Docket No. 13-109335-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

LUKE GANNON,
by his next friends and guardians, et al.,
Plaintiffs/Appellees/Cross-Appellants,
v.

STATE OF KANSAS,
Defendant/Appellant/Cross-Appellee.

BRIEF OF *AMICUS CURIAE* EDUCATION LAW CENTER

Appeal from the District Court of Shawnee County
Honorable Judges Franklin R. Theis, Robert J. Fleming, and Jack L. Burr,
District Court Case No. 10-C-1569

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INTERESTS OF *AMICUS CURIAE*

Education Law Center ("ELC") is a New Jersey non-profit organization established in 1973 to advocate on behalf of public school children for access to fair and adequate educational opportunity under state and federal laws through policy initiatives, research, public education, and legal action. ELC represented the plaintiff school children in the landmark case *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990), and continues to advocate on their behalf to ensure effective implementation of the *Abbott* remedies, which have "enabled children in Abbott districts to show measurable educational improvement." *Abbott v. Burke*, 971 A.2d 989, 995 (N.J. 2009) (*Abbott XX*) (quoting *Abbott v. Burke*, 960 A.2d 360 (N.J. 2008) (*Abbott XIX*)).

Utilizing its expertise in education law and policy, ELC established Education Justice, a national program to advance children's opportunities to learn. Education Justice assists advocates seeking better educational opportunities in states across the nation by providing analyses and other support with regard to relevant litigation; high quality preschool and other proven educational programs; resource gaps; education cost studies; and policies that assist states and school districts to gain the expertise to narrow and close achievement gaps. As part of its work, Education Justice/ELC has participated as *amicus curiae* in state educational opportunity cases in California, Colorado, Connecticut, Indiana, Maryland, Oregon, and South Carolina.

PRELIMINARY STATEMENT

Education Law Center respectfully submits this brief *amicus curiae* in order to provide the Court with a national perspective on several issues raised in this appeal. First, the national perspective demonstrates that this Court's rulings in *Montoy v. State*, 120 P.3d 306 (Kan. 2005) (*Montoy II*), and *Montoy v. State*, 112 P.3d 923 (Kan. 2005) (*Montoy III*), are sound, correct, wise, and were appropriately relied upon by the Panel below. While the State cites a few outlier cases from other states, a large majority of the decisions of Sister State high courts reflect the

same well-reasoned assessment of the proofs, legal analyses, and careful rulings as did the Court in *Montoy*. In sum, decisions in sister states overwhelmingly support the justiciability of Plaintiffs' state constitutional claims and are consistent with the holdings of this Court in *Montoy*; these other courts also have enforced the constitutional right to a suitable education while remaining sensitive to the constitutional prerogatives of the legislative branch by reference to standards which derive from legislative enactments or administrative regulations.

Second, decisions in other state high courts support this Court's rulings, upon which the Panel relied, that the state Constitution requires cost-based funding for education. That is, those decisions agree that the State's financing formula must be "based upon actual costs to educate children" that link Kansas children's right to education with the real-world resources necessary to make this right a reality. *Montoy II*, 120 P.3d at 310.

And third, the State's unusual argument that claims arising under Article 6 of the Kansas Constitution become nonjusticiable if the State's alleged failure to comply with the constitutional provision is due to the State providing insufficient education funding is without merit. It is without merit on its face and in light of the fact that high courts in other States have expressly ordered their States to provide sufficient funding for an adequate education, sometimes in specific dollar amounts.

For these reasons, the decision of the Panel below should be affirmed.

ARGUMENT

I. DECISIONS ON SIMILAR CLAIMS IN MOST STATE HIGH COURTS CONFIRM THAT PLAINTIFFS' CLAIMS ARE JUSTICIABLE AND THAT THE PANEL APPROPRIATELY USED *MONTOY'S* JUDICIALLY MANAGEABLE STANDARDS TO ASSESS THE CONSTITUTIONALITY OF STATE'S FUNDING SYSTEM.

