**No. 15-113908-S**

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**IN THE SUPREME COURT OF THE STATE OF KANSAS**

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**LUKE GANNON,**
**By his next friends and guardians, *et al.*,**

Plaintiffs/Appellees

vs.

**STATE OF KANSAS,**

Defendant/Appellee

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# BRIEF OF APPELLANT/APPLICANT-INTERVENOR, SHAWNEE MISSION UNIFIED SCHOOL DISTRICT NO. 512

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

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## NATURE OF THE CASE

In this school finance litigation, Appellant/Applicant-Intervenor Shawnee Mission Unified School District No. 512 ("U.S.D. 512") appeals the denial of its motion to intervene in *Gannon et al. v. State of Kansas*, Case No. 2010CV1569, a case originally challenging the constitutionality of the School District Finance and Quality Performance Act ("SDFQPA") and now challenging the successor statutes in the Classroom Learning Assuring Student Success Act ("CLASS"). 34 Kan. Reg. 272 § 4.

"[T]he denial of a motion to intervene is a final, appealable order under K.S.A. 60-2102(a)(4)." *Marriage of Marriage of Osborne*, 21 Kan. App. 2d 374, 376, 901 P.2d 12 (1995); *see Montoy v. State*, 278 Kan. 765, 765, 102 P.3d 1158 (2005) ("Kansans for the Separation of School and State appeals from the district court's memorandum decision and order denying its motion to intervene. An order denying an application to intervene is a final appealable order."); *State ex rel. Stephan v. Kansas Dep't of Revenue*, 253 Kan. 412, 415, 856 P.2d 151 (1993) ("An order denying an application to intervene is a final, appealable order.").

## STATEMENT OF THE ISSUE

Whether Appellant may intervene, either as a matter of right or permissively, in *Gannon et al., v. State of Kansas*, Case No. 2010CV1569, because it has a substantial interest in the subject matter of the litigation, its interests are not adequately represented by the existing parties, and its motion for intervention was timely.

## STATEMENT OF FACTS

### I. The School Finance Litigation

This Court is already intimately familiar with the substantive *Gannon* claims and issues. U.S.D. 512 wants to intervene in the litigation because the outcome will affect—

and already has affected—all districts and students across the state, yet neither the Plaintiff districts nor the State adequately represent U.S.D. 512's interests and are, in fact, taking positions adverse to U.S.D. 512. For some time now, the resultant decisions below have been skewed in favor of a few vocal districts to the detriment of U.S.D. 512 and others because the Court was not presented with the evidence, analysis, and perspective of districts whose interests diverge from both the State's and Plaintiffs'. In order to protect its rights and receive due process, U.S.D. 512 asks the Court to reverse the denial of its motion to intervene.

Because U.S.D. 512 has not been a party to this litigation, the Court may not be aware of how the SDFQPA, and now CLASS, underfunds districts like U.S.D. 512, which are mis-labeled and wrongly viewed as "wealthy" because they encompass geographic areas with higher property values. But property values do not translate into more money to spend in the classroom. In fact, under both the current and prior school finance statutes, the amount of spending allowed in each district varies inversely with property values, and the effect is for a district like U.S.D. 512 to be "resource-rich" but "revenue poor," to borrow terminology from the Panel in its most recent decision. R. Vol. 136, p. 1497.

Kansas school funding punishes property-wealthy districts by awarding them less per-pupil funding for the same tax effort, *even after* accounting for differing student demographics. The Court can find a more detailed analysis of this fact in U.S.D. 512's briefs submitted below, particularly the post-hearing brief filed on May 15, 2015. R. Vol. 133, p. 1171, 1175-6.

As an illustration, however, under the SDFQPA, U.S.D. 512 historically receives substantially less General State Aid per pupil than most other districts, including Plaintiffs.

| General State Aid Per Pupil, by year | | | | | |
|---|---|---|---|---|---|
| | 2009-2010 | 2010-2011 | 2011-2012 | 2012-2013 | 2013-2014 |
| **SMSD (#512)** | **$2,810.98** | **$2,785.81** | **$2,878.12** | **$2,972.58** | **$3,073.14** |
| Kansas City School District (#500) | $5,465.82 | $5,464.17 | $5,585.98 | $5,674.37 | $5,839.40 |
| Dodge City School District (#443) | $5,722.41 | $5,570.91 | $5,672.95 | $5,816.01 | $5,841.00 |
| Hutchinson School District (#308) | $4,570.01 | $4,620.10 | $4,704.10 | $4,697.52 | $4,672.38 |
| Wichita School District (#259) | $4,757.71 | $4,715.73 | $4,849.86 | $5,088.81 | $5.127.03 |

