NO. 113,267

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, *et al.*,

Defendants/Appellants.

RESPONSE BRIEF OF APPELLEES

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

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NATURE OF THE CASE

Does House Substitute for Senate Bill 7 ("S.B. 7") violate the Kansas Constitution? Yes. S.B. 7 wholly (and unnecessarily) replaced a dynamic school funding formula that had evolved over time, consistently being evaluated and fine-tuned by this Court and the Kansas Legislature. It replaced that formula with a static block of funds not reasonably calculated to have all Kansas schoolchildren meet or exceed the *Rose* standards; those funds are inadequate under Article 6 of the Kansas Constitution. In adopting S.B. 7, the Legislature froze spending at unconstitutional levels and then reduced that funding so that the total amount spent would match *what they wanted to spend*. There was no consideration of *what they needed to spend* to ensure that the system was reasonably calculated to have all Kansas students meet or exceed the *Rose* standards. The State's adoption of S.B. 7 completely disregards the State's obligations under Article 6 of the Kansas Constitution; the Panel's finding that S.B. 7 is unconstitutional should be affirmed.

On March 7, 2014, this Court determined that the then-current school finance formula (the School District Finance and Quality Performance Act or "SDFQPA") violated Article 6 of the Kansas Constitution (the "March Mandate" or the "Mandate"). Specifically, the Court found that the State had failed to comply with the equity component of Article 6, rendering the SDFQPA unconstitutional. Deferring to the Legislature, the Court gave the State a reasonable time period to cure the inequities, using whatever method the Legislature deemed appropriate.

What the Court did not do is equally important. It did not declare the SDFQPA constitutionally void. It did not determine that the second aspect of Plaintiffs' case – whether the SDFQPA was constitutionally adequate – was moot because the inequities in the system

rendered it wholly unconstitutional. It did not, as it very well could have done, strike down the entire school funding scheme and close Kansas schools based on the State's failure to comply with the Kansas Constitution.

Instead, showing both restraint by the Court and deference to the Legislature, the Court gave the State a unique option: if the State quickly remedied the inequities that existed in the SDFQPA, the State could avoid the consequences of its own unconstitutional acts. Yet following the March Mandate, rather than *actually* fixing the inequities that rendered the SDFQPA unconstitutional, the State adopted S.B. 7 – a funding scheme even more unconstitutional than the one that this Court reviewed in March of 2014. And, it adopted S.B. 7 in a very deceptive, underhanded manner. In order to feign compliance with this Court's orders, the State enacted H.B. 2506, which purported to cure the inequities this Court identified in the Mandate. The State only allowed H.B. 2506 to remain good law long enough to secure a preliminary ruling from the Panel in the State's favor as to the equity portion of the appeal and get past an election. Once that ruling was secured and elections were over, the Legislature enacted S.B. 7, which replaced the previous school funding formula (the SDFQPA) and repealed H.B. 2506.

S.B. 7, described as "a model of poor lawmaking," did not, as the State claims, result from informed and reasoned decisions. [R. Vol. 130, pp. 12, 24]. It was hastily put together, released on a Friday evening, scheduled for hearing on a Monday morning, and forced through the House via a two hour final-action vote (only after a state plane was deployed in an attempt to find a "yes" voter). [R. Vol. 130, p.24].

Facially, the decision to adopt S.B. 7 was in no way related to the adequacy of Kansas school funding. Even the State's attorney admits that S.B. 7 was not intended to cure any constitutional inadequacies found by the Panel. The stated purpose of the bill was to avoid compliance with the equity portion of the Mandate: the State knowingly and intentionally adopted S.B. 7 to provide less than full funding for the equalization mechanisms. [R.Vol. 140, pp. 9-10 (FOF ¶19); R. Vol. 130, p.76]. And, in analyzing whether S.B. 7 complies with the equity component of Article 6, this Court should certainly take note of this admitted purpose of S.B. 7.

But, S.B. 7 was not solely focused on unraveling the equity of the school finance formula. The most egregious aspect of S.B. 7, hidden beneath its obvious equity defects, is that the bill – with no justification related to the ability of school districts to provide an education that meets or exceeds the *Rose* standards – reduced the levels of funding available to Kansas school districts and eliminated the weightings that have been built into the system since 1992. *See, e.g., U.S.D. 229 v. State,* 256 Kan. 232, 243-44 (describing history of weightings). As a result, current levels of funding are blind to the actual costs of providing Kansas schoolchildren with an education that meets or exceeds the *Rose* standards, blind to the ever-increasing demands on Kansas school districts and schoolchildren, blind to the yearly changes in school district enrollment, and blind to the ever-changing demographics of the K-12 student population. [R. Vol. 136, p.1475].

The State adopted S.B. 7 and its static block of insufficient school funds with no evidence or indication that making further reductions to education funding was reasonably calculated to have all students meet or exceed the *Rose* standards. Instead, all of the evidence

available to the State suggested the opposite. And the State's decision in this regard only exacerbated the already existing constitutional inadequacies. These constitutional defects were further compounded by S.B. 7's failure to comport with the equity component of Article 6 of the Kansas Constitution. As a result, the Panel correctly concluded that S.B. 7 was, on its face, unconstitutional. The Panel's conclusion in this regard was supported by substantial competent evidence. There is no basis for disturbing the Panel's findings regarding the unconstitutionality of S.B. 7 on appeal and the Panel's findings should be affirmed. Because Kansas public education has been underfunded for far too long, justice *requires* an immediate remedy to the State's continued efforts to avoid its constitutional obligations.

STATEMENT OF THE ISSUES

1. The Panel had authority to adjudicate the constitutionality of House Substitute for Senate Bill 7.

2. The Panel correctly concluded that House Substitute for Senate Bill 7 violates Article 6 of the Kansas Constitution and is facially unconstitutional.

3. The Panel did not err in ordering a specific, constitutional remedy for the State's violation of Article 6 of the Kansas Constitution.

4. This Court should retain jurisdiction until the State wholly complies with its constitutional obligations.

5. This Court should exercise its inherent power to issue sanctions and award Plaintiffs' attorneys' fees.

PROCEDURAL HISTORY

In 2012, the Panel presided at a 16-day bench trial to adjudicate the constitutionality of the then-current funding system (the School District Finance and Quality Performance Act or "SDFQPA"). *Gannon v. State*, 298 Kan. 1107, 1111 (Kan. Mar. 7, 2014) ("Gannon I"). Ultimately, the Panel concluded that the SDFQPA, as it was then funded, violated Article 6 of the Kansas Constitution. *Id.* The State appealed. *Id.* at 1110. While this Court affirmed the Panel's finding that the State had created unconstitutional, wealth-based disparities, it found that the Panel did not apply the correct constitutional standard in determining whether the State violated the adequacy requirement of Article 6. *Id*. at 1111. As a result, this Court remanded the question of whether public K-12 education funding comports with the adequacy component of Article 6 of the Kansas Constitution. This Court set forth the following guidelines for the Panel to use in considering the remanded portion of the lawsuit:

> With our adoption of *Rose*, we now clarify what Article 6 of our constitution requires. We hold its adequacy component is met when the public education financing system provided by the legislature for grades K-12 – through structure and implementation – is reasonably calculated to have all Kansas public education students meet or exceed the standards set out in *Rose* and presently codified in K.S.A. 2013 Supp. 72-1127.

Id. at 1170.

Importantly, while the Court determined that the Panel had not entered *Rose*-based findings, the Plaintiffs and the Panel had always relied on the *Rose* standards to determine whether the funding system was constitutionally adequate. [R. Vol. 26, pp. 3291-95 (SOF ¶5-8); R. Vol. 24, pp. 3056-57; R. Vol. 52, pp. 706, 707; R. Vol. 29, pp. 108-110; R. Vol. 30, p.392; R. Vol. 31, pp. 631-32; R. Vol. 32, pp. 781-82, 826-27; R. Vol. 35, pp. 1642-43; R. Vol. 36, pp. 1909-10; R. Vol. 40, pp. 2501-03; R. Vol. 42, pp. 3082-84]. The State should not be

allowed to hide behind its argument that, at the time of trial, it was unaware that the *Rose* standards were the applicable standards for measuring adequacy. *See, e.g.,* State's Brief, p. 7. While the Mandate affected the findings that the Panel was required to enter in support of its conclusion that the SDFQPA was unconstitutional; it did not change anything else – not the evidence, not the theory of Plaintiffs' case, and certainly not the fact that the SDFQPA, as funded, was unconstitutional.

On December 30, 2014, in compliance with the Mandate, the Panel again declared that, under the *Rose*-based test, the SDFQPA, as funded, did not meet the adequacy component of Article 6 of the Kansas Constitution. [R. Vol. 24, p.3065]. The Panel explained that its earlier finding that the SDFQPA was unconstitutional had assumed, much like Plaintiffs had, that adequacy was measured by the *Rose* standards. [R. Vol. 24, pp. 3056-57]. The Panel diverged only with Plaintiffs "in the amount of dollars believed to represent a state of adequacy in meeting the *Rose* factors." *Id.* at 3055. The findings on which the Panel relied demonstrated "that constitutional inadequacy from any rational measure or perspective clearly has existed and still persists in the State's approach to funding the K-12 school system." *Id.* Those findings (Plaintiff's Proposed Findings of Fact and Conclusions of Law, ¶¶ 1-143, 145, and 147-164[1]), summarized below, are entitled to deference on appeal.

A. Plaintiffs' Immediately and Properly Challenged the State's Enactment of S.B. 7

After the Panel once again found that the SDFQPA – as funded – was constitutionally inadequate, the Legislature adopted S.B. 7, which was signed into law by Governor Brownback

[1] *See, e.g.,* R. Vol. 26, p. 3281. Plaintiffs, when referring to their Proposed Findings of Fact, refer to the version printed in that Response. Those Proposed Findings of Fact and Conclusions of Law (¶¶ 1-143, 145, and 147-164) are set forth exactly as they were submitted to the Panel on May 16, 2014.

on March 25, 2015. [R. Vol. 140, p.7 (FOF ¶12)]. That bill, among other things, revoked the former school finance system (the SDFQPA), including the provisions of H.B. 2506 (which the State adopted after the March Mandate) that purported to fund and cure the equity issues identified in the March Mandate. [R. Vol. 140, pp. 7-8 (FOF ¶13)].

Due to the fact that S.B. 7 is facially unconstitutional, Plaintiffs *immediately* filed a Motion for Declaratory Judgment and Injunctive Relief. [R. Vol. 130, pp. 12-43; R. Vol. 136, pp. 1424-25]. In that motion, Plaintiffs asked the Panel to declare S.B. 7 unconstitutional because it violated both the adequacy and equity components of Article 6. [R. Vol. 130, pp. 16-18; R. Vol. 136, pp. 1424-25]. On April 30, 2015, the Kansas Supreme Court invoked the jurisdiction of the Panel and tasked it with considering Plaintiffs' Motion for Declaratory Judgment and Injunctive Relief. [R. Vol. 136, p.1425].

B. The Panel Ultimately Found that S.B. 7 Violated Article 6 of the Kansas Constitution

Ultimately, the Panel found that S.B. 7 violated Article 6 of the Kansas Constitution both in regard to its adequacy of funding and in regard to the equity of funding. [R. Vol. 136, p.1425]. It is the Court's findings regarding adequacy that are relevant to this appeal. In its Order, the Panel adopted Plaintiffs' Proposed Findings of Fact and Conclusions of Law, submitted May 15, 2015, as their own, with the exception of Plaintiffs' Proposed Findings ¶¶ 101, 103, 107, 110-112. [R. Vol. 136, pp. 1426-27]. That substantial, competent evidence, as relevant to the adequacy portion of this lawsuit, is summarized below.

STATEMENT OF THE FACTS

This appeal is simple. In March of 2015, the State adopted S.B. 7, which dictated that school districts would receive roughly the amount of funding that they had been provided in

FY2015, as calculated under the SDFQPA for FY2016 and FY2017. Funding for FY2016 and FY2017 was locked in at the FY2015 amount for each district, regardless of any changes in the actual costs of providing an education to its students, in the demands on the district or its students, in the district's enrollment, or in the demographics of the district's population. S.B. 7 had no mechanisms for automatically responding to these changes, unlike the SDFQPA, which adjusted funding levels annually to respond to changes in enrollment and demographics.

Under S.B. 7, each district received *less* funding for FY2016 than it had received the year before. Prior to the adoption of S.B. 7, the amounts of funding that school districts received in FY2015 had already been declared unconstitutional by the Panel. Thus, for FY2016, each school district received *less* funding than an amount that had already been deemed unconstitutional. And, each district is slated to receive the same, unconstitutional amount of funding for FY2017.