A. All Fifty States Have a Constitutional Education Clause Providing For a Right to Education.

Although the State correctly notes that the United States Supreme Court has held that education is not a fundamental right under the federal constitution, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278 (1973); Brief of Appellant State of Kansas ("State's Br.") at 54, each of the fifty state constitutions has an Education Article or Clause that charges the legislature or General Assembly with the duty to establish, maintain and support public schools. *See* Ala. Const., art. XIV, § 256; Alaska Const., art. VII, § 1; Ariz. Const., art. XI, § 1; Ark. Const., art. XIV, § 1; Cal. Const., art. IX, § 1; Colo. Const., art. IX, § 2; Conn. Const., art. VIII, § 1; Del. Const., art. X, § 1; Fla. Const., art. IX, § 1; Ga. Const., art. VIII, § 1; Haw. Const., art. X, § 1; Idaho Const., art. IX, § 1; Ill Const., art. X; Ind. Const., art. VIII, § 1; Iowa Const., art. IX 2d, § 3; Kan. Const., art. 6, § 1; Ky. Const., § 183; La. Const., art. VIII, § 1; Me. Const., art. VIII, part 1, § 1; Md. Const., art. VIII § 1; Mass. Const., pt. 2, ch. V, § 2; Mich. Const, art. VIII, § 2; Minn. Const., art. XIII, § 1; Miss. Const., art. VIII, § 201; Mo. Const., art. IX § 1, cl. a; Mont. Const., art. X; Neb. Const., art. VII, § 1; Nev. Const., art. XI, § 2; N.H. Const., part 2, art. 83; N.J. Const., art. VIII, § 4; N.M. Const., art. XII, § 1; N.Y. Const., art. XI, § 1; N.C. Const., art. IX, § 2; N.D. Const., art. VIII, § 1; Ohio Const., art. VI § 3; Okla. Const., art. XIII, § 1; Ore. Const., art. VIII, § 3; Pa. Const., art. III, § 14; R.I. Const., art. XII, § 1; S.C. Const., art. XI, § 3; S.D. Const., art. VIII, § 1; Tenn. Const., art. XI, § 12; Tex. Const., art. VII,

§ 1; Utah Const., art. X, § 1; Vt. Const., ch. II, § 68; Va. Const., art. VIII, § 1; Wash. Const., art. IX, § 1; W. Va. Const., art. XII, § 1; Wis. Const., art. X, § 3; Wyo. Const., art. VII, § 1.

Thus, Article 6 of the Kansas Constitution states, in relevant part, that: "The legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools, educational institutions and related activities which may be organized and changed in such manner as may be provided by law." Kan. Const. Art. 6, § 1. Article 6 continues, providing that "[t]he legislature shall make suitable provision for finance of the educational interests of the state." Kan. Const. Art. 6, § 6(b).

Moreover, only Mississippi has amended its Education Article to weaken it -- which it did in response to the United States Supreme Court decision in *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686 (1954). *See* Miss. Const. of 1890, art. VIII, § 201 ("It shall be the duty of the legislature to encourage by all suitable means, the promotion of intellectual, scientific, moral and agricultural improvement, by establishing a uniform system of free public schools. . . ."), amended in 1960 ("The Legislature shall by general law, provide for the establishment, maintenance and support of free public schools upon such conditions and limitations as the Legislature may prescribe."). Indeed, Florida by passage of a referendum in November 1998 and Montana by the same method in June 1972 are the most recent states to amend their Education Articles, in both cases to strengthen them.

Although the first school funding case was decided by the high court of Massachusetts in the early 19th century, *see Commonwealth v. Dedham*, 16 Mass. 141 (1819), most state constitutional challenges to inequitable and/or inadequate funding of public schools have been brought over the past forty-five years. High courts in over twenty states, including Kansas, have held that their respective Education Articles confer a substantive right to an adequate education,

and most of those courts have remanded the cases for trials to determine whether their school funding systems comported with that right.[1] The *Montoy* case is among these leading national cases.

B. Plaintiffs' State Constitutional Claims are Justiciable as Evidenced by *Montoy* and by Other Leading Cases in Sister States.