R. Vol. 28, p. 3599.

Even after combining all revenue sources, U.S.D. 512 is far behind Plaintiffs and the State average in total state aid per pupil, per year:

| Total State Aid Per Pupil, by Year | | | | | | | |
|---|---|---|---|---|---|---|---|
| | 2008-2009 | 2009-2010 | 2010-2011 | 2011-2012 | 2012-2013 | 2013-2014 | 2013-2014 inequality: |
| **SMSD (#512)** | **$4,701** | **$4,046** | **$3,993** | **$4,393** | **$4,389** | **$4,514** | -- |
| *Statewide Average* | $7,344 | $6,326 | $6,511 | $6,983 | $6,984 | $7,088 | $2,574 per pupil *more* than SMSD (157%) |
| Kansas City School District (#500) | $9,102 | $7,937 | $8,339 | $8,852 | $8,778 | $8,915 | $4,401 per pupil *more* than SMSD (197%) |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Dodge City School District (#443) | $9,865 | $8,405 | $8,617 | $9,093 | $9,014 | $9,146 | $4,632 per pupil *more* than SMSD (203%) |
| Hutchinson School District (#308) | $7,818 | $6,918 | $7,275 | $7,560 | $7,611 | $7,727 | $3,213 per pupil more than SMSD (171%) |
| Wichita School District (#259) | $7,918 | $6,933 | $7,092 | $7,501 | $7,774 | $7,931 | $3,417 per pupil more than SMSD (176%) |

R. Vol. 28, p. 3599-600.

The same is true in terms of total expenditures per pupil, per year:

| **Total Expenditures Per Pupil, By Year** | | | | | |
|---|---|---|---|---|---|
| | 2008-2009 | 2010-2011 | 2011-2012 | 2012-2013 | 2013-2014 |
| **SMSD (#512)** | **$12,174** | **$11,817** | **$12,374** | **$12,042** | **$12,379** |
| *Statewide Average* | $12,660 | $12,282 | $12,647 | $12,776 | $12,959 |
| Kansas City School District (#500) | $16,265 | $15,553 | $14,706 | $14,987 | $15,388 |
| Dodge City School District (#443) | $12,867 | $12,026 | $13,320 | $12,525 | $13,032 |
| Hutchinson School District (#308) | $12,350 | $12,133 | $11,654 | $11,850 | $12,271 |
| Wichita School District (#259) | $12,370 | $13,069 | $12,734 | $13,704 | $13,258 |

R. Vol. 28, p. 3600.

Plaintiffs below attempted to justify these disparities on the theory that U.S.D. 512 is comprised of more demographically fortunate students who are relatively less expensive to educate. *E.g.*, R. Vol. 128, p. 69. Even assuming geographic difference were a constitutionally permitted basis for disparate state funding, a proposition with which U.S.D. 512 disagrees,[1] the facts do not support Plaintiffs' claim. Even after accounting for demographic differences, U.S.D. 512 is not treated equally – it receives substantially less money per student and less money per *weighted* student. R. Vol. 133, 1174-5. The disparity only gets worse when tax effort is included in the picture. This Court ruled in March of 2014 that tax effort *must* be considered, of course. Today the State awards funding in such a way that the same tax effort results in more spending authority in Plaintiffs' districts than it does in U.S.D. 512 and other so-called "property-wealthy" districts. R. Vol. 133, p. 1175-6.

Even after accounting for the weightings, each mill of U.S.D. 512's tax effort results in only $61.72 per (weighted) pupil; in contrast, in Plaintiff U.S.D. 500, every mill of tax effort results in a staggering 146% of that amount. R. Vol. 133, p. 1175-6. That is because the formula allows U.S.D. 500 to spend $4,426.94 for every *weighted* student but only allows U.S.D. 512 to spend $3,450.85 for each *weighted* student, while simultaneously allowing U.S.D. 500 to achieve this result with only 49.165 mills while U.S.D. 512 adopted 55.911 mills. R. Vol. 133, p. 1175-6. The upshot is:

Plaintiffs get lots more money for lots less tax effort.

[1] *Plyler v. Doe*, 457 U.S. 202 (1982) (characteristics over which a child has no control cannot be the basis upon which the state shows preferential treatment to some children but not others); *Brown v. Bd. of Ed.*, 347 U.S. 483, 493 (1954) ("where the state has undertaken to provide" education, it "is a right which must be made available to all on equal terms").

In the name of "equity," the State has more than overcompensated for naturally occurring property value disparities to make districts like Plaintiffs more revenue-advantaged than districts like U.S.D. 512. *Papasan v. Allain*, 478 U.S. 265, 287-89 (1986) (recognizing potential deprivation of equal protection arising from state-created wealth disparity among school districts, as contrasted with acceptable, naturally-occurring wealth-based disparity).

