No. 13-109335

# In the Supreme Court of the State of Kansas

**Luke Gannon, *et al.*,**

Plaintiffs-Appellees-Cross-Appellants,

v.

**State of Kansas,**

Defendant-Appellant-Cross-Appellee.

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

## CONSOLIDATED REPLY OF APPELLANT STATE OF KANSAS TO BRIEFS OF *AMICI CURIAE* KANSAS ASSOCIATION OF SCHOOL BOARDS, KANSAS NATIONAL EDUCATION ASSOCIATION, UNIFIED SCHOOL DISTRICT NO. 253 AND EDUCATION LAW CENTER

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## ARGUMENT

### I. Introduction

Four *amicus curiae* have submitted briefs, and those briefs require little response, because they are largely directed to the wrong forum. All of the *amici* briefs brazenly invite this Court to – and seem to assume and expect that the Court will – act as the State's fiscal and educational policymaker. Indeed, the *amici* briefs plainly illustrate the inherently political nature of this "case," with several of the *amici* lobbying the Court to protect special interests or particular points of view on how available funds should be spent or allocated in the Kansas educational system.

For example, the Kansas National Education Association (KNEA) wants more dollars for teacher salaries. The Kansas Association of School Boards (KASB) disagrees with where the Legislature decided to spend money – on funding KPERS for teachers – and asks the Court to impose a different tax policy for the State. Unified School District No. 253 (U.S.D. 253) argues that capital outlay and supplementary state aid funding should be increased. Finally, the New Jersey-based Education Law Center (ELC) argues (wrongly in fact) that basically "all" state supreme courts order their respective Legislatures and Governors to do whatever those courts deem best when it comes to school finance and educational policy. Overall, the *amici* sound like lobbyists, not lawyers, which only proves that they are making their "case" in the wrong forum.

In fact, none of the *amici* argue that the Panel's order to raise BSAPP to $4492 (or the school district plaintiffs' requests for about three times that increase) is required to comply with Article 6, § 6 of the Kansas Constitution. At bottom, this "case" is a political and public policy debate, the kind that traditionally takes place (and should) in the

Legislature, not this Court. Remarkably, school district plaintiffs' allies (the four *amici*) fail even to make a *constitutional* argument.

If nothing else, the *amicus* briefs demonstrate the reasons why the Court should conclude that school districts lack standing to bring such "constitutional" challenges, that such a "case" must be deemed to raise nonjusticiable questions, that any review of legislative funding and educational policy decisions at a minimum must be extremely deferential, and that courts in any event have no authority to order legislatures and governors to pass and sign or not pass or to veto any particular legislation. The State will respond briefly below to one *amicus* brief which incorrectly asserts that all state supreme courts are doing just what the plaintiffs and their *amici* seek here, but otherwise the *amicus* briefs merit no specific response. The State respectfully requests that the Court dismiss this "case" or reverse the Panel on the merits, including the unconstitutional remedy the Panel purported to order.

## II. Our Neighbor State Supreme Courts Uniformly Have Rejected The Invitation To Become Special Masters Of Their State Educational Systems In The Years Following *Montoy* (2006).

The New Jersey-based advocacy group ELC makes the erroneous suggestion that state supreme courts almost uniformly have taken on the role of special master of their state educational systems. In fact, post-*Montoy* litigation in our surrounding sister states has seen courts do just the opposite. ELC's unsupported assertions about recent case law in school finance litigation do not withstand even cursory scrutiny.

Of course, New Jersey has a well-known history with school finance, one in which its state supreme court has spent over twenty years trying with mixed success to run the State's school system. As a self-described Plaintiffs' representative in *Abbott v.*

*Burke*, ELC Amicus Br. at 1, a case that went on for well over twenty years (the opinion in *Abbott I* having been issued in 1985, *Abbott v. Burke*, 100 N.J. 269, 495 A.2d 376 (1985)), ELC has no impartial, scholarly interest in school finance issues nationwide but rather is an active proponent with a vested interest in promoting one particular model – the New Jersey model. That model, however, has been described as a "morass," or a "chilling example of the thickets that can entrap a court that takes on the duties of a Legislature," State's Opening Brief at 52-53 (quoting *City of Pawtucket v. Sundlun*, 662 A.2d 40, 59 (R.I. 1995)), and many state courts have flatly rejected the invitation to follow New Jersey. *See, e.g.*, *Nebraska Coalition for Educational Equity and Adequacy v. Heineman*, 273 Neb. 531, 557, 731 N.W.2d 164, 183 (2007).