The State contends that it made an informed, rational decision to adopt S.B. 7, concluding that it was reasonably calculated to have all Kansas schoolchildren meet or exceed the *Rose* standards. It offers no credible evidence in support of this position. And, there is no reasonable interpretation of the evidence that would allow the State to draw that conclusion. Instead, the evidence, summarized below, demonstrates:

(1) The State began making funding cuts in 2009 for political reasons.

(2) Following those cuts, school districts were forced to eliminate the services, programs, and staff that were in place to provide students with an education that meets the *Rose* standards.

(3) All of these eliminated services, programs, and staff were necessary to have students meet or exceed the *Rose* standards.

(4) All of these services, programs, and staff were eliminated for affordability reasons.

(5) The elimination of these services, programs, and staff negatively impacted student achievement, as measured by various outputs.

(6) S.B. 7 froze the funding levels into place, thereby freezing these cuts into place, and provided no additional resources to reverse the cuts or to address the decreased student achievement.

In reducing the funding available to Kansas school districts and removing the mechanisms in the previous system that responded to changes in enrollment and demographics, the State did nothing to cure the inadequacies that the Panel had already concluded rendered the SDFQPA unconstitutional. Instead, those inadequacies were only exacerbated. Therefore, the Panel, based on substantial, competent evidence, found that S.B. 7 was unconstitutional.[2]

I. THE FUNDING LEVELS THAT EXISTED PRIOR TO THE ADOPTION OF S.B. 7, WHICH S.B. 7 FROZE INTO PLACE, VIOLATED THE ADEQUACY COMPONENT OF ARTICLE 6 OF THE KANSAS CONSTITUTION

Prior to adopting S.B. 7, the State was well aware that the levels of funding provided under the SDFQPA were unconstitutional, as supported by the following evidence:

A. Between 2009 and 2012, The State Began Making Significant Cuts to Education Funding for Political Reasons

Between 2009 and 2012, the State made significant cuts to educational funding, which exceeded $511 million per year.[3] [R. Vol. 26, p.3295 (SOF ¶14); R. Vol. 90, p.5486; R. Vol. 14, pp. 1794-95]; *see also Gannon*, 298 Kan. at 1115 ("cuts to the BSAPP in fiscal years 2009 to 2012 totaled more than $511 million"). By all measures, including total expenditures,

[2] This Court should rely on that substantial, competent evidence – summarized here – and not the State's version of the facts, which are largely irrelevant and differ remarkably from the findings of fact entered by the Panel. [R. Vol. 24, pp. 3054-55; R. Vol. 136, pp. 1426-27]; *see also State v. Reiss*, 299 Kan. 291, 291 (2014) (in reviewing the factual findings relied on by the Panel, this Court should not reweigh the evidence or assess the credibility of witnesses).

[3] The State did not challenge the validity of Exhibit 241 at trial or during the first appeal, and should not be allowed to do so now. [R. Vol. 26, pp. 3351-52 (SOF ¶183)]. This Court did nothing to disturb the Panel's findings related to Exhibit 241 in *Gannon I.* 298 Kan. at 1115 ("[C]uts to BSAPP in fiscal years 2009 to 2012 totaled more than $511 million.").

funding for education decreased between 2009 and the time of trial. [R. Vol. 14, p.1788; R. Vol. 26, p.3357 (SOF ¶187)].

Those cuts were made for purely political reasons. The State made the cuts after calculating "what the Legislature decided it could afford." [R. Vol. 26, pp. 3337-38 (SOF ¶139-140); R. Vol. 76, pp. 3424-3461; R. Vol. 32, pp. 777-78; R. Vol. 39, pp. 2445-47; R. Vol. 49, p.411; R. Vol. 9, p.1105-06 (State Opening FOF ¶77, 79); R. Vol. 22, pp. 755, 777-78]. Those cuts, which were eventually frozen into place by operation of S.B. 7, were not made because the State believed that funding was already at a constitutionally adequate level. *Id*.

B. The Cuts to Funding Forced School Districts to Eliminate Services, Programs, and Staff that Were in Place to Provide Students with an Education that Meets the *Rose* Standards

The cuts to funding that began in 2009 forced Kansas school districts to eliminate services, programs, and staff that were in place to provide students with an education that meets the *Rose* standards. Funding levels are currently so low that each of the Plaintiff School Districts have had to make cuts to almost every area of education. [R. Vol. 26, pp. 3297-98 (SOF ¶22); R. Vol. 93, pp. 5740-44, 5765-69; R. Vol. 94, pp. 5770-73, 5806-09, 5815-16; R. Vol. 96, pp. 6011-49; R. Vol. 112, pp. 7634-35; R. Vol. 36, pp. 1700-01, 1800-02, 1811-12; R. Vol. 42, p.3177; R. Vol. 26, pp. 3298-99]. Each of these directly affected the ability of Kansas school districts to provide their students with an education that meets or exceeds the *Rose* standards. Those standards, as they were incorporated into Kansas statute, require:

1. Development of sufficient oral and written communication skills which enable students to function in a complex and rapidly changing society;

2. [A]cquisition of sufficient knowledge of economic, social and political systems which enable students to understand the issues that affect the community, state and nation;

3. [D]evelopment of students' mental and physical wellness;

4. [D]evelopment of knowledge of the fine arts to enable students to appreciate the cultural and historical heritage of others;

5. [T]raining or preparation for advanced training in either academic or vocational fields so as to enable students to choose and pursue life work intelligently;

6. [D]evelopment of sufficient levels of academic or vocational skills to enable students to compete favorably in academics and the job market; and

7. [N]eeds of students requiring special education services.

K.S.A. 72-1127(c).

The funding cuts required Kansas school districts to eliminate services, programs, and staff that can generally be organized into 7 categories. Each of these categories consist of services, programs, and/or staff that were specifically implemented for the purpose of having all students meet or exceed the *Rose* standards.

1. School districts were required to eliminate teaching positions. The State's expert testified that "the most important factor influencing student achievement is the quality of the teacher." [R. Vol. 38, pp. 2282-83]. The ability of school districts to have students meet each of the *Rose* standards is directly affected by the teachers and licensed staff that it has available. Yet, starting in 2009, school districts eliminated 2,500 positions, including 1,567 teaching positions. [R. Vol. 26, p.3295 (SOF ¶¶16-17); R. Vol. 33, p.1031; R. Vol. 93, pp. 5763-64; R. Vol. 75, p.3278]. Eliminating these positions forced educators to educate an ever-increasing number of students with a stagnant or reduced staff. [R. Vol. 26, p.3296 (SOF ¶18); R. Vol. 36, p.1834]. It caused school districts to increase class sizes. [R. Vol. 26, p.3296 (SOF ¶19); R. Vol. 36, pp. 1834-35; R. Vol. 32, p.788]. Larger class sizes reduce the opportunity for

educators to spend individualized time with the students in their class and therefore decrease the quality of the education provided to those students. [R. Vol. 26, p.3296 (SOF ¶19); R. Vol. 32, p.790; R. Vol. 38, p.2295; R. Vol. 29, p.199].

2. School districts were required to reduce or freeze teacher salaries. This caused a massive loss of teachers who were drawn to neighboring school districts with higher salaries. [R. Vol. 26, pp. 3296-97 (SOF ¶¶20-21); R. Vol. 32, pp. 791-92, 842; R. Vol. 33, pp. 1181-84, 1186-87, 1189-93; R. Vol. 31, pp. 690-91, 696-97; R. Vol. 30, pp. 450, 456-57; R. Vol. 83, p.4369; R. Vol. 96, p.6039; R. Vol. 53, p.801; R. Vol. 52, p.697]. This further caused a reduction in the number of teachers and licensed staff, especially quality teachers and staff, and affected the ability of school districts to have students meet each of the *Rose* standards.

3. School districts were forced to eliminate the programs, resources, technology, textbooks, interventions, and staff needed to develop sufficient communication skills in Kansas schoolchildren. Pursuant to Article 6, the education provided to Kansas students should be reasonably calculated to allow for the development of sufficient oral and written communication skills to enable students to function in a complex and rapidly changing society. K.S.A. 72-1127(a)(1). Kansas teachers, administrators, and principals are familiar with techniques that allow students to develop reading and communication skills. [R. Vol. 26, pp. 3300-04 (SOF ¶¶31-33, 35-38); R. Vol. 30, pp. 254-62; R. Vol. 31, pp. 600, 637-39; R. Vol. 36, pp. 1714-15, 1751-52; R. Vol. 32, pp. 784, 788-89, 795, 907-909, 962]. This includes the use of learning coaches, paraprofessionals, speech therapists, librarians, extracurricular activities, band and orchestra programs, reading recovery programs, one-on-one reading instruction, and others, all of which school districts had actually implemented for the purpose of meeting this *Rose*

standard. *Id.* When the funding reductions started in 2009, school districts were forced to eliminate these programs, resources, technology, textbooks, interventions, and staff.

4. School districts were forced to eliminate the programs and staff necessary to provide for the physical and mental wellness of Kansas schoolchildren. Pursuant to Article 6, the education provided to Kansas students should be reasonably calculated to allow for the development of the mental and physical wellness of all Kansas schoolchildren. K.S.A. 72-1127(a)(3). Knowing this, school districts adopted programs (including athletics programs and physical wellness programs) and hired staff (including school nurses and counselors) designed to meet this *Rose* standard. [R. Vol. 26, pp. 3308-09 (SOF ¶¶53, 64); R. Vol. 36, pp. 1853-54; R. Vol. 32, p.908; R. Vol. 99, pp. 6274-75; R. Vol. 93, pp. 5740-41, 5753-62; R. Vol. 96, p.6028-32, 6042; R. Vol. 104, pp. 3102-03, 6767-70; R. Vol. 42, pp. 3094-95; R. Vol. 99, pp. 6282-83; R. Vol. 107, p.7095; R. Vol. 30, pp. 255-57; R. Vol. 31, pp. 639-40, 694]. But those programs and staff were eliminated due to the funding cuts. *Id.*

5. School districts were forced to eliminate strategies and programs implemented to develop knowledge of the fine arts. Pursuant to Article 6, the education provided to Kansas students should be reasonably calculated to allow for the development of the knowledge of fine arts in a manner that allows the student to appreciate the cultural and historical heritage of others. K.S.A. 72-1127(a)(4). Educators understand they need to develop knowledge of the fine arts in all Kansas schoolchildren in the manner required by the applicable *Rose* standard, and, when given proper funding, know how to do so. [R. Vol. 26, pp. 3313-14 (SOF ¶68); R. Vol. 29, pp. 108-10, 170-71; R. Vol. 31, pp. 600-01; R. Vol. 32, pp. 907-09; R. Vol. 41, pp. 2783-86; R. Vol. 77, p.3550]. As a result, school districts hired staff and adopted programs

(including band and vocal music programs, drama programs, debate and forensics programs, art and graphic design programs, foreign language programs, fine arts, language arts, and family and consumer science programs) for that purpose. [R. Vol. 26, p.3314 (SOF ¶69); R. Vol. 30, pp. 261-62; R. Vol. 31, pp. 600-01, 637, 664-65; R. Vol. 29, pp. 86-87; R. Vol. 93, p.5742, 5753-62, 5767; R. Vol. 62, p.1850; R. Vol. 70, p.2832; R. Vol. 91, p.5524; R. Vol. 98, p.6244; R. Vol. 99, pp. 6276-77, 6285-86; R. Vo. 56, p.1217; R. Vol. 96, p.6020, 6029-30, 6040-42, 6054; R. Vol. 40, p.2534; R. Vol. 41, pp. 2888-89; R. Vol. 42, p.2998, 3040-41, 3061-62]. School districts were forced to eliminate these strategies and programs due to the cuts. *Id.*

6. School districts have been forced to make cuts to programs that are necessary both to acquire sufficient knowledge of economic, social, and political systems and to enable students to understand issues that affect the community, state, and nation. Pursuant to Article 6, the education provided to Kansas students should be reasonably calculated to allow for the acquisition of sufficient knowledge of economic, social, and political systems which enable students to understand issues that affect the community, state, and nation. K.S.A. 72-1127(a)(5). School districts know how to meet this *Rose* standard and often used fields trip and activity trips to do so. [R. Vol. 26, pp. 3315-17 (SOF ¶¶72-76); R. Vol. 96, p.6012; R. Vol. 32, pp. 838, 904-10; R. Vol. 29, pp. 172-73; R. Vol. 104, pp. 6778-79; R. Vol. 36, pp. 1774-76; R. Vol. 31, pp. 601-02, 664-65; R. Vol. 93, pp. 5738-40, 5742-62]. Due to the funding cuts, the opportunity to do so was eliminated or greatly reduced.