## II. U.S.D. 512 Sought Intervention

In January 2015, Plaintiffs filed a motion asking, among other things, for the Panel to consider shutting down all LOB funding statewide. *See* R. Vol. 25, p. 3236 (requesting a show cause order "as to why the Panel should not enjoin the operation of the local option budget funding mechanism"). Because the motion was directly antagonistic to U.S.D. 512's interests and vision for fair funding, U.S.D. 512 moved to intervene to protect its rights and avoid irreversible damage to its schools and students. R. Vol. 28, p. 3597. U.S.D. 512 correctly anticipated that the Panel's ruling on Plaintiffs' motion, and the legislative response, might affect its rights directly and immediately. R. Vol. 28, p. 3602-3; Vol. 130, p. 7.

Plaintiffs opposed intervention; the State did not. Initially, the Panel granted leave to intervene for the limited purpose of participating in discovery. R. Vol. 128, p. 18-19. Ultimately, on April 20, the Panel denied the motion for intervention, finding U.S.D. 512's interests "more than fully represented by the State's position" and proposing that U.S.D. 512 participate as a mere Amicus below. R. Vol. 130, p. 110 ("April 20, 2015 Order"). As a poor man's substitute, the Panel permitted U.S.D. 512 to "enter an appearance as a friend of the Court in aid of a just decision" at the hearing on

Plaintiffs' motion scheduled for May 7 and 8, 2015. R. Vol. 130, p. 114. In an e-mail to the parties, the Panel stated that the purpose of the hearing was to consider "equity and equity compliance," specifically "the effect of all measures taken or not taken by State officials since the [Gannon] Mandate was issued that affect the equity aspects of the Mandate." *See* R. Vol. 132, p. 1074. Importantly, the purpose of the hearing was to address the *new* legislation, hear *new* evidence, and apply the *new* standard for equity articulated by this Court in its mandate – all of which was directly relevant to U.S.D. 512's interests going forward. R. Vols. 138 & 139; *Gannon*, 298 Kan. 1107, 1175 (2014). In compliance with the Panel's ruling (denying intervention but permitting amicus status), U.S.D. 512 entered its appearance as a friend of the court, submitted two amicus briefs (one prior to the May 7-8 hearing and one after), and gave a brief argument at the hearing on May 8.

## III. After Denying Intervention, the Panel Entered Relief Adversely Affecting U.S.D. 512

### A. The Kansas Legislature Amended the SDFQPA with CLASS.

In April 2015, after U.S.D. 512 moved to intervene, the Kansas legislature replaced SDFQPA with the Classroom Learning Assuring Student Success Act ("CLASS"). 34 Kan. Reg. 272 § 4. CLASS provides block grants to school districts for the 2015-16 and 2016-17 based on adjustments to the General State Aid to which districts were entitled under the SDFQPA for 2014-15 school year. *Id.* at § 4(b)(3), § 6.

CLASS also contains an LOB provision, similar to that in former K.S.A. 72-6433 of the SDFQPA, authorizing school districts to "adopt a local option budget which does not "exceed the greater of: (1) The local option budget adopted by such school district for

school year 2014-2015 pursuant to K.S.A. 72-6433, prior to its repeal; or (2) the local option budget such school district would have adopted for school year 2015-2016 pursuant to K.S.A. 72-6433, prior to its repeal." Kan. Reg. 274 § 12(a). For U.S.D. 512, that cap is 33% because its voters have consistently made the choice to spend more on local education, even if it imposes a greater tax burden. That choice includes a desire by the taxpayers to voluntarily tax themselves more to try to achieve parity with better-funded districts that the state funds at higher levels.

### B. The Panel Granted Plaintiffs' Motion to Alter its December 30, 2014 Decision.

On June 26, 2015, the Panel ruled on Plaintiffs' "Motion to Alter Judgment Regarding Panel's Previous Judgment Regarding Equity," reversing and withdrawing its December 30, 2014 finding that the State had substantially complied with Article 6's equity requirements and thereby reopening equity compliance issues. R. Vol. 136, p. 1420 ("June 26, 2015 Order"). Specifically, the Panel found 2015 Senate Bill 7 ("SB7"), and amendments enacted after the May 7 and 8 hearing, unconstitutional violations of adequacy and equity requirements. The Panel also entered a "temporary restraining order," fashioning far-reaching relief not sought by any party and certainly not limited in its effect to just the parties. The Panel devised, without any briefing on the effect of its proposal, an entirely new set of school-funding statutes, to take effect statewide. *E.g.*, R. Vol. 135, p. 1488-89.

On June 29, 2015, the State moved for a stay of operation and enforcement of the Panel's June 26 judgment and "temporary restraining order." Fortunately, this Court granted the motion. If not for that stay, the Panel's order would have adversely affected

the level of funding not only in U.S.D. 512, but in various other districts across the state who, like U.S.D. 512, were not parties to the litigation.