Kansas is not New Jersey. Nor is Colorado, Iowa, Missouri, Nebraska, or Oklahoma, our neighboring sister states in the Midwest, all of which have – more recently than this Court's final decision in *Montoy* in 2006 – either found that school districts lacked standing to bring educational funding claims, held that the questions raised are nonjusticiable, and/or applied very deferential judicial review to the merits of any such claims that the courts actually reached. If this Court accepts the school district plaintiffs' and ELC's invitation to engage in aggressive judicial activism and disregard the traditional separation of powers, this Court would stand alone as an island in the heartland of the country in adopting such an approach.

For instance, in *Oklahoma Educ. Ass'n v. Oklahoma*, 158 P.3d 1058 (Okla. 2007), the Oklahoma Supreme Court rejected a "challenge [to] the current level of funding for common education," *id.* at 1062, on two grounds: (1) the "plaintiff school districts have failed to present us with any authority to show that they have standing to assert the

violation of the constitutional rights of students generally across this state," *id.* at 1064; and (2) the issues presented were nonjusticiable because the "plaintiffs are attempting to circumvent the legislative process by having this Court interfere with and control the Legislature's domain of making fiscal-policy decisions and of setting educational policy by imposing mandates on the Legislature and by continuing to monitor and oversee the Legislature." *Id.* at 1066.

In *Nebraska Coalition for Educational Equity and Adequacy v. Heineman*, 273 Neb. 531, 731 N.W.2d 164 (2007), the Nebraska Supreme Court rejected "constitutional" challenges to the funding of Nebraska's school system, holding that only nonjusticiable, political questions were at stake. In fact, the Nebraska court held that at least four of the *Baker v. Carr* nonjusticiable categories applied in this context, observing that "[t]his court is simply not the proper forum for resolving broad and complicated policy decisions or balancing competing political interests." 732 N.W.2d at 181. The court specifically cited the *Montoy* litigation as an example it did ***not*** want to follow, *id.* at 182, and concluded that "[t]he landscape is littered with courts that have been bogged down in the legal quicksand of continuous litigation and challenges to their states' school funding systems. Unlike those courts, we refuse to wade into that Stygian swamp." *Id.* at 183.

In *Committee for Educational Equality v. Missouri*, 294 S.W.3d 477 (Mo. 2009), the Missouri Supreme Court held that the plaintiff school districts lacked standing to bring several claims and then applied deferential rational basis review to the claims the Court actually reached on the merits. First, the Missouri court easily concluded that the plaintiff school districts "lack standing to assert that the alleged inadequacy of school funding violates their equal protection rights" because "[p]olitical subdivisions

established by the State are not 'persons' within the protection of the due process and equal protection clauses." *Id.* at 485 (citing C*ity of Chesterfield v. Dir. Of Revenue*, 811 S.W.2d 375, 377 (Mo. banc 1991)). Second, because the Missouri Constitution (like the Kansas Constitution) "contains neither a free-standing 'adequacy' requirement nor an equalizing mandate, Plaintiffs have failed to show [the school funding statute] impacts a fundamental right." *Id.* at 490. Thus, the Court applied the "highly deferential [rational basis] standard," *id.* at 491, and held that "funding schools in a way that envisions a combination of state funds and local funds . . . cannot be said to be irrational." *Id.*

In *King v. Iowa*, 818 N.W.2d 1 (Iowa 2012), the Iowa Supreme Court rejected constitutional challenges to the educational standards in Iowa. Although the case did not directly involve school funding, it did involve the Legislature's ability to establish and determine the educational standards for the Iowa school system. The Iowa court held that "plaintiffs' specific challenges to the educational policies of this state are properly directed to the plaintiffs' elected representatives, rather than the courts." *Id.* at 5. In language fully appropriate here, the court observed: "[t]hese issues are currently being debated throughout our state. The debate participants include legislators, the governor, executive branch officials, school boards, teachers, parents, students, and taxpayers. We believe the democratic process is best suited for resolution of those debates and can best accommodate the competing concerns of the many interested parties." *Id.* at 36.