Here, Defendant State argues that the claim at issue is non-justiciable, contending that "judicially-discoverable and manageable standards are lacking to determine whether the Legislature has made 'suitable provision for the finance of the educational interests of the State'" because Plaintiffs "[w]ant [m]ore [m]oney." (State's Br. 34-53.) However, just as this Court has done in the past, state courts across the country have rejected such claims of non-justiciability and held, instead, that it is the duty of the courts to decide these cases, controversial though they might be. *Montoy III*, 112 P.3d at 930-31, 940-41. For example, in *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472 (Ark. 2002), the Supreme Court of Arkansas held that:

> This court's refusal to review school funding under our state constitution would be a complete abrogation of our judicial responsibility and would work a severe disservice to the people of this state. . . . As Justice Hugo Black once sagely advised: "[T]he

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[1] *Haridopolos v. Citizens for Strong Sch., Inc.*, 103 So. 3d 140 (Fla. 2012); *Conn. Coal. for Justice in Educ. Funding v. Rell*, 990 A.2d 206 (Conn. 2010) (*CCJEF*); *Davis v. State*, 804 N.W.2d 618 (S.D. 2011); *Lobato v. State*, 218 P.3d 358 (Col. 2009); *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 109 P.3d 257 (Mont. 2005); *Montoy v. State*, 102 P.3d 1160 (Kan. 2005); *Edgewood Indep. Sch. Dist, v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Tucker v. Lake View Sch. Dist. No. 25*, 917 S.W.2d 530 (Ark. 1996) (*Lake View II*); *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326 (N.Y. 2003) (*CFE III*); *Vincent v. Voight*, 614 N.W.2d 388 (Wis. 2000); *Abbeville Cnty. Sch. Dist. v. State*, 515 S.E.2d 535 (S.C. 1999); *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353 (N.H. 1997); *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997); *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997); *Brigham v. State*, 692 A.2d 384 (Vt. 1997); *Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238 (Wyo. 1995) (*Campbell Cnty. Sch. Dist. I*); *McDuffy v. Sec'y of Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); *Idaho Schs. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724 (Ida. 1993); *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990) (*Abbott II*); *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989); *Pauley v. Kelly*, 255 S.E.2d 859 (W.Va. 1979); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978).

> judiciary was made independent because it has . . . the primary responsibility and duty of giving force and effect to constitutional liberties and limitations upon the executive and legislative branches.

351 Ark. at 54 (quoting Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. Rev. 865, 870 (1960)). *See also Connecticut Coalition For Justice in Education Funding v. Rell*, 990 A.2d 206, 217-26 (Conn. 2010); *Lobato v. State*, 218 P.3d 358, 363 (Colo. 2009) (this Court has "never applied the political question doctrine to avoid deciding a constitutional question, and we decline to do so now."); *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535, 539 (S.C. 1999); *Leandro v. State*, 488 S.E.2d 249, 253-55 (N.C. 1997); *DeRolph v. State*, 677 N.E.2d 733, 737 (Ohio 1997) ("We will not dodge our responsibility by asserting that this case involves a nonjusticiable political question. To do so is unthinkable. We refuse to undermine our role as judicial arbiters and to pass our responsibilities onto the lap of the General Assembly."); *Campbell County Sch. Dist. v. State*, 907 P.2d 1238, 1264-65 (Wyo. 1995); *Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 141, 147-48 (Tenn. 1993); *McDuffy v. Secretary*, 615 N.E.2d 516, 550 (Mass. 1993); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 393-94 (Tex. 1989); *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359, 364 n.4 (N.Y. 1982); *McDaniel v. Thomas*, 285 S.E. 2d 156, 157 (Ga. 1981).

Similarly, this Court should not abandon its duty to enforce the Constitution, as the State urges, and should find Plaintiffs' claims justiciable. Indeed, rulings in a number of states have held that the separation of powers doctrine *compels* the courts to act affirmatively in the face of constitutional violations. *See, e.g., Hussein v State of New York*, 973 N.E.2d 752, 754 (N.Y. 2012) (concurring opinion, noting that abandoning interpretation of the constitutional education article "would not only entrust the Legislature and Executive with the decidedly judicial task of interpreting the meaning of the Education Article but cast them in the role of being their own