## ARGUMENT AND AUTHORITY

### I. Standard of Review and Summary of Argument

Intervention is governed by KS.A. 60-224. Subsection (a) addresses "Intervention of Right," and subsection (b) addresses "Permissive Intervention." Although *permissive* intervention under K.S.A. 60-224(b) is discretionary and therefore subject to review for abuse of discretion, intervention as a matter of right is a mixed question of fact and law. *Turner v. Steele*, 47 Kan. App. 2d 976, 989, 282 P.3d 632, 641 (2012); *see Montoy v. State*, 278 Kan. at 765. Under the mixed standard of review, this Court reviews any factual findings made below under a substantial competent evidence standard, and it reviews *de novo* whether those findings are sufficient to support the legal ruling below. *Turner*, 47 Kan. App. 2d at 989, 282 P.3d at 641.

Here the Panel made no explicit factual findings, and its conclusion that intervention should not be allowed because the State would protect U.S.D. 512's rights was contrary to law. Even assuming the Panel made *implicit* findings of fact to support its legal conclusion, those findings are not supported by substantial competent evidence. U.S.D. 512 therefore was entitled to intervene in this case as a matter of right under K.S.A. 60-224(a).

More specifically, U.S.D. 512's motion was both timely and necessary to protect its rights. As shown below, courts routinely allow intervention during the remedial phase of constitutional litigation in order to preserve the rights of affected parties. In fact, as discussed below, to adjudicate U.S.D. 512's funding in its absence raises a textbook due

process problem. *Missouri v. Jenkins (Jenkins I)*, 495 U.S. 33, 66 (1990) (Kennedy, J. concurring) (calling it a "blatant denial of due process" to affect state spending in a manner that impacts "those who are [not] parties before the Court"). The Panel below heard *new* evidence and ruled on the constitutionality of *new* statutes, enacted contemporaneously with U.S.D. 512's motion, making intervention in *this* remedial phase all the more timely.

And the fact that U.S.D. 512 would be affected by the Panel's ruling on the merits was conceded by all. So obvious was the interest at stake that the Panel allowed U.S.D. 512 to intervene for the purpose of participating in discovery, notwithstanding its later decision to prevent U.S.D. 512 from presenting evidence or cross-examining witnesses when it denied intervention. In effect, the Panel pulled the rug out from under U.S.D. 512 when it reversed course, allowing U.S.D. 512 to conduct discovery and identify its evidence but then barring U.S.D. 512 from calling or cross-examining witnesses and submitting exhibits. Contrary to the Panel's conclusion, no party below adequately protected U.S.D. 512's rights.

Alternatively, even if this Court finds the denial of intervention as a right under K.S.A. 60-224(a) was not error, denial of permissive intervention under K.S.A. 60-224(b) was an abuse of discretion.

This Court should reverse the denial of U.S.D. 512's motion to intervene.

## II. U.S.D. 512 Should Have Been Granted Intervention of Right under K.S.A. 60-224(a).

Intervention of right is controlled by KS.A. 60-224(a)(2), which provides, in pertinent part:

> (a) Intervention of right. On timely motion, the court ***must*** permit anyone to intervene who: ... (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that ***disposing of the action may as a practical matter substantially impair or impede the movant's ability to protect its interest***, unless existing parties adequately represent that interest.

KS.A. 60-224(a) (emphasis added). This subsection is to be liberally construed in favor of intervention. *Smith v. Russell*, 274 Kan. 1076, 1083, 58 P.3d 698 (2002); *In re Petition of City of Shawnee for Annexation of Land*, 236 Kan. 1, 11, 687 P.2d 603 (1984). Intervention as a matter of right is dependent on three factors: (1) a substantial interest in the subject matter; (2) inadequate representation of the intervenor's interest; and (3) timely application. *See McDaniel v. Jones*, 235 Kan. 93, 106, 679 P.2d 682 (1984). Intervention is especially appropriate where necessary to protect rights that cannot otherwise be adequately protected. *See In re Petition of City of Shawnee for Annexation of Land*, 236 Kan. at 11; *Hukle v. City of Kansas City*, 212 Kan. 627, 512 P.2d 457 (1973). U.S.D. 512 has a right to intervene because it satisfies each of the requirements under K.S.A. 60-224(a). *See McDaniel*, 235 Kan. at 106.

### A. U.S.D. 512 Has a Substantial Interest in the Subject Matter of the Litigation.

The parties agreed, and the Panel did not dispute, that U.S.D. 512 has a substantial interest in the subject matter of the dispute in this case, specifically the constitutionality of the state of Kansas's school finance formula. Under K.S.A. 60-224(a), a party must claim an interest "relating to the property or transaction which is the subject of the matter." The transaction at issue is a transaction among the State, the school districts, and the school children of Kansas. Because U.S.D. 512 is a school

district in Kansas and receives funding from the State, it has an interest in that transaction. Additionally, because the State has a constitutional duty to suitably finance education, U.S.D. 512 has a property right at issue in this case. A duty to finance something necessarily creates a property interest in the person who is the beneficiary of that duty. Accordingly, U.S.D. 512 has an interest relating to "property" which is the subject of this action.

