finical*, 254 Kan. 529, 532, 867 P.2d 322 (1994) ("We repeatedly have held that when an appealable order is not appealed it becomes law of the case.").

III. If this Court Finds that SB 19 Does Not Substantially Comply with *Gannon IV*, the Court Should at Most Issue Declaratory Relief, Allowing the Legislature to Address any Remaining Issues.

There can be no doubt that the Legislature has responded in good faith and with careful deliberation to this Court's decision in *Gannon IV* and has cured the constitutional defects previously identified. But if the Court nevertheless concludes that SB 19 does not fully comply in some respect with Article 6, the Court should at most issue declaratory relief explaining the violation and then allow the Legislature adequate time and an opportunity to cure any violations identified by the Court.

There is no reason that any remedy should include closing the schools or disrupting ongoing financial obligations of the school districts. Closing the schools would, in fact, itself violate Article 6, federal law, and K.S.A. 60-2106(d).

A. Any remedy should be limited to declaratory relief.

If this Court were to hold that the new school finance system violates Article 6, § 6, in some respect, then the Court’s remedy should be limited to declaratory relief, allowing the Legislature to cure the violation, as this Court and others consistently have done. *See Gannon IV*, 390 P.3d at 502-04; *Gannon III*, 304 Kan. at 527-28; *Gannon II*, 303 Kan. at 741-43; *Gannon I*, 298 Kan. at 1198-99; *Montoy v. State*, 278 Kan. 769, 120 P.3d 306, 310 (2005) (*Montoy II*); *see also* Richard E. Levy, *Gunfight at the K-12 Corral: Legislative v. Judicial Power in the Kansas School Finance Litigation*, 54 U. Kan. L. Rev. 1021, 1090 (2006) (“[T]he most common course of action for courts has been to declare the system of school finance unconstitutional and afford the legislature an opportunity to fix the problem . . .”). As courts in other states have recognized, it would be inappropriate to mandate a specific remedy or attempt to judicially rewrite the relevant statutes. *See, e.g., Abbeville County School District v. State*, 410 S.C. 619, 655-56, 767 S.E.2d 157 (2014); *DeRolph v. State*, 78 Ohio St. 3d 193, 212-13 & n.9, 677 N.E.2d 733 (1997); *Claremont School Dist. v. Governor*, 142 N.H. 462, 475-76, 703 A.2d 1353 (1997); *Leandro v. State*, 346 N.C. 336, 355-57, 488 S.E. 2d 249 (1997); *Brigham v. State*, 166 Vt. 246, 268, 692 A.2d 384 (1997); *Bismarck Public School Dist. No. 1 v. State*, 511 N.W.2d 247, 263 (1994).

If the Court were to find an Article 6 violation—even though the Legislature in good faith and with careful deliberation provided substantial additional funding (and the means to generate the necessary revenue) in an effort to correct the issues identified in *Gannon IV*—the Court should issue declaratory relief explaining what it finds to be any remaining problems, and the Court should then allow the Legislature to choose how to address those problems.

B. At bare minimum, the Court should allow the first year of SB 19 to remain in effect.

For the reasons set forth above, SB 19 is constitutional and should be approved in its entirety by the Court. But if the Court disagrees, it should at least acknowledge that SB 19 provides a substantial amount of new funding—approximately \$194 million in additional state aid and an estimated \$32 million in additional LOB revenue—to school districts for the 2018 fiscal year, commencing on July 1, 2017, and that students return for the new school year only about one month after oral argument in this case. In the event this Court were to find an Article 6 violation, the Court should allow year one of the law to remain in effect and allow the Legislature to address any remaining issues during the 2018 legislative session. Given that the 2017-18 school year is fast approaching, even if the Legislature came back in special session and provided additional funding for the coming school year, it is doubtful that school districts would be able to effectively and efficiently use any funds to address the student performance issues identified in *Gannon IV*. Such funding so late in the game likely would not be spent (in some ways, could not be spent) in ways that further the requirements of Article 6. *See Minutes of May 22, 2017, Senate Select Committee*

on Education Finance at p. 3 (Dr. Watson testifying that the most significant disadvantage of a large, single-year funding increase is that the most pressing need of most schools is to hire new personnel, many of whom would not be available in such a short period of time regardless of new funding). A Court order effectively compelling districts to waste funds would serve no legitimate purpose. Instead of requiring additional funding for this coming school year, if this Court continues to believe the Kansas school funding system is constitutionally infirm, it should accept the substantial additional funding for the 2017-18 school year as the first step in phasing in additional funding, as in *Montoy IV*, and allow the Legislature to resolve any outstanding funding issues in its 2018 legislative session.

C. In no event should any “remedy” involve closing the schools.

In no circumstances is there justification for the Court to order a remedy that would have the effect of closing the schools. As the State has previously explained, such an extreme remedy would itself violate the Kansas Constitution, a Kansas statutory prohibition on closing schools, and federal law. *See* State’s Motion for Rehearing or Modification, *Gannon v. State* (filed June 10, 2016). Defunding, and thus closing, Kansas schools would be unconstitutional and unwise, regardless of which branch of government is responsible, and must not occur.

If the Court finds any remaining violation(s) of Article 6, it should identify and explain any such violation(s), and then permit the Legislature adequate time and opportunity to address any such violation(s).

CONCLUSION

SB 19 cures the constitutional deficiencies this Court identified in *Gannon IV*.
At a minimum, SB 19 constitutes good-faith, substantial compliance with *Gannon IV*.
The Court should declare SB 19 constitutional and dismiss this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 30th day of June 2017, the above brief was electronically filed with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to registered participants, and copies were electronically mailed to:

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