constitutional watchdogs. . . . [P]arsing out what the Education Article actually requires . . . not only enables the Legislature and Executive to fulfill their constitutional mandate but ensures that we in the judiciary do the same"); *McCleary v. State*, 173 WN.2d 477, 540-41 (2012) (noting that "the constitution requires the judiciary to determine compliance with [the Education] article" and "that this court cannot stand on the sidelines and hope the State meets its constitutional mandate to amply fund education"); *State v. Campbell County Sch. Dist.*, 2001 WY 90, P33 (2001) ("When [legislative and political school financing] defects lead to continued constitutional violations, judicial action is entirely consistent with separation of powers principles and the judicial role."); *Robinson v. Cahill*, 351 A.2d 713, 724 (N.J. 1975) ("The Court, as the last-resort guarantor of the Constitution's command, possesses and must use power equal to its responsibility." (discussing school funding)).

C. *Montoy I*s a Leading Case Demonstrating That Courts Are Institutionally Suited to Enforce the Constitutional Right to an Education, Using Judicially Manageable Standards.

In enforcing these constitutional mandates, courts have increasingly relied upon manageable standards that have arisen from judicial rulings and from legislative developments in the wake of these rulings, in fulfilling their responsibility to protect the constitutional rights of children to an adequate education. For example, this Court held in *Montoy II* that Article 6 requires the Legislature to make "'suitable provision for finance' [which] encompasses many aspects," and made clear that "[f]irst and perhaps foremost it must reflect a level of funding which meets the constitutional requirement." *Montoy II*, 120 P.3d at 309. Thereafter, the Court articulated concrete standards, tethered to legislative action, that could guide future judicial decisionmaking. The Court, for example, cited the constitutional requirement for "intellectual, educational, vocational and scientific *improvement"* noting the Legislature's "apparent recognition of this [improvement] concept" in legislative "performance levels and standards" and

"standards for individual and school performance." *Id.* (emphasis in *Montoy II*) (internal citations omitted).

Often citing *Unified Sch. Dist. No. 229 v. State*, plaintiffs in cases from sister states, like Plaintiffs here (and like the Panel below), point to the statutory and regulatory standards developed by legislatures and state education departments as appropriate to both reflect state values and provide benchmarks for determining whether children are being afforded a constitutionally-adequate education. 885 P.2d 1170 (Kan. 1994). *See, e.g., Haridopolos v. Citizens for Strong Schs., Inc.*, 81 So. 3d 465, 469 (Fla. Dist. Ct. App. 1st Dist. 2011) (noting that "courts in other jurisdictions have seen fit to define the contours of a constitutionally guaranteed education and to establish judicial standards of educational quality reflecting varying degrees of specificity and deference to the other branches of government" (quoting *Committee for Educational Rights v. Edgar*, 672 N.E.2d 1178, 1191 (Ill. 1996)). The important principle that emerges from *Montoy* is that students' performance, as measured using these standards, demonstrates whether schools receive sufficient resources to offer an education in line with constitutional norms. *See Unified Sch. Dist. No. 229*, 885 P.2d at 1174, 1186 (By "utiliz[ing] as a base the standards enunciated by the legislature and the state department of education," the court will fulfill its "obligation of interpreting the Constitution and of safeguarding the basic rights reserved thereby to the people."); *Abbott v. Burke*, 693 A.2d 417 (N.J. 1997) (*Abbott IV*) (State content and performance standards "are facially adequate as a reasonable legislative definition of a constitutional . . . education.").

The benefits of utilizing such standards are manifest: Courts have found that such content-based standards give judges objective, legislatively created baselines that inform judicially manageable standards. Further, *U.S.D. No. 229* and *Montoy* also stand for the

principle that holding the other branches of government to standards that they have independently adopted avoids intrusion by the courts into policy-making functions that are the province of the other government branches.