In sum, the specific "property" or "transaction" which is the "subject of the action" is the funding of public education in the state of Kansas. At issue, therefore, is a substantial benefit to which U.S.D. 512 is statutorily and constitutionally entitled, *i.e.* adequate and equitable funding for public education. U.S.D. 512's ability to satisfy the first element of intervention as a right was never in question.

### B. U.S.D. 512 Was Not Adequately Represented by the Parties.

"[T]o avoid intervention the opposing party has the burden of showing the applicant's interest is adequately represented by the existing parties." *McDaniel*, 235 Kan. at 106-07. "[T]he interests of the existing parties and the party seeking intervention need not be wholly adverse before there is a basis for concluding that existing representation of a different interest may be inadequate." *Id.* at 109; *see Utah Assoc. of Cntys. v. Clinton*, 255 F.3d 1246, 1253 (10th Cir. 2001) ("To satisfy this element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied. This burden is minimal.").

Plaintiffs opposed intervention, in part on the grounds that they adequately represent the interests of *all* Kansas school districts. The Panel did not buy this argument. Quite the opposite – in a position not advanced by anyone, the Panel found

U.S.D. 512's interests adequately represented ***by the State***. This conclusion was based on the flawed assumption that U.S.D. 512 wishes to preserve the status quo. R. Vol. 130, p. 113. However, U.S.D. 512 had told the Court this was not the case. *E.g.*, R. Vol. 28, p. 3602 ("The State's attempts to defend the status quo should make it obvious that the *Defendant does not align with U.S.D. 512's interests.*") (emphasis added). While U.S.D. 512 opposed Plaintiffs' suggested remedies—to (1) eliminate LOB funds altogether or (2) award more LOB funding in Plaintiffs' districts only at the expense of others—this does not mean U.S.D. 512 supports the status quo. To the contrary, U.S.D. 512 advanced a position taken by neither Plaintiffs nor the State, hence the need for its intervention. R. Vol. 132, p. 1085-92.

The Panel based its denial of intervention on the element as to which the party opposing intervention bears the burden, and not even the party opposing intervention contended the State represented U.S.D. 512's interests. This was clear error.

**i. U.S.D. 512 is not adequately represented by Plaintiffs, and the Order granting Plaintiffs relief denied U.S.D. 512 due process.**

The Panel did not find U.S.D. 512's interests adequately represented by the Plaintiffs in this case. And while Plaintiffs and U.S.D. 512 both share an interest in increased education funding in Kansas—an interest adverse to Defendant—their interests are separate and distinct on a number of issues because U.S.D. 512: (1) receives less state funding than Plaintiffs on a per-pupil basis; (2) is deprived of substantially similar educational opportunities for similar tax effort, and (3) relies heavily on strong local support, particularly through the LOB, to fight such underfunding and inequity.

### a. Plaintiffs and U.S.D. 512 are adverse on equity.

As noted above, Plaintiffs argued the State's level of funding is inadequate, yet the school finance formula historically allocates even less per-pupil funding to U.S.D. 512. R. Vol. 28, p. 3599-600. *This remains true even after accounting for differences in student demographics.* R. Vol. 133, p. 1174-5. And Plaintiffs obtain more money for each mill of tax effort than U.S.D. 512 obtains for the same tax effort. R. Vol. 133, p. 1175-6. Yet Plaintiffs' claim is for *more* "equity" in its favor, less for U.S.D. 512. That makes them adverse.

Plaintiffs' argument also overlooked the fact the LOB is the sole meaningful mechanism by which a district like U.S.D. 512 can try to level the playing field created by disproportionate state aid. R. Vol. 28, p. 3599-600. Awarding Plaintiffs even more "equalization" than that provided under the current law will only further disadvantage districts like U.S.D. 512, forcing them to rely on more local effort to try to achieve parity. Additionally, more property "equalization" will exacerbate the unreasonable funding gap between districts like U.S.D. 512 and Plaintiff districts. And because local effort is capped, U.S.D. 512 will be unable to bridge this widened funding gap. In sum, Plaintiffs' version of "equalization" harms districts like U.S.D. 512, further reducing their ability to achieve "substantially similar educational opportunity through similar tax effort."

Moreover, Plaintiffs are adverse in that they requested the Panel enjoin all LOB spending. R. Vol. 25, p. 3233. This request could not care less about the significance of LOB funding to districts like U.S.D. 512 and the devastating consequences that would result from such action. Whereas Plaintiffs would hold hostage other districts' LOB funds in order to preserve a relatively smaller amount of Supplemental General State Aid

for themselves, U.S.D. 512 opposes restricting local school funding and further reducing school spending by hundreds of millions of dollars across the state. Plaintiffs' proposal would hurt Kansas schools, just their schools less so.

