No. 15-113267-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

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

Plaintiffs/Appellees

vs.

STATE OF KANSAS,

Defendant/Appellant

BRIEF OF *AMICUS CURIAE*, SHAWNEE MISSION UNIFIED SCHOOL DISTRICT NO. 512

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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TABLE OF CONTENTS

STATEMENT OF INTEREST 1

Gannon v. State,
No. 113,908, Memorandum and Order (Kan. Sept. 21, 2015) 1

NATURE OF THE CASE 1

STATEMENT OF THE ISSUES 1

STATEMENT OF FACTS 1

ARGUMENT AND AUTHORITY 4

I. Standard of Review 4

II. The Panel Incorrectly Applied This Court's Test for Evaluating Equity. 4

Gannon v. State,
No. 113,908, Memorandum and Order (Kan. Sept. 21, 2015) 5

A. The Panel Wrongly Focused On Spending Levels Alone and Ignored Tax Effort. 5

B. The Panel Wrongly Took a Keyhole View of Spending, Ignoring Overall Spending Levels and the Correct Equity Test. 6

C. The Panel Ignored This Court's Instructions that Prior Funding Levels Are Not the Relevant Constitutional Standard. 7

Gannon v. State,
No. 113,908, Memorandum and Order (Kan. Sept. 21, 2015) 7, 8

III. CLASS Advantages Plaintiffs and Disadvantages SMSD to Such An Extent that It Violates Article VI's Equity Requirement 8

Abbott by Abbott v. Burke,
575 A.2d 359 (N.J. 1990) 10

Missouri v. Jenkins,
495 U.S. 33 (1990) 9

Plyler v. Doe,
457 U.S. 202 (1982) 10

IV. Enjoining the Spending Cap Is the Least Restrictive Means to Remedy the Inequity Caused by the Cap 11

A. The Spending Cap Violates the Federal and State Constitutions' Free Speech Clauses. 11

Keyishian v. Bd. of Regents,
385 U.S. 589 (1967) 11

Petrella v. Brownback,
787 F.3d 1242 (10th Cir. 2015) 11

Shelton v. Tucker,
364 U.S. 479 (1960) 11

Tinker v. Des Moines Indep. Cmty. Sch. Dist.,
393 U.S. 503 (1969) 11

i. The Spending Cap Directly Burdens First Amendment Expressive and Educational Liberties. 11

Ariz. Free Enter. Club's Freedom Club PAC v. Bennett,
131 S. Ct. 2806 (2011) 12, 13

Bd. Of Educ. Island Trees Union Free Sch. Dist. No 26 v. Pico,
457 U.S. 853 (1982) 12

Buckley v. Valeo,
424 U.S. 1 (1976) 13

Citizens Against Rent Control v. City of Berkeley,
454 U.S. 290 (1981) 13

Griswold v. Conn.,
381 U.S. 479 (1965) 12

Keyishian v. Bd. of Regents,
385 U.S. 589 (1967) 12

Pierce v. Soc'y of Sisters,
268 U.S. 510 (1925) 12

Shelton v. Tucker,
364 U.S. 479 (1960) 12

United States v. Nat'l Treasury Employees Union,
513 U.S. 454 (1995) 12

ii. *Meyer v. Nebraska* and *Pierce v. Society of Sisters* Further Illustrate the Constitutional Infirmities of the Spending Cap. 13

Meyer v. Nebraska,
262 U.S. 390 (1923) 13, 14

Obergefell v. Hodges,
135 S. Ct. 2584 (2015) 14

Papasan v. Allain,
478 U.S. 265 (1986) 14

Pierce v. Soc'y of Sisters,
268 U.S. 510 (1925) 13, 14

San Antonio Indep. Sch. Dist. v. Rodriguez,
411 U.S. 1 (1973) 14

Troxel v. Granville,
530 U.S. 57 (2000) 14

Wisconsin v. Yoder,
406 U.S. 205 (1972) 13

B. Enjoining the Spending Cap is the Least Restrictive Means to Remedy the Inequity Caused by the Cap 14

Campbell Cnty. Sch. Dist. v. State,
907 P.2d 1238 (Wyo. 1995) 15

CONCLUSION 15

STATEMENT OF INTEREST

Shawnee Mission Unified School District No. 512 ("SMSD") has an interest in this litigation because, if the Panel is affirmed, it will see a reduction in the amount of funding it receives. Its interests are not represented by any party to this appeal. *See Gannon v. State*, No. 113,908, Memorandum and Order (Kan. Sept. 21, 2015) ("we agree with U.S.D. 512 that its interests are not adequately represented by the parties").