Employing the same types of standards, in logical and reasoned analysis, other state high courts have interpreted their state constitutions and statutory enactments to identify judicially manageable standards. *See, e.g., Conn. Coalition for Justice in Educ. Funding, Inc.*, 990 A.2d at 254 (noting agreement with "New York Court of Appeals' explication of the 'essential' components requisite to this constitutionally adequate education"); *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 212 (Ky. 1989) (noting the specific requirements of "an efficient system of education"); *Lake View Sch. Dist. No. 25*, 91 S.W.3d at 487-88; *Unified Sch. Dist. No. 229*, 885 P.2d at 1185-87 (discussing the *Rose* factors, which the legislature adopted); *McDuffy v. Secretary*, 615 N.E.2d 516, 554 (Mass. 1993); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1359 (N.H. 1997); *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997); *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535, 540-41 (S.C. 1999); *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 776 (Tex. 2005) (establishing a standard for "suitable" provision for education).

Specifically, as in *Montoy*, these courts often find that, through its own "provisions, the legislature has imposed criteria for determining whether it has made suitable provision for the finance of education." *Montoy II*, 120 P.3d at 309. *See e.g., Conn. Coalition for Justice in Educ. Funding, Inc.*, 990 A.2d at 254 (noting a judicially manageable standard); *Rose*, 790 S.W.2d at 212 (same); *Lake View Sch. Dist. No. 25*, 91 S.W.3d at 486-88 (same); *Claremont Sch. Dist.*, 703 A.2d at 1359 (same). Indeed, just as the Panel's decisions did here, other courts examine their State's education standards, including content-based standards and assessment systems enacted or adopted by state legislatures and state departments of education, when adjudicating

educational adequacy claims.[2] These statutory and regulatory standards and assessments provide benchmarks to measure whether the State is making suitable provision of education and affording schools and students sufficient resources, in light of both the state values embodied in each state's constitution and the laws on the one hand and student performance on the other. *See, e.g., Abbott v. Burke*, 693 A.2d 417, 428 (N.J. 1997) (*Abbott IV*) (noting that state standards "represent the first real effort on the part of the legislative and executive branches to define and to implement the educational opportunity required by the Constitution. It is an effort that strongly warrants judicial deference.").

Moreover, employing standards crafted by the Legislature or Executive Branch not only provides courts with workable criteria for evaluating the constitutional adequacy of state systems of education in view of contemporary and changing needs, but also results in holding other branches of government accountable to satisfy the standards that they themselves developed. *See, e.g., Idaho Sch. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724, 728 (Ida. 1993) (noting that the court's responsibility to adjudicate is "simpler" where "the executive branch of the government has already promulgated educational standards pursuant to the legislature's directive"); *Leandro*, 488 S.E.2d at 259 (directing the trial court to consider the "[e]ducational goals and standards adopted by the legislature"); *McCleary*, 269 P.3d at 250 (noting that the State's requirements "provide[] 'specific substantive content to the word education'" in the state

[2] *See, e.g., Lobato*, 218 P.3d at 372, n.17 (directing the trial court to consider "education reform statutes with proficiency targets and content standards . . . to help evaluate the constitutionality of the legislature's actions"); *Columbia Falls*, 109 P.3d at 312 ("Unless funding relates to needs such as academic standards . . . and performance standards, then the funding is not related to the cornerstones of a quality education."); *Hull v. Albrecht*, 950 P.2d 1141, 1145 (Ariz. 1997) ("[A] constitutionally adequate system will make available to all districts financing sufficient to provide facilities and equipment necessary and appropriate to enable students to master the educational goals set by the legislature."); *Abbott v. Burke*, 693 A.2d 417 (N.J. 1997) (*Abbott IV*)

constitution's education clause). *Montoy* and decisions in sister state's courts confirm that the Panel here appropriately used Legislatively-adopted standards to assess the constitutionality of the State's funding system.

II. THE PANEL APPROPRIATELY ORDERED THE STATE TO COMPLY WITH ITS COST-BASED FUNDING SYSTEM, AS EVIDENCED BY THIS COURT'S DECISIONS IN *MONTOY* AND SIMILAR DECISIONS IN OTHER COURTS ACROSS THE NATION.