**b. The Panel's adoption of Plaintiffs' version of equity denied U.S.D. 512 due process.**

Due process requires that U.S.D. 512 be allowed to participate in the adjudication of its funding. It was a similar concern that led Justice Kennedy, joined by Chief Justice Rehnquist and Justices O'Connor and Scalia, in the *Missouri v. Jenkins* concurrence, 495 U.S. 33, 66 (1990), to note the inherent unfairness in a school finance litigation order that had the "direct effect of extracting money from persons who have had no presence or representation in the suit." There, the concurring Justices called it a "blatant denial of due process" to compel state spending in a manner that would *go beyond* "adjudication of controversies and imposition of burdens on *those who are parties before the Court.*" *Id.* (emphasis added). Even in the absence of a due process violation, *Jenkins* also stands for the proposition that a district court must choose equitable relief in the remedial phase of litigation that is the least disruptive and most narrow means of curing the constitutional violation(s) found. *Id.* at 33, 43, 51, 78-79 (discussing limits on remedial authority and use of "minimally obtrusive methods to remedy constitutional violations"); *Missouri v. Jenkins (Jenkins II)*, 515 U.S. 70, 88, 126-28 (1995) (Thomas, J. concurring) (citing Blackstone and the "inherent limitations" on equitable remedial discretion).

In a similar way, Plaintiffs' request to enjoin local funding provisions, directly implicated U.S.D. 512 interests, including due process and equal protection under the federal and state constitutions, and so did the Panel's ruling. After denying U.S.D. 512 the opportunity to participate in the litigation, the Panel ordered relief that would have

negatively impacted the equitable distribution of state funds adversely to U.S.D. 512 had this Court not stayed that result. The Panel's order further tips the unequal distribution of state money in favor of Plaintiffs so that Plaintiffs would achieve *even more* "educational opportunity" for the same "tax effort." *See* R. Vol. 133, p. 1175-6 (showing the extent to which Plaintiffs already achieve more classroom spending for each mill of tax effort under the status quo, and why additional "equalization" of the kind Plaintiffs requested would only worsen the disparity).

Certainly the Panel could have entered a less disruptive and expansive order. It went well beyond attempting to remedy the complaints of just the few Plaintiff districts, imposing Plaintiffs' skewed view of "equity" on the entire state. The Panel not only ignored the various ways in which the current school funding formula already "equalizes" for property wealth by awarding disproportionately more money to Plaintiffs than to districts like U.S.D. 512, it also ignored two important instructions from this Court in the process. First, the Panel ignored this Court's instruction that the proper test for equity is "**not** whether the cure necessarily restores funding to the prior levels." *Gannon*, 298 Kan. 1107, 1181, 319 P.3d 1196 (2014) (emphasis added). The Panel focused exclusively on how the new funding statutes compared to the funding levels under the SDFQPA. *E.g.*, R. Vol. 136, p. 1451, 1466-67. Second, the Panel did not compare the relative "educational opportunity" in the districts to the corresponding "tax effort." This Court instructed the Panel to measure equity by examining whether districts can achieve similar educational opportunity for similar tax effort. *Gannon*, 298 Kan. at 1175. U.S.D. 512 made that analysis in its briefing. R. Vol. 133, p. 1175-6. But the Panel did not, focusing on the distribution of funds and never the distribution of tax effort.

Had U.S.D. 512 been allowed to participate, the Panel would have heard from more than just the two superintendents called by Plaintiffs to self-servingly discuss the impact of the proposed relief on *their* districts. No one spoke for the districts who would lose funding and be forced to increase tax effort (assuming each such district is not already at the spending cap) under Plaintiffs' vision of "equity." Had U.S.D. 512 been allowed to participate, the evidence would have shown a less one-sided view of what is "equitable." While U.S.D. 512 cannot guarantee it would have won a more favorable result from the Panel that has so wholeheartedly adopted Plaintiffs' vision, it would at least have been allowed due process.[2]

And that is without even getting into the Panel's wholesale rewriting of the school finance statutes outside the democratic process instead of providing for narrow relief that affected only the parties.[3] The bottom line is that U.S.D. 512 was prejudiced by the Panel's refusal to allow it to participate as a party. The Panel's far-reaching order affected more than just the parties to the litigation – in districts across the state, the Panel's proposed redistribution of funds *increased* the amount of tax effort necessary to achieve similar educational opportunity with Plaintiffs. This was a denial of due process,

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[2] *Jenkins II*, 515 U.S. at 127-28 (Thomas, J. concurring)("If their remedial discretion had not been cabined, Blackstone warned, equity courts would have undermined the rule of law and produced arbitrary government."); *cf. Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1991) (State court's remedial discretion is limited by the Fourteenth Amendment Due Process clause, and departure from traditional common-law procedures creates a "presumption that [state's] procedures violate due process"; "When the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process.").