7. Schools districts were forced to make technology cuts. School districts were required to eliminate or cut key technology positions, were required to reduce technology expenditures, or were otherwise required to reduce their technology budget following the

funding cuts. [R. Vol. 26, pp. 3335-36 (SOF ¶132-133); R. Vol. 96, p.6012, 6017, 6019, 6021, 6040-42; R. Vol. 104, p.6775; R. Vol. 93, p.5741, 5753-62; R. Vol. 86, p.4655; R. Vol. 94, p.5804, 5806; R. Vol. 84, p.4462; R. Vol. 30, pp. 460-62]. A system that is *structured* to allow Kansas students to survive in the twenty-first century, to develop the *Rose*-based academic and vocational skills, and to develop the *Rose*-based communications skills must ensure the availability of technology. [R. Vol. 26, pp. 3336-37; R. Vol. 70, pp. 2771-72; R. Vol. 73, pp. 3062; R. Vol. 71, pp. 2939, 2941-42; R. Vol. 96, p.5994; R. Vol. 36, pp. 1809-12; R. Vol. 82, pp. 4156-57; R. Vol. 77, p.3562]. In other words, the availability of technology goes to each of the *Rose* standards. After all, "[t]echnology is at the core of virtually every aspect of our daily lives and work." [R. Vol. 26, pp. 3336; R. Vol. 70, pp. 2771-72]. "[Y]et in our educational system, it is considered an optional component and in many learning environments, it is simply non-existent." *Id.*

In sum, educators in Kansas know how to provide their students with an education that meets the *Rose* standards and had implemented services, programs, and staff in order to do so. *Supra; see also*, R. Vol. R. Vol. 30, pp. 216-22, 284. However, when the funding cuts began in 2009, school districts were forced to eliminate these services, programs, and staff.

C. The Services, Programs, and Staff Cut as Result of Decreased Funding Were Eliminated for Affordability Reasons

The funding cuts that began in 2009 required school districts to eliminate the services, programs, and staff discussed above because school districts could no longer afford them. In other words, rather than eliminating these services, programs, and staff because they were unsuccessful, inefficient, or unnecessary, the school districts eliminated them because they could no longer afford them. [R. Vol. 26, p.3303 (SOF ¶34)] (regarding the programs,

resources, technology, textbooks, interventions, and staff necessary to develop communication skills); [R. Vol. 26, pp. 3309-12 (SOF ¶¶54-65); [R. Vol. 36, pp. 1769-71, 1773-74; R. Vol. 32, pp. 796, 844-45, 904-11; R. Vol. 34, pp. 1237-38; R. Vol. 31, pp. 587-90, 599, 639-48, 692; R. Vol. 29, pp. 170-71; R. Vol. 40, pp. 2514-18, 2522-23, 2531; R. Vol. 30, pp. 272, 462; R. Vol. 41, pp. 2883-84; R. Vol. 82, pp. 4156-57; R. Vol. 71, pp. 2936-42; R. Vol. 93, pp. 5741, 5753-62; R. Vol. 99, p.6283; R. Vol. 96, pp. 6019-20, 6054; R. Vol. 104, p.6776] (regarding the elimination of programs and staff necessary to provide physical and mental wellness of students); [R. Vol. 26, p.3317 (SOF ¶77); R. Vol. 42, pp. 3092-95; R. Vol. 32, pp. 904-07; R. Vol. 30, pp. 261-62] (regarding positions and programs necessary to develop the knowledge of fine arts or of economic, social, or political systems); [R. Vol. 26, p.3336 (SOF ¶134); R. Vol. 31, pp. 664-65, 667-68; R. Vol. 30, pp. 434-35] (regarding technology cuts).

The State has not, and cannot, offer any evidence that these services, programs, and staff were eliminated for any reason other than the State's political decision to reduce funding. The State cannot offer any evidence that these services, programs, and staff were not necessary to provide Kansas schoolchildren with an education that meets the *Rose* standards. The only evidence presented to this Court, and the Panel, yields the opposite conclusion: the State's cuts to education funding that began in 2009 negatively impacted the structure of the education system, *i.e.*, what services, programs, and staff were available. And, for no reason other than political reasons, those necessary services, programs, and staff were eliminated.

D. <u>The Elimination of These Services, Programs, and Staff Negatively Impacted Student Achievement</u>

The cuts that began in 2009 obviously affected the structure of the education system. And, those alterations to the structure of the education that Kansas schoolchildren were

receiving were not harmless. The elimination of those services, programs, and staff had significant, negative impact on student achievement, as measured by various outputs. Every educator at trial testified that they were unable to provide all of their students with an education that comported with the requirements of the Kansas Constitution. [R. Vol. 30, pp. 283-84 (testifying that Kansas City is currently unable to provide a "suitable education" to all of its students with the current resources but could do so with additional resources); R. Vol. 32, p.920 (stating Wyandotte High School does not have adequate funds to provide its students with a suitable education); R. Vol. 36, pp. 1857-58 (testifying that Dodge City is not providing all of its students with a suitable education); R. Vol. 41, p.2900 (testifying her school cannot provide a suitable education to all of its students with the resources that it currently has); R. Vol. 42, pp. 3043-46 (testifying that Hutchinson is unable to provide all of its students with a suitable education with the current resources)]; *see also Gannon*, 298 Kan. at 1185-86. That inability was frozen into place by the adoption of S.B. 7.

1. The State Should Have Expected that its Cuts to Funding Would Negatively Impact Student Achievement

The overwhelming evidence, available to the State at all times relevant to this litigation, demonstrates that reducing funding to education negatively impacts student achievement and performance. [R. Vol. 26, p.3299 (SOF ¶24)]. Or, in the words of the Panel, "yes, money makes a difference." [R. Vol. 24, p.30]. The following evidence was available to the State:

First, the *Gannon* Panel made a factual finding that student performance is linked to funding and rejected the State's arguments otherwise. [R. Vol. 14, pp. 1869-88]. In so finding, the *Gannon* Panel stated, "Here, we disagree substantially with the above suggested findings advanced by the Defendant . . . . We find the truth of the matter is contrary to the State's

assertions." [R. Vol. 14, p.1877]. That finding, entered well before the State adopted S.B. 7 was not disturbed on appeal and now represents the law of the case.

Second, the most recent cost study conducted, commissioned by the State itself, found "a 1% increase in district performance outcomes was associated with a .83% increase in spending – almost a one-to-one relationship." [R. Vol. 14, pp. 1646-47; R. Vol. 13, pp. 1637-38 (FOF ¶199)].

Third, actual experiences of Kansas schools, such as the "remarkable story" of Kansas City's Emerson Elementary, demonstrate the importance of funding in increasing student performance. [R. Vol. 19, pp. 198-99; R. Vol. 20, pp. 216-222, 252-62, 284, 327, 408, 449; R. Vol. 13, pp. 1714-15; R. Vol. 21, p.600, 639; R. Vol. 22, pp. 784, 788-89, 795, 907-09, 962; R. Vol. 26, pp. 1714-15, 1751-52].

Fourth, between 2010-11 and 2011-12, the percentage of all students meeting AYP only increased by .4%. [R. Vol. 26, p.3299 (SOF ¶24); R. Vol. 116, pp. 8301-06]. Between 2005-06 and 2006-07 (when the school districts were able to put to use increased funds pursuant to *Montoy*), the percentage of all students meeting AYP increased by 5.4%. *Id.* Since the cuts began in 2009-10, the increases in the percentage of students meeting AYP year-to-year has dramatically decreased. *Id.* This data is especially important in light of the State's continued insistence that "all is well" because things are "improving." The State's actions have significantly slowed – and in some cases stopped or reversed – a previous pattern of steady and substantial increases.

Fifth, educators are aware and agree that they cannot increase student achievement and outcomes with decreased funding. [R. Vol. 26, p.3299 (SOF ¶25); R. Vol. 97, pp. 6102-27; R. Vol. 92, p.5691; R. Vol. 98, pp. 6215, 6246].

Sixth, the State itself attributes significantly decreased rates of improvement on state assessments to "the staff and budget cuts taking place in Kansas in 2010." [R. Vol. 26, p.3299 (SOF ¶26); R. Vol. 126, p.15577].

Seventh, the 2010 Commission found that "Kansas students have made great academic strides . . . largely due to the infusion of school funding." [R. Vol. 26, p.3200 (SOF ¶27); R. Vol. 78, pp. 3602, 3609].

Eighth, money – and the resources that cost money – are necessary to implement an adequate education system. The things that schools can do to increase student outcomes – like reducing class sizes and increasing teacher salaries – cost money. [R. Vol. 97, p.6130; R. Vol. 30, pp. 237-38 ("Everything costs money. As you know, there's nothing in life that's truly free.")]. And, it is obviously the amount of funding that is provided to a district that dictates how much money they can dedicate to increasing staff, decreasing class sizes, and increasing teacher salaries. The State simply cannot dispute the point that money makes a difference. Their own expert, Dr. Hanushek, testified that "the most important factor influencing student achievement is the quality of the teacher." [R. Vol. 38, pp. 2282-83; R. Vol. 14, p.1783]. He further testified, "The money [spent on education] is obviously important at some level. You have to have funds to have teachers in schools." [R. Vol. 14, p.1781; R. Vol. 13, p.1638]. Given that a school district cannot hire a quality teacher without adequate funding, the "debate" over whether "money matters" is settled. [R. Vol. 97, pp. 6128-49].

The State's arguments that increased funding is not associated with increased student achievement should be disregarded; the overwhelming data indicates otherwise.

2. The Funding Cuts Resulted in Decreased Numbers of Kansas Students Being College- and Career- Ready

The State's arguments that money does not matter should further be disregarded because the evidence available to this Court and the Panel shows that the elimination of programs, services, and staff negatively impacted achievement as measured by various outcomes, including ACT results, graduation rates, and remediation rates. [R. Vol. 26, pp. 3320-24 (SOF ¶¶87-99); R. Vol. 60, pp. 1577-1695; R. Vol. 29, pp. 159-60; R. Vol. 35, pp. 1573-76; R. Vol. 126, p.15543; R. Vol. 57, p.1218; R. Vol. 56, p.1165, 1178-79; R. Vol. 72, p.3028; R. Vol. 75, pp. 3288, 3294-95; R. Vol. 33, p.1074; R. Vol. 29, pp. 84, 94-96; R. Vol. 34, p.1223; R. Vol. 53, p.809; R. Vol. 62, pp. 1789-1877; R. Vol. 70, pp. 2754, 2798-2804; R. Vol. 79, pp. 3761-62; R. Vol. 74, pp. 3141-43].

There is substantial, competent evidence before this Court, as there was before the Panel, that Kansas students do not graduate from high school college and career ready. [R. Vol. 26, pp. 3328, 3330; R. Vol. 36, pp. 1700-01, 1753, 1857-58; R. Vol. 35, pp. 1575-76; R. Vol. 29, pp. 159-60]. For instance, in Kansas City, 18% of the students overall did not graduate from high school within 5 years, only 34% of students attend college, and less than 11% graduate from college. [R. Vol. 26, pp. 3322-23 (SOF ¶94); R. Vol. 30, pp. 227-28; R. Vol. 26, p.3328 (SOF ¶111); R. Vol. 29, pp. 159-60].

In the twenty-first century, preparation for a career necessarily includes preparation for college because a high school diploma is no longer sufficient. [R. Vol. 26, p.3319 (SOF ¶¶83-85); R. Vol. 52, p.752; R. Vol. 38, pp. 2164-65; R. Vol. 73, p.3057; R. Vol. 35, pp. 1580-83; R.

Vol. 67, p.2462; R. Vol. 41, pp. 2730-31, 3154-55]. Yet, Kansas schools are preparing its students for neither. The funding provided to Kansas school districts does not allow them to have their students graduate from high school career- and/or college-ready and therefore does not allow them to meet or exceed the *Rose* standards.

3. The Funding Cuts Negatively Impacted Performance on Reading Assessments

Assessment results show that Kansas students are struggling. *Gannon*, 298 Kan. at 1130 (finding that the "plaintiff districts are among those that have struggled to meet AYP targets"). Reading assessment results reveal that, because of the decreased funding levels, Kansas students are not being provided with an adequate education that meets the *Rose* factors, especially as to the development of communication skills and the development of academic or vocational skills.

The evidence before this Court does not demonstrate a level of progress that satisfies the Kansas Constitution or with which the State should be satisfied. Results on those assessments demonstrate that a significant number of Kansas students (especially those students that are economically disadvantaged, Hispanic, ELL, or African-American) are not meeting the reading standards *set by the State*. [R. Vol. 26, p.3306 (SOF ¶¶41-43)]. The State admits as much, conceding that in 2011-12, only 71.2% of students with disabilities, only 71.8% of ELL students, only 71.1% of African-American students, and only 77.9% of Hispanic students tested above proficient on the state reading assessments. State's Brief, p. 34. The statewide results printed in the State's brief demonstrated that, with the exception of a few subgroups, performance on state reading assessments decreased between 2010-11 and 2011-12. *Id.* The assessment results simply do not support the State's conclusion that student performance in Kansas is increasing.