NATURE OF THE CASE

In this portion of the school finance litigation, the Court is asked to review the "equity" aspects of the Panel's June 26, 2015 ruling on Plaintiffs' Motion to Alter Judgment. R. Vol. 136, p. 1420.

STATEMENT OF THE ISSUES

1) The Panel did not apply this Court's test for determining equity because it did not examine relative tax effort among districts.

2) The Panel did not apply this Court's test for determining equity because it compared the current law to *prior funding levels*, rather than measure current law by the constitutional "equity" standard, *i.e. reasonably equal access to substantially similar educational opportunity through similar tax effort.*

3) The Panel worsened equity among school districts.

4) The Panel should have lifted the education spending cap to remedy the existing funding inequities among school districts as the least restrictive means to cure the remaining constitutional defect.

STATEMENT OF FACTS

This appeal addresses whether the "classroom learning assuring student success act" ("CLASS"), fulfills the "equity" requirement of Article 6 of the Kansas Constitution. CLASS replaced the SDFQPA and made several changes relevant to equity. For one, the method for calculating each district's funding has changed. Rather than apply the

SDFQPA's weightings to current demographics, CLASS awards "block grants" to the districts, with the amount based upon the funding each district received in 2014-15.[1]

One aspect that did not change under CLASS is the cap prohibiting districts from spending more than the State prescribes, either through LOB funds or other resources. Each school district has unlimited *taxing* authority. K.S.A. 79-5040. Under the most recent iteration of the SDFQPA, a district could *spend* only as much as "33% of state financial aid of the district in the current school year" from its LOB fund. *See* former K.S.A. 72-6433(a)(1). CLASS repeals K.S.A. 72-6433 but adopts a new, nearly identical spending cap in § 12, where it provides that in the 2015-16 and 2016-17 school years:

> "the board of any school district may 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 ...; or (2) the local option budget such school district would have adopted for school year 2015-2016....

(emphasis added). In short, the power to have an LOB remains, but LOB spending is capped. For SMSD, that cap is 33%. Because of the Spending Cap, SMSD cannot spend more on classroom instruction to overcome State underfunding, rendering the district resource rich in theory but revenue poor in fact. R. Vol. 136, p. 1497 ("even the resource-rich may find themselves revenue poor").

The Kansas school finance system's underfunding, coupled with the Spending Cap, results in a significant detriment to districts like SMSD. The funding crisis has led to a crippling loss of teachers, loss of foreign language programs, larger class sizes, closure of neighborhood schools, and loss of property values. More generally, the Spending Cap ensures any district receiving disproportionately low funding cannot rely on additional

[1] The Panel received exhibits issued by the Department of Education projecting the amounts each district will receive, assuming the block grants are fully funded, in 2015-16 and 2016-17. *See* Exhibits 701 and 702.

tax effort to overcome the state-created inequity. To the extent the Spending Cap was ever intended to ensure equity, it has done the opposite.

A. CLASS Allows Plaintiffs More Educational Opportunity for the Same Tax Effort.

Both the SDFQPA and CLASS punish districts in areas of relatively higher property wealth by awarding them less per-pupil funding for the same tax effort, *even after* accounting for differing student demographics. CLASS worsened this inequity by allocating funding even more favorably to the Plaintiffs to the detriment of districts like SMSD. Under the SDFQPA, SMSD received substantially less General State Aid per pupil than most other districts, including Plaintiffs. R. Vol. 28, p. 3599. Even after combining *all* revenue sources, SMSD remained far behind Plaintiffs and the State average in total state aid per pupil, per year. R. Vol. 28, pp. 3599-600. The same is true in terms of total expenditures per pupil, per year. R. Vol. 28, p. 3600.

Plaintiffs attempted to justify these disparities on the theory that SMSD is comprised of more demographically fortunate students who are relatively less expensive to educate. *E.g.*, R. Vol. 128, p. 69. But even after accounting for demographic differences, SMSD will receive substantially less money both per student and per *weighted* student under CLASS. R. Vol. 133, p. 1175; Exhs. 3018 & 701. And the disparities are large. Kansas City may spend ***128%*** of what SMSD may spend per weighted pupil ($4,426.94 / $3,450.85 = 128%). *Id.* That is a staggering difference. Multiplied by the number of students in SMSD, the result is a substantial state-created wealth disparity. The per-pupil spending gap between Kansas City and SMSD in 2013-14, for example, equates to $40.17 million of lost classroom spending. R. Vol. 133, p. 1179. The disparity only gets worse when tax effort is considered. Today the State

awards funding in such a way that each unit of tax effort results in more spending authority for Plaintiffs than for SMSD and others similarly situated. R. Vol. 133, pp. 1175-6.