[3] *Jenkins I*, 495 U.S. at 66 (Kennedy, J. concurring) ("The [remedial order was] not 'representative' in any sense and the individual citizens of the [Kansas City school district] whose property (they later learned) was at stake were neither served with process nor heard in court").

as well as an illustration of the fact that Plaintiffs did not represent U.S.D. 512's interests: Plaintiffs urged the Panel not to look at the big picture, and the Panel complied.[4]

### ii. U.S.D. 512 is not adequately represented by the State.

The Panel found U.S.D. 512's interests adequately represented by the State. This finding was based on the flawed assumption that U.S.D. 512, like the State, wishes to preserve the status quo. R. Vol. 130, p. 113 ("Since no issue but the equity prong of the *Gannon* decision is presently before us and the State is arguing that the Mandate of the Kansas Supreme Court in *Gannon* has been satisfied by subsequent legislative action since the issuance of the high Court's March 7, 2014 Opinion or, alternatively, that the Mandate has been mooted by legislative changes in the governing statutes, U.S.D. 512's intervention in support of such a result, which would preserve the status quo, seems more than fully represented by the State's position."). This assumption is wrong.

The State, as the proponent of CLASS, seeks to uphold the law, and, therefore, the status quo (including the LOB Cap). Contrary to the State's position, U.S.D. 512 seeks to eliminate the LOB Cap, arguing it is an arbitrary limit, untethered from actual educational needs or costs. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 52 n. 107 (1973); *Papasan v. Allain* , 478 U.S. 265, 287-89 (1986); *Hargrave v. Kirk*, 313 F. Supp. 944, 948-49 (M.D. Fla. 1970), *vacated on other grounds*, 401 U.S. 476 (1971); *Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238 (Wyo. 1995) (school financing "recapture" statute—which allowed property wealthy school districts to retain only 109% of the level set by the legislature—was unconstitutional because the 109% level was

[4] *Jenkins II*, 515 U.S. at 138 (Thomas, J. concurring) ("The desire to reform a school district . . . cannot so captivate the judiciary that it forgets its constitutionally mandated role.")

> could be attained." *Id.* citing *Sierra Club v. Espy*, 18 F.3d at 1205 (citation omitted); see also 7C Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, FEDERAL PRACTICE & PROCEDURE § 1916 at 425-26 (2d ed. 1986) ("The requirement of timeliness is not a means of punishment for the dilatory and the mere lapse of time by itself does not make an application untimely."). *Id.*

255 F.3d 1246 (10th Cir. 2001). It is common for parties to seek intervention during the remedial phase of a constitutional challenge. *E.g.*, *Brown v Bd. of Ed.*, 83 F.R.D. 383 (D. Kan. 1979) (granting intervention as of right nearly 24 years after the case was decided in the Supreme Court); *Johnson v San Francisco Unified School Dist.*, 500 F.2d 349 (9th Cir. 1974) (reversing trial court's denial of intervention in school desegregation case just days before the final desegregation plan was set for court approval and ruling that intervention should have been allowed as of right because parents and individuals had interests unique from the District who was required to represent broader interests).

The same pro-intervention, flexible "timeliness" requirement is apparent from Kansas cases interpreting K.S.A. 60-224(a). In *Roberts v. Krupka*, 246 Kan. 433, 790 P.2d 422 (1990), the Kansas Supreme Court reversed a finding that an intervention motion was untimely, even though the motion was filed 38 months after the lawsuit began. "There was no evidence the delay in filing prejudiced the plaintiff in any way," and intervention would not "result in additional discovery or delay of trial." 246 Kan. at 443; *see In re Petition of City of Shawnee for Annexation of Land*, 236 Kan. at 11.

U.S.D. 512's intervention was timely. Its intervention would not—and did not—"result in additional discovery [beyond what the Panel already had ordered for the parties] or delay in trial." Moreover, the need for intervention had only recently arisen when U.S.D. 512 filed its motion. Plaintiffs' January 2015 request that the Panel re-open

districts, like U.S.D. 512 and similarly situated districts, to achieve equity with better funded districts, like plaintiffs.

More generally, however, the State did not articulate the effect Plaintiffs' requested relief would have on U.S.D. 512's students. The State did not analyze the per-pupil spending caps to illustrate that U.S.D. 512 receives less funding per mill levied than the Plaintiff districts receive. The State *could not* point out that Plaintiffs are already the beneficiaries of extraordinary "equalization" beyond what other districts receive because to do so would be to admit the existing inadequacies of the status quo. The State signed the status quo into law and *could not* make these arguments. Only U.S.D. 512 advocated for the lifting of the LOB Cap to remedy the existing inequity. U.S.D. 512's interests were not adequately represented by any of the parties, least of all the State, which insists on underfunding and capping U.S.D. 512's spending levels.