These same issues also exist at the district level, where significant numbers of students in the Plaintiff School Districts do not meet state reading standards. [R. Vol. 26, pp. 3307-08 (SOF ¶¶44-48)]. For instance, in 2011, 32.9% of all students in Kansas City, Kansas scored below proficiency on Kansas reading assessments. [R. Vol. 26, p.3307 (SOF ¶46)]. In Wichita, the students within subgroups especially struggled: approximately one-third of Wichita's Hispanic students and African-American students did not meet state reading standards. [R. Vol. 26, p.3307 (SOF ¶44)].

Likewise, Kansas students have struggled to meet national reading standards. In 2011, more than half of the black students in Kansas, more than half of the ELL students in Kansas, and two-thirds of the Kansas students with disabilities tested below basic on the National Assessment of Education Progress ("NAEP") 4th grade reading test. [R. Vol. 26, p.3307 (SOF ¶49); R. Vol. 67, pp. 2464-65]. Approximately one in every four white students tested failed to meet basic proficiency. *Id.*

Presented with the same data that is available to Plaintiffs, the State now tries to argue that reading assessment scores do not demonstrate any lack of oral and written communication skills in Kansas. But, when Governor Brownback, then U.S. Senator, was presented with similar results in 2009, he took a much different stance, stating, "As you can see from this graph, 28% of our students are below basic levels according to National Assessment of Educational Progress scores. That number is far too high. Only 25% of our students are reading proficiently. That number is far too low." [R. Vol. 26, pp. 3307-08 (SOF ¶50); R. Vol. 67, pp. 2459-63].

4. The Funding Cuts Negatively Impacted Performance on Math Assessments

The results of the Kansas math assessments yield a similar finding: because of decreased funding, Kansas school children are not receiving an education that develops their mathematical skills. [R. Vol. 26, pp. 3324-25; R. Vol. 61, pp. 1763-86; R. Vol. 116, pp. 8299-8300]. The results of the state math assessments for the 2010-2011 school year show a staggering disparity in the math scores of the various subgroups: approximately one-third of African-American students (32.6% or 11,569 students) in the State scored below proficient. [R. Vol. 26, pp. 3326-27; R. Vol. 61, pp. 1763-86].

Similar results are seen at the district level among the Plaintiff School Districts. [R. Vol. 26, pp. 3327-28 (SOF ¶¶105-109); R. Vol. 63, p.2040, R. Vol. 65, pp. 2197-2315, R. Vol. 116, pp. 8314-33l; R. Vol. 64, pp. 2042-65, 2185-96; R. Vol. 66, pp. 2447-63; R. Vol. 26, p.3327]. Shockingly, in 2010, only 56.5% of African-American students in Kansas City were at or above proficiency in math. [R. Vol. 26, p.3327 (SOF ¶107); R. Vol. 63, p.2040].

5. The Funding Cuts Caused the State to Fail to Meet its Constitutional Obligations with Regard to a Significant Number of Kansas Students.

The State paints a picture for this Court that Plaintiffs are overreacting to the State's inability to reach *all* Kansas schoolchildren. But, the State is not failing to meet its constitutional obligation by one or two students, or even five percent of students. The State is failing to meets its constitutional obligation with regard to a significant number of Kansas students. [R. Vol. 26, pp. 3329-30 (SOF ¶112)]. Thousands of students in Kansas are not meeting standards on state assessments. *Id.*; [R. Vol. 127, pp. 102-04; R. Vol. 61, pp. 1740-62] (12.2% or 58,218 students, scored below proficiency in reading in 2010-11); [R. Vol. 61, pp.

1763-86] (14.6%, or 69,670 students, scored below proficient in 2010-11; approximately one-third of African-American students (or 11,569 students) in the State scored below proficient on math assessments in 2010-11); [R. Vol. 61, pp. 1788] (almost one-fifth (17.4%) of all 11th grade students scored below proficient in 2010-11 on math assessments); [R. Vol. 60, pp. 1577-1695] (in 2011, there were a significant number of Kansas students (more than one-fifth) who did not graduate in either 4 years (19.3%) or 5 years (24.8%)).

II. THE ADOPTION OF S.B. 7 DID NOT CURE THE UNCONSTITUTIONALITY OF THE INADEQUATE FUNDING LEVELS

The evidence available to the Panel, and to this Court, demonstrates that the funding levels that existed prior to the adoption of S.B. 7, which S.B. 7 then froze into place, violated the adequacy component of Article 6 of the Kansas Constitution. At all times before the State adopted S.B. 7, it knew that the decreased funding levels were negatively impacting the ability of Kansas school districts to provide their students with an education that met or exceeded the *Rose* standards. In response to the Panel's explicit finding that those levels of funding were unconstitutional, the State adopted S.B. 7. S.B. 7 did nothing to cure the unconstitutionality of the inadequate funding levels provided to Kansas school districts.

A. S.B. 7 Wholly Replaced a Dynamic System with a Static Block of Funds

On March 25, 2015, following the Panel's determination that the then-current levels of funding were unconstitutional and inadequate, the State adopted S.B. 7. [R. Vol. 136, pp. 1423-73]. While S.B. 7 is described as a "new formula," it is not a complete overhaul of the SDFQPA. It relies on the SDFQPA to determine the amount of funding that would be due to a district in FY2015 and then carries that funding level forward into FY2016 and FY2017. [R.

Vol. 136, p.1433]. Rather than addressing the inadequacies that were in the former system, S.B. 7:

(1) Purported to hold every district harmless (*i.e.* – provide them with the same level of funding received the previous school year) by freezing operational funding for two years (FY2016 and FY2017) based on the level of FY2015 funding. [R. Vol. 136, p.1429]. By freezing the funding levels at the levels calculated using FY2015 data, S.B. 7 essentially eliminates the weightings that have been built into the system since 1992. [R. Vol. 140, p.11 (FOF ¶24)]. The funding for FY2016 and FY2017 will not accommodate any changed demographics within a school district, including changes in enrollment or changes in the number of students that cost more to educate. [R. Vol. 136, at p. 1433]. Under S.B. 7, the funding for FY2016 and FY2017 is "blind to any changes in the number and demographics of the K-12 student population." [R. Vol. 136, p.1475].

(2) Actually cut funding to every district by .4% to place into the "extraordinary need fund." [R. Vol. 136, p.1431; R. Vol. 130, p.14]; *see also* S.B. 7, at Sec. 6(a)(7).

(3) Further cut funding to only the poorest school districts in Kansas by reducing the amounts of equalization aid to which they were entitled. Every school district eligible for equalization aid, including all four of the Plaintiff School Districts, received a net loss in funding under S.B. 7. [R. Vol. 130, p.14].

Knowing that the school districts had already made substantial cuts to all areas of education and knowing those cuts negatively impacted student achievement, (*supra*, at Statement of the Facts §I.), the State further reduced funding to school districts. Those funding reductions only

compounded the already existing problems, resulting in districts being forced to make *more* cuts. For example, due to the additional decrease in funding to Kansas City, that district had to defer necessary expansion services in early childhood intervention as well as implementation of key aspects of the district's college and career pathways, implementation of the Diploma+ program, and additional necessary technology replacement. [R. Vol. 140, p.33-34 (SOF ¶93-95); R. Vol. 138, pp. 25-33; R. Vol. 142, pp. 1459-62]. These cuts were made solely because of reductions in funding and not because the cuts were anticipated to increase educational opportunity. *Id.* These reductions further hinder Kansas City's ability to provide its students with an education that meets or exceeds the *Rose* standards. *Id.* Similarly, the Hutchinson school district had to make cuts because of S.B. 7 that affected its ability to provide its students with an education that meets or exceeds the *Rose* standards, including (a) reducing office equipment at the district's facilities; (b) the elimination of three elementary instructional coaches; (c) the elimination of one middle school librarian; (d) the elimination of one high school teacher; (e) the elimination of a secretarial position at the Administration Office Business Center; and (f) the elimination of a Maintenance and Grounds/Warehouse position. [R. Vol. 140, p.34 (SOF ¶¶96-99); R. Vol. 139, pp. 291-92; R. Vol. 142, pp. 1463-68].

The reductions in funding under S.B. 7 further hampered school districts' ability to provide their students with an education that meets or exceeds the *Rose* standards.

B. S.B. 7 Violated the Adequacy Component of Article 6 Because it Reduced the Overall Funding Levels, Which Had Already Been Deemed Unconstitutional

To be clear, no school district has received increased funding under S.B. 7. This unsupported (and easily debunked) rhetoric likely stems from Governor Brownback's constant

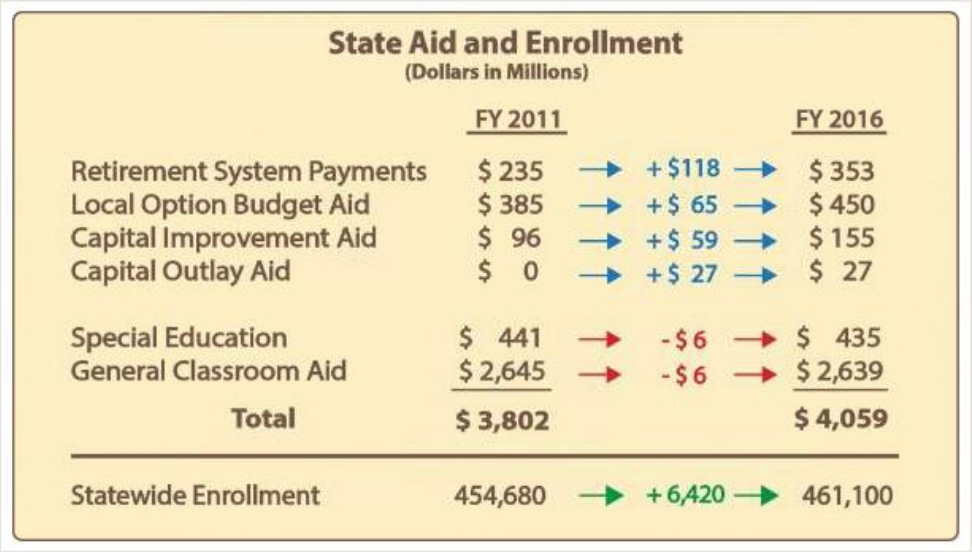
insistence that, under S.B. 7, Kansas will spend a "record" $4.059 billion on education in FY16 (the current school year). *See, e.g.*, State of Kansas Comparison Report, at p.60.[4] The evidence, however, shows that **no school district**, including the Plaintiff School Districts, will receive *more* money under the operation of S.B. 7. As Dale Dennis testified, the funds "now bundled for delivery" to the school districts "will be less." [R. Vol. 136, p.1430].

S.B. 7 certainly did not restore the cuts to funding that started in 2009. [R. Vol. 26, p.3357 (SOF ¶187)]. Instead, current funding levels have devolved to pre-*Montoy* levels. [R. Vol. 24, p.3065; R. Vol. 26, p.3353]. "[G]iven inflation from 2012 to 2014 of 3.606%, [the subsequent increase in the BSAPP between 2012 and 2014] actually amounts to a 1.7% decrease since 2012 in terms of the purchasing power of the [school district's] general funds." [R. Vol. 24, p.3125]. "Even with the increase of the LOB BSAPP cap . . . the total increase in the combined statewide general funds and supplemental general funds . . . is . . . a net loss in purchasing power from 2012 of $65,910,252." [R. Vol. 24, pp. 3125-26].

It is undisputed that S.B. 7's "extraordinary need fund" *subtracted* money from the amount that the districts would have otherwise received. [R. Vol. 136, pp. 1431-32]. Quite clearly, every district's funding levels were reduced by at least .4%. [R. Vol. 136, p.1474]. Further, S.B. 7 singled out districts that were entitled to equalization aid and targeted them (and them alone) for additional cuts to funding. [R. Vol. 140, p.10 (FOF ¶21)]. Those targeted cuts resulted in an average cut in state aid to those districts that exceeds $100 per pupil. *Id.*

[4] The report is available at: http://www.budget.ks.gov/publications/FY2016/FY_2016_Comparison_Report--Updated_9-17-2015.pdf. It is appropriate for this Court to take judicial notice of this information pursuant to K.S.A. 60-409.

The State relies on artificially inflated amounts of total spending on "education" to claim significant increases in funding. *See e.g.*, State of Kansas Comparison Report, *supra* n.4, at p. 60 (claiming a $257 million increase over a 5-year period). Carefully dissecting these alleged "increases" in education funding demonstrates that the monies that actually go to the classroom for education aid have decreased and not increased.