The table below takes the per-*weighted*-pupil total aid and compares it to the 2014-15 mills in each district established in Exhibit 3008:

	C2: Total aid per WEIGHTED pupil	**D: 2014-15 Total mills**	**E: Value of each mill, on a WEIGHTED per-pupil basis (divide C2 by D)**
Kansas City (#500)	$4,426.94	49.165	$90.04
Hutchinson (#308)	$4,107.99	52.086	$78.87
Dodge City (#443)	$4,293.24	57.029	$75.28
Wichita (#259)	$4,031.06	53.735	$75.02
SMSD (#512)	$3,450.85	55.911	$61.72

R. Vol. 133, p. 1176; Exhs. 3008, 3018, 701. In the name of "equity," CLASS more than overcompensates for naturally occurring property value disparities to make districts like Plaintiffs substantially more revenue-advantaged than districts like SMSD.

ARGUMENT AND AUTHORITY

I. Standard of Review

SMSD agrees with the State that *de novo* review applies.

II. The Panel Incorrectly Applied This Court's Test for Evaluating Equity.

Under current law, Plaintiffs are not deprived of reasonably equal access to substantially similar educational opportunity for similar tax effort, but districts like SMSD are. This Court recently clarified that the standard for equity under Article 6 of the Kansas Constitution is a reasonableness test: "To violate Article 6, the ['wealth-

based'] disparities ... must be unreasonable when measured by our test: School districts must have reasonably equal access to substantially similar educational opportunity through similar tax effort." *Gannon*, 298 Kan. 1107, 1180, 319 P.3d 1196 (2014) (emphasis added). The proper test is "not whether the cure necessarily restores funding to the prior levels." *Id.* at 1181 (emphasis added).

A. The Panel Wrongly Focused On Spending Levels Alone and Ignored Tax Effort.

Plaintiffs receive far more total state aid per pupil than does SMSD. Plaintiffs' equity claims are based on their alleged disadvantage in the distribution of a much smaller pool of funds: capital outlay aid and supplemental general state aid. Plaintiffs' equity claims turn upon the premise that Plaintiffs' lower property values make their local effort less productive, but Plaintiffs ignore the fact that even after local effort is included, **total expenditures per pupil remain, almost uniformly, higher** than in SMSD and similar districts – and at lower levels of tax effort! R. Vol. 28, pp. 3599-600; R. Vol. 133, p. 1176; Exhs. 3008, 3018, 701.

Indeed, under CLASS, Plaintiffs were able to *reduce* their tax effort yet still maintain higher projected spending.[2] Each mill of Plaintiffs' tax effort is projected to result in more dollars per pupil (weighted or not) than in SMSD. R. Vol. 133, p. 1176; Exhs. 3008, 3018, 701. When each unit of tax effort results in more educational opportunity, Plaintiffs have no constitutional violation to remedy. The Panel never

[2] In the 2014-15 school year each of the plaintiff districts reduced their tax effort. Kansas City reduced its tax effort by 11.039 mills, Hutchison by 8.097 mills, Dodge City by 3.587 mills, and Wichita by 3.480 mills. Exh. 3008. So while CLASS provided for increases in both the amount of supplemental general state aid and capital outlay aid for 2014-15, *at the same time* the districts incurred a lower "tax effort" to receive those funds. And Plaintiffs are free to reduce their tax effort even further, because the amounts of state aid in 2015-16 and 2016-17 under CLASS are locked in. R. Vol. 136, p. 1433.

examined the relative tax effort among the districts, and it therefore did not apply the correct test.

B. The Panel Wrongly Took a Keyhole View of Spending, Ignoring Overall Spending Levels and the Correct Equity Test.

Even looking at spending levels alone, however, the Panel took a keyhole view of which spending levels matter. Throughout this litigation, Plaintiffs have urged they are underfunded, relative to other districts, in only two measures – capital outlay equalization and supplemental general state aid. But the equity test articulated by this Court calls for examination of the big picture – comparing overall tax effort and overall educational opportunity. The Panel did not examine whether *overall spending* is reasonably equal among districts for the same tax effort.

Looking at total expenditures, the measures by which Plaintiffs are advantaged dwarf the alleged "cuts." The Panel received evidence that CLASS will provide 93% of the supplemental general state aid anticipated under the most optimistic predictions of what House Bill 2506 would have provided. Exhs. 3020 & 701. Plaintiffs call this 93% funding a "7% loss." Exh. 614. That may be one way to look at it, but it is not the constitutional test articulated by this Court. The Panel should have rejected Plaintiffs' assertion that 100% of HB2506 is constitutional, but 93% of that amount is not. If the amount of LOB equalization was sufficient under HB2506 to achieve substantially similar educational opportunity, then 93% of that amount is constitutional as well. There was no evidence that 93% could not reasonably achieve similar educational opportunity—especially in light of all the other sources of revenue Plaintiffs receive.