Finally, and most recently, in *Lobato v. State*, 304 P.3d 1132 (Colo. 2013), the Colorado Supreme Court reversed a trial court decision which had held that current Colorado school funding violated the Colorado Constitution. The Colorado court emphasized that its judicial review was necessarily deferential, permitting the court only

to "determine whether the state's public school financing system is rationally related to the constitutional mandate that the General Assembly provide a 'thorough and uniform' system of public education." *Id.* at 1139 (internal quotations and citation omitted). The court cautioned that, "[i]n applying this test to the public school financing system, our task is not to determine 'whether a better financing system could be devised,' but rather to determine 'whether the system passes constitutional muster.'" *Id.* at 1139-40 (citation omitted). Further, the court will "presume that the statutes that make up the school financing system are constitutional, and we will uphold the legislation unless the Plaintiffs have proven beyond a reasonable doubt that the statutes fail to pass the . . . rational basis test, and are therefore unconstitutional." *Id.* at 1140. The Colorado Supreme Court upheld the Colorado school finance system, pointing out that "[w]hile the trial court's detailed findings of fact demonstrate that the current public school financing system might not be ideal policy," *id.* at 1144, the system was rational and therefore constitutional, allowing the court "'to say what the law is,' *see Marbury v. Madison*, 5 U.S. 137, 177 (1803), without unduly infringing upon the policy-making power of the General Assembly." *Id.*

Thus, an unbroken line of cases from our neighbor states post-*Montoy* decline to engage in judicial review that would substitute the courts' subjective judgments for the decisions made by elected policymakers in the school finance context. Contrary to ELC's erroneous suggestion, that trend is not brushed away by labeling these courts as a "few outliers." ELC Amicus Br. at 1. Instead, school finance litigation has evolved over time through at least three "waves" of litigation. As the most recent evolution – of which this case is a part – has come to focus on the "adequacy" of funding, there has been a

documented "dramatic change in the judicial response to adequacy litigation," a "negative trend for adequacy plaintiffs" in which courts have expressed "increasing separation of powers concerns." J. Simon-Kerr, R. Sturm, *Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education*, 6 Stan. J. Civ. Rts. & Civ. Lib. 83, 83 (April 2010). This judicial skepticism has been a direct result of the shifting of the litigation by plaintiffs – as is true in this case – from a focus on identifying and articulating any particular constitutional right to simply asking courts to "arbitrat[e] the underlying funding dispute." *Id.*, at 107. Defining constitutional rights is often a judicial function, but mandating particular appropriations is not. *Id.*

The State is not urging this Court to "abandon its duty to enforce the Constitution," ELC Amicus Br. at 6, or "to say what the law is." *Marbury*, 5 U.S. at 177. Rather, the State is urging the Court to enforce the Kansas Constitution as written, both Article 6, § 6 regarding the making of "suitable provision for the finance of the educational interests of the State," and Article 2, §§ 1, 24, which plainly give the Legislature the sole authority to make appropriations for the State. In fact, the strong recent trend represented by the cases from Oklahoma, Nebraska, Missouri, Colorado and Iowa, is that educational policy and funding issues are to be resolved in the democratic process, not in the courts in the guise of a "case."

Nor do the cases ELC cites in Section III of its brief in fact support the proposition that the Panel, or this Court, "may appropriately order the State to disburse a precise dollar amount to the education system." ELC Amicus Br. at 13. Instead, as the cases ELC cites recognize, and as the State demonstrated both in its opening brief and in

its reply, the courts lack authority to compel or prohibit particular legislative enactments or gubernatorial signatures or vetoes.

## CONCLUSION

Like the school district plaintiffs in this case, the *amici curiae* fail to demonstrate how the Panel's decision can be sustained. Instead, for the reasons fully briefed in the State's previous submissions to this Court, the case must either be dismissed for lack of jurisdiction or the Court must enter judgment in the State's favor on the merits.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 27th day of September, 2013, true and correct copies of the above and foregoing CONSOLIDATED REPLY OF APPELLANT STATE OF KANSAS TO BRIEFS OF AMICI KANSAS ASSOCIATION OF SCHOOL BOARDS, KANSAS NATIONAL EDUCATION ASSOCIATION, UNIFIED SCHOOL DISTRICT No. 253 and EDUCATION LAW CENTER were mailed, postage prepaid, to:

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