State Aid and Enrollment
(Dollars in Millions)

	FY 2011		FY 2016
Retirement System Payments	$ 235	+ $118	$ 353
Local Option Budget Aid	$ 385	+ $ 65	$ 450
Capital Improvement Aid	$ 96	+ $ 59	$ 155
Capital Outlay Aid	$ 0	+ $ 27	$ 27
Special Education	$ 441	- $ 6	$ 435
General Classroom Aid	$ 2,645	- $ 6	$ 2,639
Total	**$ 3,802**		**$ 4,059**
Statewide Enrollment	454,680	+ 6,420	461,100

See, e.g., "Block grants are a bad recipe," Goossen, Duane (September 16, 2015).[5] Rather, as demonstrated in the comparison chart above, these "increases" are largely attributed to irrelevant increases. Certain components of the State's education budget (including KPERS money, equalization aid, the local option budget, and restricted federal funds) do not provide

[5] The comparison chart, comparing funds in FY11 and FY16, is available at http://realprosperityks.com/goossen-block-grants-are-a-bad-recipe/. The numbers used by Goossen to create the Chart come directly from the State of Kansas Comparison Report, *supra* n.4, at pp. 59-60. The FY2016 "General Classroom Aid" was calculated by performing the following calculation:

Block Grant	$3,457
Plus: Extraordinary Needs Aid	$12
Less: KPERS	$353
Less: LOB State Aid	$450
Less: Capital Outlay Aid	$27
General Classroom Aid	**$2,639**

school districts with money that can be used "to provide adequacy under Article 6." *Gannon*, 298 Kan. at 1237 ("The panel may consider the restrictions on the use of these federal, pension, and other funds and determine that even with the influx of these additional monies the school districts are unable to use them in the manner necessary to provide adequacy under Article 6."). Because the following sources of revenue are not used "to provide adequacy under Article 6," they are properly discounted from consideration when determining the overall adequacy of funding:

1. KPERS: While this Court has suggested that KPERS money could be "a valid consideration because a stable retirement system is a factor in attracting and retaining quality educators," the State made no such arguments in defending the constitutionality of S.B. 7. And, no facts presented by the State support this finding. [R. Vol. 24, pp. 3107-08 (indicating KPERS could benefit local school districts, but – as structured – does not)]. Instead, the facts show that KPERS costs merely "pass-through" a district's budget. [R. Vol. 24, 3101 ("KPERS funding, then and now, involves a pass-through accounting."); R. Vol. 32, pp. 992-93]. KPERS funds are not available to the districts to spend and are not available for use in the classroom. [R. Vol. 32, pp. 992-93]. School districts have no flexibility in how they spend this money. *Id.* KPERS money could not be used to supplant the loss of any money caused by cuts to the base. [R. Vol. 32, pp. 1012-16]. Increases in the amount of KPERS money that "passed through" school districts' budgets in fiscal year 2011 were "an accounting anomaly" that "doesn't have anything to do with offsetting the cuts made on the operating side." [R. Vol. 32, pp. 1036-38]. The Panel properly concluded that, as currently structured, the KPERS fund does not provide

school districts with money that can be used to provide adequacy under Article 6. [R. Vol. 24, pp. 3107-09].

2. Equalization Aid: Additional equalization aid may relieve the district's local taxpayers of some of their obligation to contribute to the district's educational funds, but such aid is not primarily designed to provide more money to the classroom. [R. Vol. 140, pp. 31-32 (FOF ¶¶ 88-89)]. When the State provides more equalization aid to a school district, it does not necessarily increase the amount of money that the school district receives. It simply replaces local money with state money. *Id.* In other words, school districts receive the same total level of funding; all that changes is the source of the funding. *Id.*

3. Local Option Budget in General. The Panel properly found that, as currently structured, the local option budget, including the supplemental general state aid, is not "properly" "included in any measure of the adequacy of the Kansas K-12 school finance formula." [R. Vol. 24, pp. 3107-32]. The evidence "belie[s] any practical, as well as legal, reliance on a LOB as a constitutionally adequate funding source given its statutory funding design is optional and voluntary as to both its existence and in the dollar contribution to be made to it." [R. Vol. 24, pp. 3130].

4. Restricted Federal Funds. Many federal funds are "limited for a particular purpose." For instance, Title I funds and money used for bond and interest, transportation, and food services are not available for use in the classroom. Increased expenditures in these areas do not always mean that the State spent any additional money; thus, these numbers mislead. [R. Vol. 32, pp. 995-96, 1014-15; R. Vol. 33, pp. 1024, 1026; R. Vol. 41, p.2829]. The Panel properly found that, as currently structured, federal funds are not "properly" "included in any measure of

the adequacy of the Kansas K-12 school finance formula." [R. Vol. 24, pp. 3103-04, 3107-09 (as the system is currently structured, federal funds should not be considered "in any test of *state funding adequacy* particularly, *statewide* school funding adequacy")].

No school district has received increased funding under S.B. 7. Any suggestion otherwise should be disregarded.

C. S.B. 7 Violated the Adequacy Component of Article 6 Because it Eliminated the Weightings

S.B. 7 effectively removed the weightings that ensure equal educational opportunities for students that cost more to educate. [R. Vol. 140, p.11 (FOF ¶24); R. Vol. 142, pp. 278-80; R. Vol. 135, p.1412]. These weightings, such as the bilingual and at-risk weightings, ensured that districts with a higher number of disadvantaged students received adequate funding to ensure that those students were provided with the same educational opportunities as other student, *i.e.* – the educational opportunities required by the *Rose* standards. [R. Vol. 140, p.11 (FOF ¶24)]. In other words, the funding formula recognized that it cost more money to develop the *Rose* standards in some students and provided additional funds with which to educate those students. *These weightings no longer exist under S.B. 7*. School districts no longer receive an amount of money specifically tailored to meet the needs of the students they are required to educate. The operation of S.B. 7 ensures that school districts receive funding that is not reasonably calculated to provide for the increased costs of educating these disadvantaged students. [R. Vol. 140, p.11 (FOF ¶25)]. Likewise, S.B. 7 does not calculate funding based on the number of students enrolled, ensuring that school districts do not receiving funding that is reasonably calculated to provide an education for the actual students enrolled in their district. [R. Vol. 136, pp. 1432-34].

The removal of the weightings has significant effects on the funding that a district receives. For instance, Kansas City received *more* funding in FY2015 than it did in FY2014 because of the SDFQPA's reliance on weighted enrollment to calculate a district's general state aid. [R. Vol. 140, p.29 (SOF ¶82)]. Kansas City had 526.5 more FTE students in FY2015 than it did in FY2014. *Id.*; [R. Vol. 143, pp. 2164-78, 2181-88]. Based on the previous formula, Kansas City received additional funding for those additional students, resulting in an increase in funding. *Id.* However, Kansas City received *no* additional funding under operation of S.B. 7 because enrollment increased in FY2016. And, if Kansas City experiences a similar increase in enrollment for FY2017, it will receive *no* additional funding pursuant to S.B. 7. [R. Vol. 140, pp. 33-34 (SOF ¶90-91)]. Because of the removal of the weightings, the amount of money that a school district receives will now be completely divorced from what it costs to educate those students that are more costly to educate and divorced from what it costs to educate *more* students. The State has offered no evidence that removing these weightings was reasonably calculated to have all Kansas students meet or exceed the *Rose* standards.

In sum, knowing that it was already providing an unconstitutional level of funding under operation of the SDFQPA, the State adopted S.B.7 – wholly replacing a dynamic school funding formula with a static block of *fewer* funds.

ARGUMENTS AND AUTHORITIES

I. JUSTICE REQUIRES AN IMMEDIATE REMEDY

A. The Mandatory Nature of Article 6 of the Kansas Constitution Requires Action to Remedy Any Violations of Its Provisions

The Kansas Constitution places an affirmative constitutional obligation upon the Kansas Legislature to "make suitable provision for finance of the educational interests of the state."

KAN. CONST., Art. 6; *Gannon*, 298 Kan. at 1141-42, 1147. The State of Kansas is currently failing to comply with that obligation.

The positive, mandatory nature of Article 6 requires that the Kansas courts take action to remedy any violations of its provisions. This concept of a positive duty is not a novel concept; it is inherent in the concept of "checks and balances" in the American system familiar to any civics student. And, Article 6's positive duty demands a remedy even if it means encroaching upon the Legislature's appropriations power. Plaintiffs fully expect that the State will – as it has in all aspects of this litigation – continue to hide behind its Article 2 appropriations powers to justify its failure to comply with Article 6 of the Kansas Constitution. Given that the remedy in the Panel's June 2015 Order does not violate Article 2, does not encroach on the Legislature's appropriations power, and does comply with the Kansas Supreme Court's Mandate, it is unnecessary for this Court to determine whether Article 6 requires the Court to impose upon the Legislature's appropriations power. Yet, the State cannot use its Article 2 powers to violate Article 6 of the Kansas Constitution. Allowing the State to preserve the powers vested to the Legislature by Article 2 of the Constitution while completely repudiating Article 6's commands regarding how that power must be exercised would give the Legislature absolute discretion regarding school funding. This would violate the very language of Article 6, which "communicates a clear intention not to give [the Legislature] absolute discretion in the finance of schools." *Gannon*, 298 Kan. at 1144 (emphasis added).

Plaintiffs do not seek to take away any of the Legislature's powers, including its power to appropriate. Although ordinarily it is not the Court's role to direct the Legislature on how to appropriate, how to levy taxes, or how to spend the funds it collects, this case is the exception.

The Kansas Constitution provides virtually no mandatory state programs or services, except for the education of Kansas public schoolchildren. The Legislature still has authority to determine how to provide that funding – if it deems a tax increase or restoration of taxes inappropriate to adequately fund education – it has the authority to make that decision. It does not, however, have the authority to fund education in a manner that does not comport with Article 6 of the Kansas Constitution. Nor does Governor Brownback have that authority. Article 6 represents the will of the people as enacted through the demanding constitutional amendment process. Passage of the education amendment required a two-thirds vote by both houses of the Kansas legislature and a majority vote of the people of Kansas. *See* KAN. CONST., Art. 14. The State seeks to thwart the will of the people based solely on a majority vote of the current Legislature in the exercise of its Article 2 appropriations power; this would allow the shifting whims of one or two legislators voting on a budget bill to outweigh the will of Kansans as enshrined in their properly amended Constitution. Such a result is untenable. As this Court previously held, "We conclude from this constitutional assignment of different roles to different entities that the people of Kansas wanted to ensure that the education of school children in their state is *not entirely dependent upon political influence or the voters' constant vigilance.*" *Gannon*, 298 Kan. at 1159 (emphasis added).

The rule of law requires that Article 6's constitutional mandates be upheld above all the shifting changes inherent in the democratic political process. From the Magna Carta to the passage of the United States' Bill of Rights to the (much later) enactment of Article 6 of the Kansas Constitution, obedience to the mandates of the people as enshrined in duly-enacted constitutions have been central to the concept of ordered liberty. As the Panel stated in its

earlier decision, and as quoted approvingly by this Court, "[m]atters intended for permanence are placed in constitutions for a reason – to protect them from the vagaries of politics or majority." *Gannon*, 298 Kan. at 1159.

As the Panel and this Court have repeatedly found, the State has been derelict in fulfilling the positive duty imposed upon it by Article 6 of the Kansas Constitution. The State must now be held accountable and must be required to comply with the Kansas Constitution. Article 6 demands that these violations be remedied. And, for the reasons identified below, the violations should be remedied *immediately*.

B. The Unconstitutionalities Present in the Current System Have Existed for Too Long and Must be Remedied *Immediately*

The funding of Kansas public education has remained unconstitutionally funded for too long. With the exception of the brief two-year period in which the State was judicially-required to increase funding to education immediately following *Montoy*, Kansas public education has been underfunded for at least a decade. Justice *requires* an immediate remedy to this continued unconstitutionality. This Court must take *immediate* action to remedy the unconstitutionalities that exist in the current funding system.

In March of 2014, this Court concluded that the State of Kansas was not meeting the affirmative obligation imposed upon it by Article 6 to provide an equitably funded education. It therefore ordered that the inequities be remedied no later than July 1, 2014. [R. Vol. 140, pp. 4-5 (FOF ¶¶1-2)]. *More than a year later*, the inequities that this Court identified remain; no remedy has been adopted, enacted, or even suggested, by the State. And, in purporting to cure those inequities, the State has amped up its continued efforts to thwart compliance with the Kansas Constitution by adopting S.B. 7. To be clear, no one – not even the State – contends

that S.B. 7 is a cure for the State's unconstitutional funding of education; the State's attorney admits that S.B. 7 does not even address the inadequacies found by the Panel. Governor Brownback has further admitted that the two-year period during which S.B. 7 operates is – what he calls – "a timeout in the school finance wars" to allow the Legislature "sufficient time to write a new modern formula." [R. Vol. 142, pp. 1440-46; R. Vol. 135, p.1415 (indicating Ex. 650 was admitted)]. This is particularly troublesome for multiple reasons.