Plaintiffs may appear to have a slightly better argument with respect to capital outlay aid. Exh 614 (claiming a "40% loss"). But upon considering the amount of

money at issue in this category, that appearance fades away. The capital outlay pie is much smaller than the supplemental general state aid pie. For example, the "40%" Plaintiffs complain about represents roughly half of the challenged "7%" in supplemental general state aid. Beyond that, however, the difference between HB2506 and CLASS in terms of capital outlay aid, at most a $18.3 million difference statewide, represents a tiny portion of the statewide state aid. *Id.* Defense Exhibits 3020 and 3033 show the amount at issue is a fraction of a percent of the overall total state aid these districts will receive:

	CLASS Total from all state sources	**CLASS Capital outlay "cuts"**	**"Cuts" as a percentage of total aid under CLASS**
Kansas City (#500)	$166,390,069	$805,045	0.48%
Hutchinson (#308)	$32,669,165	$120,227	0.37%
Dodge City (#443)	$53,530,285	$247,897	0.46%
Wichita (#259)	$339,822,020	$3,020,714	0.89%

Exhs. 701 & 3033. The idea that less than a 1% reduction in overall aid makes the difference between constitutional and unconstitutional has no basis in the reasonableness test this Court articulated. Yet, that is the upshot of the Panel's ruling.

C. The Panel Ignored This Court's Instructions that Prior Funding Levels Are Not the Relevant Constitutional Standard.

This Court could not have been clearer that restoring prior funding levels is *not* the test for constitutional compliance. 298 Kan. at 1181. With respect to supplemental general state aid, this Court said, "[a]ny cure will be measured by determining whether it sufficiently reduces the unreasonable, wealth-based disparity so that the disparity then becomes constitutionally acceptable under our equity test, *not whether the cure*

necessarily restores funding to the prior levels." *Id.* at 1107, 1188-89 (emphasis added). And on the subject of capital outlay equalization, one of the other "safe harbors" remains implemented after CLASS. Because the ban on transfers formerly contained in K.S.A. 72-8814(c) is gone, this "enable[s] the funds envisioned by the statutory scheme to be available to school districts as intended." *Id.* at 1198. The take-away is: the combination of CLASS provisions provides ample sources of revenue to meet the equity test vis-à-vis Plaintiffs' remanded claims. But not so for districts like SMSD.

Despite this, Plaintiffs argue that more equalization is needed, and that CLASS is inequitable, based on the incorrect premise that the State must undo "cuts" and restore equalization to *prior levels. E.g.*, R. Vol. 130, p. 17. Plaintiffs complain that the funding they will receive under CLASS is not the same as "the equalization mechanisms as they existed at the time." *Id.* But a "cut" from prior spending levels does not show greater inequity absent a comparison of relative educational opportunities and tax effort.

The Panel adopted Plaintiffs' incorrect premise. In essence the Panel found CLASS and the related subsequent enactments inequitable because they were less favorable to Plaintiffs when compared to the latest version of the SDFQPA. R. Vol. 136, pp. 1451-53, 1465-66. Thus, the Panel measured equity not by looking at relative levels of educational opportunity (*i.e.* spending) and tax effort, but by comparing CLASS to the SDFQPA, as though the SDFQPA projections were an enshrined constitutional standard. The Panel's failure to apply the proper standard is reversible error.

III. CLASS Advantages Plaintiffs and Disadvantages SMSD to Such An Extent that It Violates Article VI's Equity Requirement.

CLASS already "equalizes" more than it should, by distributing to higher AVPP districts drastically lower amounts and then capping expenditures so a higher-AVPP

district cannot meet the higher per-pupil spending levels allowed in lower-AVPP districts. Currently the law satisfies the equity test vis-à-vis Plaintiffs, but not SMSD, because Plaintiffs can achieve more funding with far less tax effort.

SMSD's LOB has been a meaningful mechanism for trying to level the playing field created by disproportionate state aid, but there is a limit – literally – to how much SMSD can use local effort to offset these disparities. The Spending Cap puts a ceiling on local self-help that could be used to overcome the State's unequal aid distribution. Such caps are problematic under both federal and state constitutions. *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990) (Striking a state education spending cap, and stressing the importance of "a proper respect for the integrity and function of local government institutions. Especially is this true where, as here, those institutions are ready, willing and—*but for the operation of state law* curtailing their powers—able to remedy the deprivation of constitutional rights themselves.") (emphasis added).