As this Court has made clear, in order to realize stated educational goals the state school funding system must provide adequate, cost-based levels of funding. After the trial court found that "the financing formula was not based upon actual costs to educate children," which distorted important weighting factors in the formula, this Court held that the State's attempt to comply with its constitutional mandate to "make suitable provisions for finance of the educational interests of the State," Kan. Const. Art. 6, § 6(b), "must reflect a level of funding which meets the constitutional requirement" and that "the equity with which the funds are distributed and the actual costs of education . . . are critical factors for the legislature to consider in achieving a suitable formula for financing education." *Montoy II*, 120 P.3d at 309-11. Then, in *Montoy III*, this Court thoughtfully specified, in detail, the cost-based standards against which it analyzed the funding formula and its impacts. *Montoy III*, 112 P.3d at 925-26, 932-37 (specifying costs of education categorized by base state aid per pupil, at risk, bilingual, special education, local option budget, cost of living weighting, and low-enrollment weighting).

As this Court did in *Montoy*, in other states in which the existing finance system has not made suitable provisions to cover educational costs, the courts respond by declaring the funding system unconstitutional and ordering the legislative and executive branches to cure the

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(noting that the state's curriculum standards "embody the substantive content of a thorough and efficient education").

deficiency, if necessary by providing additional funding. *See, e.g.*, *McCleary*, 269 P.3d. at 261-62 (ordering the state to fully fund its plan for cost-based funding of public education); *CFE v. State*, 861 N.E.2d 50, 52 (N.Y. 2006) (ordering the state to increase annual education funding); *Montoy II*, 120 P.3d at 310 (noting that the Court was "allow[ing] the legislature a reasonable time to correct the constitutional infirmity in the present financing formula"); *Abbott IV*, 693 A.2d at 443, 446 (ordering the State to allocate additional funds to high-need school districts); *Claremont Sch. Dist.*, 703 A.2d at 1359-61 (holding the State funding system unconstitutional and requiring the legislature and Governor "to provide for a constitutionally adequate public education and to guarantee adequate funding in a manner that does not violate the State Constitution").

Requiring the State to align its funding commitment, what Defendant denominates "money," to its own educational standards, is necessary if the State's children are to be educated in a manner that complies with Article 6 of Kansas' Constitution. In fact, a number of state high courts have ordered States to perform educational costing-out studies and to provide funding in accordance with those studies. *See, e.g.*, *Campbell County Sch. Dist.*, 907 P.2d 1238; *Campaign for Fiscal Equity (CFE) v. State*, 801 N.E.2d 326 (N.Y. 2003); *Lake View Sch. Dist.*, 351 Ark. 31. The remedial order in *CFE v. State*, for example, required the State to "ascertain the actual cost of providing a sound basic education," as well as to provide funding in accordance therewith. *CFE*, 801 N.E.2d at 348.

For these reasons, although the State argues that the Court has overstepped its bounds by addressing education funding deficiencies, this Court has embraced the fundamental principle that the judiciary has an essential responsibility under the State Constitution. *See Harris v. Shanahan*, 387 P.2d 771, 790-91 (Kan. 1963) (noting that the judiciary has "the obligation of

interpreting the Constitution and safeguarding the basic rights reserved thereby to the people [and] this court is the sole arbiter of the question whether an act of the legislature is invalid under the Constitution of Kansas."). *Montoy*, even as it fulfilled this responsibility, also appropriately left it to the Legislature, at least in the first instance, to act. *Montoy II*, 120 P.3d at 310-11.

But the Court's remedial orders should also reflect the national experience, which shows that Courts in a large number of other states have addressed violations of constitutional provisions similar to Article 6 of the Kansas Constitution by ordering that the State fund education at or above a certain cost-based or need-based level, even in the face of separation of powers and deference arguments. *See, e.g.*, *McCleary*, 269 P.3d at 261-62 (ordering the state to fully fund its plan for cost-based financing of public education); *CFE*, 861 N.E.2d at 52 (ordering the state to increase annual education funding by a certain amount); *Abbott IV*, 693 A.2d at 443, 446 (ordering the State to allocate additional funds to high-need school districts). The Panel decision should be affirmed.

III. AS EVIDENCED BY DECISIONS IN HIGH COURTS IN SISTER STATES, THE PANEL WAS CORRECT TO ORDER THE STATE TO PROVIDE SUFFICIENT FUNDING FOR ADEQUATE EDUCATION AND THE PANEL, OR THIS COURT, MAY APPROPRIATELY ORDER THE STATE TO DISBURSE A PRECISE DOLLAR AMOUNT TO THE EDUCATION SYSTEM.