First, there is simply no need to wholly rewrite a new formula. The SDFQPA had existed since 1992. During its existence, the Supreme Court thoroughly evaluated the formula at least six times: in *U.S.D. 229*, in *Montoy I*, in *Montoy II*, in *Montoy IV*, in *Montoy V*, and again when this Court issued its first decision in *Gannon*. These decisions all resulted in the careful vetting and fine-tuning of the formula; a formula that, when fully funded, would arguably provide Kansas students with a suitable education in a manner that this Court suggested was constitutional. But, in 2015, with no reasonable explanation, the Legislature tossed out 23 years of effort and began to study how to re-write the whole formula. Completely re-writing the formula is unnecessary and – given the uncertainty as to when a new formula will be written and whether it will be constitutional – it is certainly not a "remedy" for the unconstitutionalities that this Court has required the State to cure. *See Montoy v. State of Kansas*, 279 Kan. 817, 821, 825-26 (2005) ("Montoy IV") (citing *DeRolph v. State*, 2000 Ohio 437, 728 N.E.2d 993 (2000)) ("A remedy that is never enforced is truly not a remedy.")).

Second, a timeout in providing a constitutional education for Kansas schoolchildren is nothing more than a conscious decision by the State of Kansas to sacrifice the education of Kansas schoolchildren for at least two more years. The State has been on notice that it needs to

constantly monitor the constitutionality of its school finance legislation since 1994 when this Court first held: "The issue of [the suitability of the school finance system] is not stagnant; past history teaches that ***this issue must be closely monitored***." *U.S.D. 229 v. State*, 256 Kan. 232, 258 (1994). This Court reminded the State of its obligation to closely monitor school finance legislation in the *Montoy* litigation in 2003 and 2005. *Montoy v. State*, 275 Kan. 145, 153 (2003) ("Montoy I") (citing *U.S.D. 229*, 256 Kan. at 258); *Montoy v. State of Kansas*, 278 Kan. 769, 771-72 ("Montoy II").

The State has not complied with that obligation. The State is quite aware of its failures in this regard; Plaintiffs first put the State on notice that its funding levels were unconstitutional in June of 2010. [R. Vol. 107, pp. 7087-7134]. In response, the State took no action to cure those unconstitutionalities. But now, after knowingly funding education at unconstitutional levels for at least five years, the State asks for two more years to get it right. And, in doing so, it does not even attempt to explain why it waited until March of 2015 to take what it describes as the "critical first step" to funding education at a constitutional level. *See, e.g.*, State's Brief, p.5 (indicating that the adoption of S.B. 7 in March of 2015 was a "critical first step in developing a new formula"). The State's purported explanation for its decision to adopt S.B. 7 is nothing more than an admission that it has wholly failed to comport with the oft-repeated requirement that it must constantly monitor the constitutionality of the funding. There is no reason that the State's enactment of S.B. 7 should be immune from the requirements of the Kansas Constitution.

Who chooses which generation of Kansas schoolchildren must sacrifice their education in order to allow the Legislature to comply with its obligations and finally adopt a

constitutionally funded formula? According to the State, the Legislature – and the Legislature alone – holds that power. Kansas students deserve more than a few years' worth of a constitutionally-appropriate education nestled in between court cases and cost studies; the Constitution demands more. Yet, year after year, Kansas students are given the same message: we will deal with this "soon." For Kansas students, "soon" cannot come soon enough. For a student who started kindergarten in a public school in Kansas in 2009-2010, a two-year "timeout" means sacrificing all of elementary school and at least a year of middle school before the State even *begins* to fund education constitutionally. Those seniors scheduled to graduate in 2016-17 (the last year of funding provided by S.B. 7) have not benefitted from a constitutionally-funded education since they were in the fifth grade. And, that constitutional education was only provided for two years following *Montoy*, when this Court forced the State to comply with its constitutional obligations.

In the meantime, the State's "timeout" results in school districts receiving *less funding* than the amount that the Panel has already held as unconstitutional, receiving *less funding* than the Kansas Constitution demands, and receiving *less funding* than an amount reasonably calculated to have all students meet or exceed the *Rose* standards. This Court should not allow such a result.

C. The State's Efforts to Escape Review Should be Disregarded

Plaintiffs have presented substantial, competent evidence that S.B. 7 is wholly unconstitutional. *Supra*, at Statement of the Facts. The State asks this Court, in the face of that overwhelming evidence, to take no affirmative action to remedy that unconstitutionality. In fact, the State intends to use this appeal to take a second shot at arguing that these issues are not

justiciable. *See* State's Brief, pp. 43-46. These improper attempts to evade judicial review must be disregarded. This Court has already expended significant effort analyzing and determining that these issues are justiciable and proper for judicial review. *Gannon*, 298 Kan. at 1197. Since these issues are properly before this Court, this Court "is the sole arbiter of the question of whether an act of the legislature [*i.e.* – the enactment of S.B. 7] is invalid under the Constitution of Kansas." *Gannon*, 298 Kan. at 1161. "*However delicate that duty may be, we are not at liberty to surrender, or to ignore it, or to waive it.*" *Id.*

Immediate action is required. It is inherently necessary that this Court take action to cure the unconstitutionalities perpetuated by the State, which the Kansas Legislature willfully refuses to cure itself.

II. THE APPROPRIATE STANDARD OF REVIEW AND ALLOCATION OF BURDEN

The issues before this Court raise mixed questions of fact and law, and a bifurcated standard of review is proper. If the State disputes any of the Panel's findings, the Court should apply a substantial competent evidence standard. *Gannon*, 298 Kan. 1182 (citing *Progressive Products, Inc. v. Swartz*, 292 Kan. 947, 966 (2011)). So long as the Panel's findings are supported by substantial competent evidence and support the Panel's conclusions of law, those findings should stand. *Id.* In reviewing the factual findings, this Court should not reweigh the evidence or assess the credibility of witnesses. *State v. Reiss*, 299 Kan. 291, 296 (2014). And, it should disregard any conflicting evidence or other inferences that might be drawn from the evidence. *Gannon*, 298 Kan. at 1182. The Panel's conclusions of law based on its findings are subject to unlimited review. *Id.* (citing *Progressive Products*, 292 Kan. at 955).

In reviewing the constitutionality of a statute, courts typically begin with a presumption that the legislative action is constitutional. *See e.g, Barrett v. U.S.D. 229*, 272 Kan. 250, 255 (2001). Because of this presumption, it was initially Plaintiffs' burden to prove that the school funding scheme was unconstitutional. However, when Plaintiffs demonstrated that the SDFQPA was unconstitutional as to Article 6 of the Constitution (as this Court found that they did in March of 2014), "the burden of proof [then] 'shifted to the defendants to show that the legislature's action has resulted in suitable provision for the financing of education as required by Article 6, §6.'" *See Montoy IV*, 279 Kan. at 821, 825-26. Here, the Legislature's purported fix for the unconstitutionalities identified in the Court's Mandate is S.B. 7; thus, the Legislature must demonstrate that S.B. 7 results in "suitable provision for the financing of education as required by Article 6, §6." Since Article 6 has two components – adequacy and equity – the State must demonstrate that it is constitutional as to both of those components. It cannot. As Plaintiffs proved in the equity portion of this appeal, S.B. 7 does not meet provide funding that meets this Court's equity test. As demonstrated here, S.B. 7 similarly fails constitutional muster because it does not meet the adequacy component. Because the State has not, and cannot, meet its burden to prove that S.B. 7, its chosen "cure," has "resulted in suitable provision for the financing of education," the Panel's order finding S.B. 7 unconstitutional should be affirmed.

III. THE PANEL HAD AUTHORITY TO ADJUDICATE THE CONSTITUTIONALITY OF HOUSE SUBSTITUTE FOR SENATE BILL 7

On March 26, 2015, Plaintiffs filed a Motion for Declaratory Judgment and Injunctive Relief, seeking an order declaring S.B. 7 unconstitutional because it violated both the adequacy and equity components of Article 6. *Supra*, at Procedural History. On April 30, 2015, the

Kansas Supreme Court invoked the jurisdiction of the Panel and tasked it with considering Plaintiffs' Motion for Declaratory Judgment and Injunctive Relief. *Id.*

The State contends that Plaintiffs were required to amend their pleadings in order to challenge S.B. 7. State's Brief, p. 79. The State offers no legal support for this proposition. And, there is none. As this Court instructed in *Montoy v. State of Kansas*:

> The spirit of our present rules of civil procedure permits a pleader to shift the theory of his case as the facts develop, as long as he has fairly informed his opponent of the transaction or the aggregate of the operative facts involved in the litigation. *Griffith v. Stout Remodeling, Inc.*, 219 Kan. 408 Syl P3, 548 P.3d 1238 (1976). The determination of whether a party's claim is a late shift in the thrust of the case which prejudices the opponent is left to the sound discretion of the trial court. Where such exercise of discretion is questioned on appeal, we must determine whether the opposing party was taken by surprise and, if so, whether it resulted in substantial prejudice to that party. *Boydston v. Kansas Board of Regents*, 242 Kan. 94 Syl. P1, 744 P.2d 806 (1987).

Montoy I, 275 Kan. at 149-150.

Thus, the question here – on appeal – is whether it took the State by surprise when the Panel adjudicated the constitutionality of S.B. 7 and, if so, whether it resulted in substantial prejudice to the State. *Id.* Absent a showing of surprise or unfair prejudice to the State, it would have been an error for the Panel to exclude consideration of Plaintiffs' claims. *Id.* at 150.

The State makes no argument that it was taken by surprise when Plaintiffs shifted their theory of the case from attacking the constitutionality of the SDFQPA to attacking the constitutionality of S.B. 7. Given that the SDFQPA was wholly replaced by S.B. 7, the State should have *expected* that the Plaintiffs would change their theory. And, the "theory" never changed – from the beginning, Plaintiffs have been challenging whether the funding levels are adequate. In the Notice of Claims filed in 2010, Plaintiffs alerted the State that they were challenging "inadequate funding levels that fail to provide equal educational opportunities." [R.

Vol. 107, p. 7087]. The only "change" is that the funding is now being provided by S.B. 7 and not the SDFQPA. Nonetheless, the State had ample notice of that change. The day after S.B. 7 was signed by Governor Brownback, Plaintiffs filed a Motion for Declaratory Judgment and Injunctive Relief, attacking the constitutionality of S.B. 7 and asking that the Panel invalidate it for its violations of both the adequacy and equity components of Article 6. [R. Vol. 130, pp. 16-18; R. Vol. 136, pp. 1424-25]. The State responded on April 13, 2015, substantively arguing that Plaintiffs' requested relief should be denied. [R. Vol. 130, pp. 73-79]. Then, on April 30, 2015, this Court specifically put the State on notice that the Panel had the jurisdiction to consider Plaintiffs' motion and to determine the constitutionality of S.B. 7. [Supreme Court 4/30/15 Order, at p.3; R. Vol. 136, p.1425]. On May 7, 2015, eliminating any chance that the State could have been surprised about this "change in theory," the Panel announced that – consistent with the Supreme Court's Order – it would determine the constitutionality of S.B. 7. [R. Vol. 138, p.9]. Any argument that the State was surprised by the fact that Plaintiffs were challenging the constitutionality of S.B. 7 must be ignored.

Given that the State was not surprised by the shift in Plaintiffs' theories, the Panel was within its sound discretion to consider whether S.B. 7 violated the Kansas Constitution. This is further bolstered by the State's complete inability to show how it was prejudiced by Plaintiffs' shift in focus from SDFQPA (which was rendered non-existent) to its replacement, S.B. 7. *See, e.g.*, State's Brief, pp. 79-80 (failing to demonstrate any prejudice resulting from the Panel's consideration of the constitutionality of S.B. 7). The State cannot make such a showing because no such prejudice exists. And, because it failed to make this argument in its Opening Brief, it should be prevented from doing so in its reply brief.

The Panel did not act outside its authority in adjudicating the constitutionality of S.B. 7. And, as demonstrated below, the Panel correctly concluded that S.B. 7 was unconstitutional. That decision should be affirmed.

IV. THE PANEL APPLIED THE CORRECT TEST IN ADJUDICATING THE CONSTITUTIONALITY OF S.B. 7

This Court explicitly set forth the applicable standard for determining whether the adequacy component of Article 6 is satisfied, stating:

> [W]e now clarify what Article 6 of our constitution requires. We hold its adequacy component is met when the public education financing system provided by the legislature for grades K-12 – through structure and implementation – is reasonably calculated to have all Kansas public education students meet or exceed the standards set out in *Rose*.

Gannon, 298 Kan. at 1170. Regardless of whether the State disagrees with the Court's test, it was the proper test for the Panel to apply in adjudicating the constitutionality of S.B. 7.

Further, the Panel was obligated to actually *apply* this test; not merely presume that the State met the test in adopting S.B. 7, as the State suggests. *See, e.g.* State's Brief, p. 46. The State's argument that the Panel was obligated to presume that the system was constitutional is belied by the actual language of the Mandate. There, this Court specifically instructed the Panel to actually *assess* the constitutionality of the school finance scheme as follows:

- To "*assess* whether the public education financing system provided by the legislature for grades K-12 – through structure and implementation – is reasonably calculated to have all Kansas public education students meet or exceed the standards set out in *Rose* and as presently codified in K.S.A. 2013 Supp. 72-1127." *Gannon*, 298 Kan. at 1172; *see also id.* (discussing what the Panel must "consider" in its "assessment").