Awarding Plaintiffs even more "equalization" only puts districts like SMSD further behind and exacerbates the unreasonable funding gaps among districts. Because local effort is capped, SMSD will not be able to offset more "equalization" aid. SMSD and similarly situated districts need equalization in the form of lifting the LOB Cap to permit voluntary spending to bridge the state-created underfunding.

When the Panel drafted its own school finance formula it attempted to order greater "equalization" of the kind requested by Plaintiffs, and in doing so, it reduced the ability of other districts to achieve substantially similar educational opportunity through similar tax effort. A better remedy would have been to enjoin the Spending Cap in Section 12 of CLASS so districts like SMSD can pursue parity with Plaintiffs' far higher

levels of spending per unit of tax effort. Especially considering how this result would have been consistent with Article 6 and the other constitutional doctrines at play.

When "equity" is pursued by capping funding, it obstructs the educational opportunity of some for the sake of others. As the New Jersey Supreme Court noted:

> If . . . the quality level were to be pegged somewhere near the average, and if strict limits were to be placed on any district's ability to exceed that amount in spending, a significant number of suburban districts would be compelled to substantially *decrease* their educational expenditures, in effect, to ***diminish the quality of education now provided to their students***. . . .

Abbott by Abbott v. Burke, 575 A.2d 359, 366 (N.J. 1990) (emphasis added). Here, the cap is a hard ceiling on educational funding and punishes any excess dollar-for-dollar. While the State calls this equitable, it is not equal treatment under the law – it is deliberately different treatment (a targeted, discriminatory burden) specifically designed to bring about an artificial equality of outcomes. *See 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 over others). The suggestion is that "equity" can be achieved only by stifling, for some students, the excellence that additional resources would enable them to achieve. That version of "equity" posits that for districts to have equal access to the bare minimum of education required by the Kansas Constitution, no district should be allowed to exceed the bare minimum. The Court should reject that reasoning and the discriminatory, Procrustean vision it embodies.

IV. Enjoining the Spending Cap is the Least Restrictive Means to Remedy the Inequity Caused by the Cap

A. The Spending Cap Violates the Federal and State Constitutions' Free Speech Clauses.

In addition to violating the equity component of Article 6 of the Kansas Constitution, the Spending Cap burdens the fundamental expressive and educational liberties protected by the Free Speech Clauses in the First Amendment and Section 11 of the Kansas Bill of Rights.[3] Indeed, the people themselves have elevated expressive and educational rights for heightened judicial protection by expressly providing for their protection in the state constitution. The United States Supreme Court has recognized education as a fundamental right under the First Amendment when a statute abridges the freedom to acquire knowledge. *See, e.g.*, *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate").

i. The Spending Cap Directly Burdens First Amendment Expressive and Educational Liberties.

The heart of education is the communication of ideas and information. Put simply, education *is* speech. Therefore the Free Speech clause directly applies to an education spending cap. "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of

[3] Although the Tenth Circuit recently rejected application of strict scrutiny in a federal constitutional challenge to the spending cap based on the First Amendment and the Due Process Clause, *Petrella v. Brownback*, 787 F.3d 1242 (10th Cir. 2015), the Court remanded the case for further proceedings under rationality review. A writ of certiorari to the United States Supreme Court was filed on September 18, 2015. This Court can independently review the constitutionality of the Spending Cap under the federal and state constitutions. This Court may construe the state constitution's Free Speech Clause to protect expressive liberties beyond what the federal constitution protects.

educational opportunity above an arbitrary level. Courts have held unconstitutional statutes imposing *lesser* burdens on education than the Spending Cap. *See, e.g.*, *Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238, 1268-69 (Wyo. 1995) (holding arbitrary and unconstitutional a "recapture" statute that functioned like a spending cap and redistributed 75% of local funds exceeding a statutorily prescribed amount).

CONCLUSION

The Panel was supposed to assess relative educational opportunity *and* tax effort. Instead, it treated the status quo as the benchmark for constitutional compliance and entered sweeping relief detrimental to districts like SMSD. This Court should:

- reverse,
- declare that CLASS satisfies the equity test vis-à-vis Plaintiffs' claims based on supplemental general state aid and capital outlay aid,
- declare that CLASS does not satisfy the equity test vis-à-vis districts like SMSD, and
- enjoin the operation of the spending cap or order that it be lifted enough to permit underfunded districts, like SMSD, to achieve equity with better funded districts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 6th day of October 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 Amicus Curiae 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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