### C. U.S.D. 512 Timely Moved for Intervention

The third element, timeliness, also never entered the Panel's analysis. The Kansas rules governing intervention are modeled after the federal rules of civil procedure. The Tenth Circuit stated in *Utah Association of Counties v. Clinton*:

> "The timeliness of a Motion to Intervene is assessed in light of all the circumstances including the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances." *Utah Associates*, 255 F.3d at 1250 citing, *Sanguine, Ltd. V. United States Dep't. of Interior*, 736 F.2d 1416, 1418 (10th Cir. 1984) (citations omitted). "The analysis is contextual; absolute measures of time should be ignored. *Id.* citing *Sierra Club v. Espy*, 18 F.3d at 1205; see also *Stupak-Thrall*, 226 F.3d at 475 (absolute measure of time between filing of the Complaint and the Motion to Intervene is one of least important circumstances). . . . Courts should allow intervention where no one would be hurt and greater justice

equity arguments (and the Panel's grant of that request) along with Plaintiffs' request that the Panel consider enjoining all LOB spending just to preserve Plaintiffs' desired levels of Supplemental General State Aid, illustrated the need for intervention. While Plaintiffs had a keen interest in fighting for more "equity" for themselves, Defendant's interests were to avoid any increased education spending for anyone. Left out of the picture, of course, were districts like U.S.D. 512, whose interests would not be served by either result.

Someone had to speak up for the districts that are underfunded compared to Plaintiffs and do not share (1) Plaintiffs' antagonistic views toward more local funding and (2) the State's hostile views toward more funding or any tax increase at all (whether or not the voters would approve a tax increase to improve their children's education). The current procedural posture of this case, in particular its supposedly "remedial" phase, made intervention all the more timely. *See Hukle*, 212 Kan. at 627 (finding timely a post judgment motion to intervene filed one day after defendants sought dismissal of the appeal because dismissal would have left intervenors without adequate representation and the appellate court had not yet made its final ruling); *McDaniel*, 235 Kan. at 93 (allowing post-judgment intervention); *City of Shawnee v. City of Bonner Springs*, 236 Kan. 1, 687 P.2d 603 (1984) (allowing post-judgment intervention in order to permit intervenors' participation in appeal).

Plus, the Panel's denial of U.S.D. 512's motion came in the wake of new legislation that adversely impacted U.S.D. 512. The Panel received new evidence concerning the new legislation. It was therefore not as though allowing U.S.D. 512 to present evidence would have replowed old ground or otherwise sidetracked the

proceedings – the parties were responding to *new* developments with *new* analysis and evidence. In many ways it was as though the case were a new lawsuit. While much time had passed in the *Gannon* litigation, the cases cited above explain that is not the test. What was vastly more important was the fact that new legislation, and the Panel's reaction to it, would almost certainly (and ultimately did) affect U.S.D. 512's rights, and U.S.D. 512 stood ready to weigh in on those issues but for the Panel's denial of its motion. In short, while U.S.D. 512 was like many litigants who appropriately and timely request intervention during the remedial phase, it was especially egregious to deny intervention here where the evidence most critical to the Panel's determination had yet to be presented. U.S.D. 512's application was more than timely.

Accordingly, U.S.D. 512 satisfied all intervention factors, and intervention was proper as a matter of right. The Panel erred.

### III. Alternatively, U.S.D. 512 Should Have Been Granted Permissive Intervention Under K.S.A. 60-224(b).

Even if this Court finds U.S.D. 512 may not intervene as a matter of right, permissive intervention was still warranted because of the importance of the rights and interests involved. Permissive intervention is governed by K.S.A. 60-224(b), which empowers a court to allow a party to intervene whenever there is a common legal or factual question:

> (b) Permissive intervention…On timely motion, the court may permit anyone to intervene who: …(B) has a claim or defense that shares with the main action a common question of fact or law.

K.S.A. 60-224(b)(1)(B). Here, there were numerous common questions of law and fact, as discussed above. The most critical ones relate to whether the legislature's recent

## CERTIFICATE OF SERVICE

On this 10th day of August 2015, the undersigned hereby certifies that, pursuant to Kan. Ct. R. 6.09(a)(1), two (2) true and correct copies of the foregoing Brief of Appellant/Applicant-Intervenor Shawnee Mission Unified School District No. 512 were served upon the parties by depositing the same in the United States Mail, postage prepaid, and properly addressed to the following:

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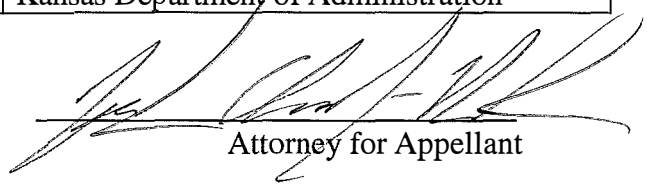

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