- To promptly make findings on the adequacy portion of the lawsuit by "*consider*[ing]whatever evidence it deems relevant." *Gannon*, 298 Kan. at 1199 (emphasis added); *see also id*. at 1170-73 (discussing the Panel's "analysis" and what it must "consider").

- "[T]o make an adequacy determination, complete with findings, *after applying the test to the facts*." *Gannon*, 298 Kan. at 1171 (emphasis added).

The Panel did as instructed and applied the correct test in adjudicating the constitutionality of S.B. 7. If the Panel were required to presume that the system was constitutional, as the State contends, the result would be nonsensical. Consider, for example, the following argument by the State:

> The Legislature had the Kansas assessment test score data, but it also considered the reduction of "gaps" between subgroups on students on the NAEP, SAT, and ACT assessments, and expert opinions to reasonably conclude that its students were doing quite well and that the amount of funding provided to schools was sufficient to ensure the opportunity of a quality education for every child in this state. **The Panel was required to defer to the Legislature's policy judgments and its actual and presumed findings of fact, but it did not.**

State's Brief, p. 58. In other words, the State contends that the Panel, in considering the totality of the overwhelming evidence before it (from which the only logical conclusion is that more funding is needed) was required to defer to the State's irrational, illogical, and incorrect conclusion that further decreasing current funding levels – which have consistently decreased since 2009 despite increasing costs, demands, and enrollment – would meet the adequacy component of Article 6 of the Kansas Constitution. The State's position is untenable. The Panel complied with the March Mandate, and applied the proper test in adjudicating the constitutionality of S.B. 7.

V. THE PANEL CORRECTLY CONCLUDED THAT S.B. 7 VIOLATES THE ADEQUACY COMPONENT OF ARTICLE 6 OF THE KANSAS CONSTITUTION

The substantial, competent evidence before the Panel and this Court demonstrates that S.B. 7 is not *reasonably calculated* to have all Kansas public education students meet or exceed the *Rose* standards. *Supra*, at Statement of the Facts. The State does not dispute this; it never

even argues that S.B. 7 complies with the *Rose* standards-based test articulated by this Court. It does not. Rather, as counsel for the State has admitted, S.B. 7 "was not intended to" address "the adequacy concerns" raised by the Panel. [R. Vol. 139, p.372]. The Panel reached the correct conclusion in determining that S.B. 7 was unconstitutional. That decision should be affirmed for the following reasons:

A. The Legislature Adopted S.B. 7 – Which Further Cut the Funding Provided to Kansas School Districts – Knowing that Kansas Public Schools Were Already Being Funded at An Unconstitutional Level and Perpetuating Those Inadequacies

Following the *Gannon* trial, the State was well aware of the dismal state of education that it had caused when it reduced funding for political reasons. In January of 2013, the Panel announced that "there is simply no reliable evidence advanced by the State that indicates that a reduction in funds available to the K-12 school system" would result in compliance with the requirements of Article 6. [R. Vol. 14, p. 1877]. In December of 2014, the Panel repeated this warning after considering the updated evidence, stating:

> Our conclusion [following the 2012 trial] was that the current funding levels, having devolved to pre-*Montoy* levels, could not be sustained, that is, that *no evidence* justified a conclusion that what was now less funding could somehow equate to equal or more in supporting the outcomes demanded by the K.S.A. 72-1127(c) standards and the study experts opinions.
>
> Accordingly, we found the Kansas K-12 school financing formula constitutionally inadequate in its present failure to implement the necessary funding to sustain a constitutionally adequate education as a matter of current fact as well as the precedent facts that supported the *Montoy* decisions. That is still our opinion.

[R. Vol. 24, p.3065 (internal citations omitted)].

In response to both of these findings by the Panel, the State adopted S.B. 7, *which further reduced the money provided to fund K-12 public education*. *Supra*, at Statement of the

Facts §II.A.-B. In doing so, it provided no evidence that *less* funding could somehow cause an already inadequate level of funding to become adequate.

The State's adoption of S.B. 7 did nothing to cure the existing constitutional inadequacies that the Panel found to exist in December of 2014. Rather, as the Panel found, "SB7, by its failure to provide funding consistent with the needs found in our *Opinion* of December 30, 2014 and by freezing the inadequacy we found existing through FY2015 for FY2016 and FY2017, also stands, unquestionably, and unequivocally, as constitutionally inadequate in its funding." [R. Vol. 136, pp. 1473-74].

B. S.B. 7 Was Not Adopted to Address the Actual Costs of Funding an Education in Kansas

While this Court has concluded that the Legislature's failure to consider the actual costs of funding public K-12 education in Kansas does not necessarily render the funding scheme unconstitutional, the Court has made clear that "actual costs remain a valid factor to be considered during application of our test for determining constitutional adequacy under Article 6." *Gannon*, 298 Kan. at 1170. Thus, it is still imperative to determine whether the Legislature considered the actual costs in analyzing the constitutionality of the funding scheme adopted. *See, e.g.*, *Montoy II*, 278 Kan. at 775 (identifying one factor that led to finding of unconstitutionality as "the financing formula was not based upon actual costs to educate children but was instead based on former spending levels and political compromise . . . [which] distorted the low enrollment, special education, vocational, bilingual education, and the at-risk student weighting factors").

The importance of considering "actual costs" derives from the reality that there are very few situations in which the Legislature could adopt a funding scheme that is both completely

divorced from the actual costs of funding education and constitutionally adequate. [R. Vol. 24, pp. 3058-60 (explaining how the analysis of whether the State is funding an education structured and implemented to have all students meet the *Rose* standards necessarily involves an analysis of what it would cost to do so); R. Vol. 97, pp. 6128-49] While this Court gave two potential scenarios in which a constitutionally adequate system *could* result without consideration of actual costs (*i.e.*, accidentally or for worthy non-cost-based reasons), neither of those circumstances are present here. The evidence clearly demonstrates that S.B. 7 does not meet the adequacy component of Article 6.

The State does not even attempt to argue that it considered – or even estimated – the actual costs of providing an adequate education in adopting S.B. 7. There simply is no evidence that the Legislature's decision to freeze funding levels into place was reasonably calculated to produce *any* educational outcome. The State has repeatedly admitted that it knowingly and intentionally adopted S.B. 7 to provide less than full funding for the equalization mechanisms. [R. Vol. 140, pp. 9-10 (FOF ¶19)]; *see also* R. Vol. 130, p.76. And, in its brief, it admits that the goal of S.B. 7 was not to fund at an adequate level, but rather to establish a funding system that is "sustainable, stable, and predictable." State's Brief, p. 5. These are the types of "political and other factors not relevant to education" that have been previously condemned by this Court. *Montoy II*, 278 Kan. at 775.

The lack of a cost-based justification for adopting S.B. 7 is compounded by the fact that the levels of funding that were frozen into place (the amount of funding that a district would receive under the SDFQPA for FY2015) were arbitrarily set and divorced from the actual costs of providing an education. The funding levels that the Legislature chose to freeze in place were

not levels that were deemed to be adequate; it was a funding level set for political reasons based on "what the Legislature decided it could afford." *Supra* Statement of the Facts §I.A. The State did not consider the costs associated with providing a constitutional education when it began making the cuts that led to the filing of this lawsuit. [R. Vol. 30, pp. 2467-70; R. Vol. 22, pp. 755, 777-78]. At no time since the Plaintiffs filed their initial Complaint has the State made any effort to ascertain the actual cost of delivering an adequate education to Kansas students. *See, e.g.*, R. Vol. 14, p.1775; R. Vol. 13, pp. 1631-32; R. Vol. 27, p.2112 (stating that no one in the Legislature has determined the actual cost of delivering an education that meets the college readiness requirements, Common Core requirements, and the requirements of the state assessments). In fact, the State admits that the previous funding levels were the result of "bureaucratic games." State's Brief, p.7.

Moreover, there is simply no evidence that the cost of educating Kansas students has decreased; to the contrary, since *Montoy*, the undisputed evidence is that the costs of educating Kansas students has only increased. [R. Vol. 14, pp. 1792-93; R. Vol. 13, p.1652; R. Vol. 19, p.180; R. Vol. 20, pp. 253-55, 263; R. Vol. 21, p.561; R. Vol. 22, p.794; R. Vol. 23, pp. 1057-58, 1067-68; R. Vol. 25, p.1551; R. Vol. 27, pp. 2051-52; R. Vol. 30, p.2462; R. Vol. 31, pp. 2800, 2857-58, 2899-2900; R. Vol. 32, pp. 2937-38, 2997-98, 3021; R. Vol. 42, p.762; R. Vol. 50, p.1787; R. Vol. 79, p.5389]. This caused the Panel to conclude that "there is simply no reliable evidence advanced by the State that indicates that *a reduction in funds available* to the K-12 school system" would result in compliance with the requirements of Article 6. [R. Vol. 14, p. 1877]. Likewise, the evidence shows that the State has forced Kansas school districts to meet the increasing demands associated with educating students without increasing the

resources available to them. [R. Vol. 26, pp. 3331-34 (SOF ¶115-126, 128); R. Vol. 127, pp. 30:19-32:2; 49:3-51:14, 78:7-11, 82:11-19; R. Vol. 126, pp. 15531, 15541, 15543-44, 15548, 15576; R. Vol. 37, p.2084; R. Vol. 53, p.855; R. Vol. 54, pp. 924-26; R. Vol. 55, pp. 1072, 1092; R. Vol. 56, pp. 1126, 1141, 1162-77; R. Vol. 75, pp. 3275, 3287-3313; R. Vol. 29, pp. 131-34; R. Vol. 30, pp. 393, 453; R. Vol. 92, p.5594; R. Vol. 32, 792-93, 802-806; R. Vol. 36, p.1806].

The State took an unconstitutional level of funding, resulting from political choices and "bureaucratic games," and froze that level of funding into place for the next two years (again, calling S.B. 7 a "freeze" is conservative – while purporting to hold school districts harmless, it actually reduced funding to only the poorest school districts and took .4% of each district's allotted funds). Freezing unconstitutional levels of funding into place does nothing to change the constitutionality of those amounts and did nothing to change the fact that the State never evaluated, considered, or asked what it would reasonably cost to have all Kansas students meet or exceed the *Rose* standards.

C. There is No Evidence Before this Court that S.B. 7 is Reasonably Calculated to Have All Kansas Schoolchildren Meet or Exceed the *Rose* Factors

Under the *Rose*-based test, the Panel was required to assess whether the school finance system – through structure and implementation – was reasonably calculated to have all Kansas public education students meet or exceed the *Rose* standards. In defending its position on appeal, the State has offered no evidence that S.B. 7 was reasonably calculated to have all students meet or exceed the *Rose* standards. While the State contends that it made an informed, rational decision to adopt S.B.7, it offers no credible evidence in support of this position. There

is no reasonable interpretation of the evidence that would allow the State to draw that conclusion. Instead, the evidence demonstrates:

(1) The State began making funding cuts in 2009 for political reasons. *Supra*, at Statement of the Facts §I.A.

(2) Following those cuts, school districts were forced to eliminated the services, programs, and staff that were in place to provide students with an education that meets the *Rose* standards. *Supra*, at Statement of the Facts §I.B.

(3) All of these eliminated services, programs, and staff were necessary to have students meet or exceed the *Rose* standards. *Supra*, at Statement of the Facts §I.C.

(4) All of these services, programs, and staff were eliminated for affordability reasons. *Supra*, at Statement of the Facts §I.C.

(5) The elimination of these services, programs, and staff negatively impacted student achievement, as measured by various outputs. *Supra*, at Statement of the Facts §I.D.

(6) S.B. 7 froze the funding levels into place, thereby freezing these cuts into place and provided no additional resources to reverse either the cuts or the decreases in student achievement. *Supra*, at Statement of the Facts §II.

The Kansas Constitution not only requires funding education at adequate levels, but it also "imposes a mandate that our educational system cannot be static or regressive but must be one which "advances to a better quality or state." *Gannon*, 298 Kan. at 1146; *Montoy II*, 278 Kan. at 773. Even if the State had not reduced funding levels, but had actually frozen them into place, such a static system does not pass constitutional muster. This is especially true given that

the reduced funding has caused static and/or regressive achievement. *Supra*, at Statement of Facts, §I.D.