The State seems to claim that its failure to implement the *Montoy* remedy and provide adequate funding to comply with Article 6 becomes nonjusticiable because it involves "*money*," a specific dollar amount that must be spent to achieve constitutional compliance. (State's Br. 37 and State's Reply Br. 1 (emphasis in Reply Br.).) The State wrongly cites *McDaniel v. Thomas*, an equal protection case, in which the Georgia Supreme Court held the level of school funding to be a justiciable controversy and declared that education must provide each child the opportunity to acquire the skills necessary for "the enjoyment of the rights of speech and of full participation in the political process." *McDaniel v. Thomas*, 285 S.E.2d 156, 165 (Ga. 1981). The State also

cites the out-dated *Coalition for Adequacy and Fairness in School Funding v. Chiles*, which was rejected by Floridians, who voted to strengthen the Florida Constitution's Education Article. 680 S. 2d 400 (Fla. 1996). *See Bush v. Holmes*, 919 So. 2d 392, 403 (Fla. 2006) (noting that "the Constitutional Revision Commission proposed and the citizens of this state approved an amendment to article IX, section 1" in response to *Coalition for Adequacy and Fairness* (citing Art. IX, § 1(a), Fla. Const.)). As a result, *Citizens for Strong Schools (CSS) v. Florida State Board of* Education, a case very much like *Montoy*, is now proceeding to trial under the new Education Article, after the State's motion to dismiss was denied. *See Haridopolos v. Citizens for Strong Sch., Inc.*, 103 So. 3d 140 (Fla. 2012).

Indeed, the talisman of "*money*" does not prevent state courts from ordering funding increases for public education in order to require compliance with the Education Articles of the State Constitutions at issue. For example, the Washington Supreme Court recently retained jurisdiction and ordered the state to fully fund its plan for cost-based funding of public education, *McCleary*, 269 P.3d. at 261-62; in response, the Legislature added $982 million in school funding for the coming year. Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Litigation (Aug. 29, 2013), http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/ReportToLegislativeOnArticleIXLitigation.pdf (last visited Sept. 3, 2013). Likewise, the New York Court of Appeals, the state's highest court, ordered the state to increase annual education funding to New York City by at least $1.93 billion, *CFE*, 861 N.E.2d at 52, while the New Jersey Supreme Court ordered the State to allocate at least an additional $248 million dollars to 28 high-need school districts for the coming school year, *Abbott IV*, 693 A.2d at 443, 446, and the Arizona Court of Appeals ordered the state to increase education funding, annually, in accordance with a voter-

approved proposition, *Cave Creek USD v. Ducey*, 295 P.3d 440 (Ariz. Ct. App. 2013) (on appeal). *See also Montana Quality Education Coalition v. State*, Consent Decree (Mont. 1st Jud. Dist. Ct., April 4, 2012) (issued by Judge Dorothy McCarter) (Consent Decree requiring the State to fully fund its school funding formula, as "mandated by [state law] and *Columbia Falls Elementary Sch. Dist. No. 6 v. State*" (citing *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 109 P.3d 257). The lesson from these cases is clear: Courts must and do order States to provide sufficient funding for adequate education. This Court should affirm the Panel decision below consistent with this experience, and with the principles set forth in its own jurisprudence, as elucidated by Plaintiffs. Response Brief of Appellees/Cross-Appellants 67-83.

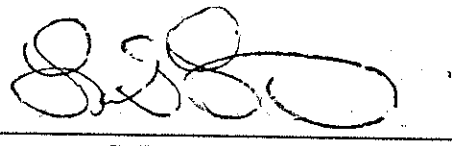
CONCLUSION

For all the foregoing reasons, *amicus* ELC respectfully urges this Court, consistent with its well-reasoned jurisprudence and with Article 6 of the Constitution, to affirm the decision of the Panel below.

Dated this 5th day of September, 2013.

Respectfully submitted,

Gibbons P.C.



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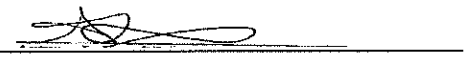

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