In addition to freezing the unconstitutional levels of funding into place, the State also completely removed the weightings from the funding system. *Supra*, at Statement of the Facts §II.C. This further violated the adequacy component of Article 6 of the Kansas Constitution because "[t]his method of state aid distribution adopted by House Substitute for SB7 . . . can find no accepted factual basis or any principle that has ever been approved by any court or supported by any expert or educator for determining the appropriate financing of Kansas K-12 schools." [R. Vol. 136, p.1479]; *see also Montoy IV*, 279 Kan. at 839 ("[A]lthough H.B. 2247 does provide a significant funding increase, it falls short of providing constitutionally adequate funding for public education. . . . At oral arguments, counsel for the State could not identify any cost basis or study to support the amount of funding[,] its constellation of weightings and other provisions, or their relationships to one another.").

Even on appeal, the State makes no attempt to defend the complete removal of the weightings system from the school finance formula. It cannot. The weightings are an essential component of the school finance formula. Historically, this Court has recognized the necessity of these weightings; it has not treated favorably the State's attempts to alter these built-in weightings when those attempts had no "cost basis" to support the alteration. *Montoy IV*, 279 Kan. at 831-833, 839. The State makes no effort to demonstrate that removing the weightings was reasonably calculated to have all Kansas students meet or exceed the *Rose* standards. The Panel's determination that S.B. 7 is unconstitutional should be affirmed.

VI. THIS COURT SHOULD RETAIN JURISDICTION UNTIL THE STATE WHOLLY COMPLIES WITH ITS CONSTITUTIONAL OBLIGATIONS

The State has been unwilling to meet its burden under the Constitution for almost as long as the constitutional obligation has existed. And, in the face of yet another example of the State abdicating its constitutional duty, it suggests that this Court should overlook any constitutional deficiencies with S.B. 7. The State's continual maneuvering to avoid a court determination of inadequate funding has exacerbated funding problems and created a never-ending, unconstitutional status quo: any Constitutional and statutory duties are avoided and the situation continues for each successive generation of Kansas kids. [R. Vol. 96, p.7090]. The State has demonstrated a clear pattern of making representations to the Court in order to seek dismissal of a school funding case and then defaulting on those commitments. To finally achieve constitutionality, it is imperative that this Court retain jurisdiction over this matter until the State wholly fulfills its constitutional obligations.

VII. THE PANEL DID NOT ERR IN ORDERING A SPECIFIC, CONSTITUTIONAL REMEDY FOR THE STATE'S VIOLATION OF ARTICLE 6 OF THE KANSAS CONSTITUTION; IN FACT; A SUPPLEMENTAL ORDER REQUIRING THE STATE TO INCREASE FUNDING IS APPROPRIATE BASED ON THE PANEL'S FINDINGS

This Court should lift its July 30, 2015 Stay of the Panel's June 26, 2015 Order. But, as discussed below, this Court should also enter a supplemental order requiring the State to fund a constitutionally adequate education at a level consistent with the average of the cost studies already performed by the State. While the Panel's Order – including its remedy – was supported by competent factual findings and constitutional, the evidence demonstrates that Legislature has *underfunded* school finance in Kansas for years, as the Panel has now found twice. In the face of those findings, the State refused to adopt a constitutional school funding

system and instead enacted S.B. 7. As a result, the Panel – consistent with the Mandate, the separation of powers doctrine, and the Kansas Constitution – was required to take action to remedy the State's unconstitutional act. The Panel did so, and paid careful attention to issues related to the separation of powers, as this Court instructed. The State can identify no basis for invalidating the Panel's remedy and it should stand.

But in addition, the inadequate funding found by the Panel and demonstrated by the evidence presented throughout this case must be remedied *now*. In order to determine an appropriate remedy, this Court should look to the evidence provided at trial which showed that even if the SDFQPA had been fully funded, it would not have provided sufficient funding to meet this Court's *Rose*-based adequacy test for 2012-2013 or 2013-2014. While the SDFQPA called for a BSAPP of $4,492, the Legislative Post Audit study, discussed below, demonstrates that the base would need to have been set at $6,142 in 2012-13; and $6,365 in 2013-14 in order to meet the actual costs of providing an adequate education. [R. Vol. 20, p. 2619 (SOF ¶156); R. Vol. 89, p. 5386]. The A&M study (also discussed below), would have set the BSAPP at $5,965 for the 2011-2012 school year. [R. Vol. 20, p. 2619 (SOF ¶153); R. Vol. 89, pp. 5364-88; R. Vol. 83, p. 4261 (showing 2011 inflation rates used to calculate inflation on the A&M base for 2011-12 school year)].

This evidence has been found by the Panel to represent reasonable estimates of the actual cost of providing an education that meets this Court's *Rose*-based adequacy test. [R. Vol. 20, p. 2617 (SOF ¶146); R. Vol. 35, pp. 1611-12 (regarding A&M); R. Vol. 37, p. 2051 (regarding LPA)]. This Court should therefore utilize these cost-estimates (appropriately adjusted for inflation) to determine and set an appropriate floor for the base for the 2015-2016

school year and beyond to ensure that the State complies with this Court's adequacy test and the Kansas Constitution.

Thus, while the Panel's findings and remedy appropriately focused on the harms caused by the Legislature's passage of S.B. 7, a law that enshrined the years of underfunding on a go-forward basis, a supplemental remedy that sets a floor for state aid that meets this Court's *Rose*-based adequacy test is necessary to remedy the continuing constitutional inadequacies in school funding. As shown below, that floor should be no lower than a Base State Aid Per Pupil of $5,944. Kansas students can no longer be asked to be content with a BSAPP of $4,492 that all available evidence demonstrates has been inadequate for over a decade.

At a minimum, should this Court, *for any reason*, reject the Panel's remedy set forth in its June 26, 2015 Order, justice requires that this Court enter an immediate order granting Plaintiffs' relief from S.B. 7, which is wholly unconstitutional, thereby reinstating the SDFQPA.

A. The State Should Be Required to Fund Education at a Level no Lower Than a Base State Aid Per Pupil of $5,944.

Given the need for immediate relief in this matter to rectify the unconstitutionally inadequate education Kansas schoolchildren have received for years, this Court should require that the State fund education at a level no lower than a base state aid per pupil of $5,944. The State has commissioned several studies regarding the costs of providing a suitable education to Kansas students. [R. Vol. 20, p. 2617 (SOF ¶146); R. Vol. 47, pp. 230-31(commissioning the Legislative Post Audit (LPA) study); R. Vol. 47, p. 232 (commissioning the Augenblick and Myers (A&M) study); and R. Vol. 47, pp. 233-34 (commissioning the 2010 Commission)]. Again, this Court gives particular weight to these cost estimate studies in its "evaluation of a

remedy." *Gannon*, 298 Kan. at 1163; *Montoy IV*, 279 Kan. at 844. This is largely because these cost studies, and their updates, were reasonable estimates of the actual cost of providing a suitable education, at the time they were conducted. [R. Vol. 20, p. 2617 (SOF ¶146); R. Vol. 35, pp. 1611-12 (regarding A&M); R. Vol. 37, p. 2051 (regarding LPA)]. Because these cost studies provide this Court with reasonable information regarding how much it costs to provide an education that meets the *Rose* factors, this Court should find the cost estimates to be a reasonable basis for fashioning an appropriate remedy. *See Montoy IV*, 279 Kan. at 844 ("we accept [the A&M study] as a valid basis to determine the cost of a constitutionally adequate public education in kindergarten through the 12th grade."). The following evidence further supports this conclusion:

In 2001, the Legislative Coordinating Council was charged with "provid[ing] for a professional evaluation of school district finance to determine the cost of a suitable education for Kansas children." [R. Vol. 20, p. 2617 (SOF ¶147); R. Vol. 47, p. 232]. As a result, the Augenblick and Myers study was conducted. [R. Vol. 20, p. 2617 (SOF ¶147); R. Vol. 35, pp. 1611-12].

The A&M study concluded that the base state aid should be raised to a level that would be equivalent to $4,650 in 2000-01. [R. Vol. 20, p. 2618 (SOF ¶149); R. Vol. 89, p. 5374]. In 2005, Schools for Fair Funding, Inc. requested that Augenblick, Palaich and Associates (APA) (formerly A&M) update the A&M study. [R. Vol. 20, p. 2618 (SOF ¶150); R. Vol. 83, pp. 4249-51; R. Vol. 35, pp. 1626-27]. The A&M study was updated based on CPI. [R. Vol. 20, p. 2618 (SOF ¶150); R. Vol. 35, pp. 1626-27; R. Vol. 83, pp. 4252-53]. Based on that update,

APA calculated an updated base cost of $4,806 for the 2004-05 school year. [R. Vol. 20, p. 2618 (SOF ¶151); R. Vol. 83, pp. 4254-57; R. Vol. 35, pp. 1626-28].

APA again updated its original study in September 2011 and October 2011. [R. Vol. 20, p. 2618 (SOF ¶152); R. Vol. 83, pp. 4258-60, 4262-75]. Therein, APA concluded that the 2000-01 base cost of $4,550 would be $5,738 when adjusted for inflation. [R. Vol. 20, p. 2618 (SOF ¶152); R. Vol. 83, p. 4259, 4262-4276]. Based on those previous updates, it can be estimated that the A&M base would need to be set at **$5,965 for the 2011-12 year.** [R. Vol. 20, p. 2619 (SOF ¶153); R. Vol. 89, pp. 5364-88; R. Vol. 83, p. 4261 (showing 2011 inflation rates used to calculate inflation on the A&M base for 2011-12 school year)].

In 2005, the LPA was charged with conducting "a professional cost study analysis to estimate the costs of providing programs and services required by law." [R. Vol. 20, p. 2619 (SOF ¶154); R. Vol. 47, p. 230]. The study allowed for the use of historical data and expenditures, if they used "a reliable method of extrapolation." *Id.* Ultimately, the study did use historical spending data consistent with the statute. [R. Vol. 20, p. 2619 (SOF ¶154); *See* R. Vol. 81, pp. 3953, 3999]. They specifically did so to avoid the appearance that LPA was suggesting the State should supplant state funds with federal funds. [R. Vol. 81, p. 3953].

The LPA study concluded the base should be increased to $4,167 for 2005-06 and to $4,659 for 2006-07. [R. Vol. 20, p. 2619 (SOF ¶155); R. Vol. 89, p. 5386]. In 2006, the LPA projected costs out to 2013-14 in 2006-07 dollars. *See* R. Vol. 80, pp. 3898-99. The estimates indicated that the base would need to be $5,012 in 2007-08; $5,239 in 2008-09; $5,466 in 2009-10; $5,695 in 2010-11; $5,922 in 2011-12; **$6,142 in 2012-13; and $6,365 in 2013-14.** [R. Vol. 20, p. 2619 (SOF ¶156); R. Vol. 89, p. 5386].

The Panel made a factual finding that these studies were valid and reliable, stating,

> [W]e have scrutinized both studies, but particularly, focused on the study consultants recommendations since they were, in fact, the only demonstrated experts. We have considered their reports and accepted them, after review, as valid. Properly viewed, both are quite compatible, each one supportive of the other. . . . Certainly, the recommendations reflected by the cost studies could support a finding for a higher value for the BSAPP . . .

[R. Vol. 20, p. 2621 (SOF ¶164); R. Vol. 14, pp. 1828, 1869, 1957-58]. **The average of these reasonable cost studies is a base of $5,944.** [R. Vol. 20, p. 2622 (SOF ¶165); R. Vol. 90, p. 5390 (A&M recommendation for FY2012 was $5,965 and LPA recommendation for FY2012 was $5,922, the average of which is $5,944))]. Thus, in order to cure the constitutional inadequacies due to the State's failure to fund the base at an appropriate level during the pendency of Plaintiff's lawsuit, this Court should find that this average base is an appropriate measure of what it costs to fund an education that meets the *Rose*-based test and order the State to fund education at a level no lower than a base state aid per pupil of $5,944. [R. Vol. 20, p. 2622 (SOF ¶166)].

B. The Panel Did Not Violate the Separation of Powers Doctrine

The State has, throughout this litigation, repeatedly attacked the Panel and this Court for supposedly violating the separation of powers doctrine; in fact, it makes this accusation every time any court gives the Legislature direction. The State's brief wholly fails to challenge the Panel's remedy on the grounds of separation of powers. Instead, the State concedes that the remedy is appropriate. However, should the State attempt to untimely raise this separation of powers argument in its reply, it should ring hollow. The Kansas Constitution does not provide the Legislature the power to maintain and preserve all authority and discretion for itself with regard to the amount of money spent on public education in Kansas. *Gannon*, 298 Kan. at 1144

("The 1966 legislature's insistence on keeping 'suitable' to specifically modify 'provision' communicates a clear intention not to give itself absolute discretion in the finance of schools."). The separation of powers doctrine is designed to prevent such a result. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *Gannon*, 298 Kan. at 1137 (citing *Van Sickle v. Shanahan*, 212 Kan. 426, 445 (1973)). This Court should not allow the Legislature to accumulate all power regarding the funding of Kansas education when the Constitution explicitly dictates otherwise.

The Panel, consistent with its constitutional duty to review the Legislature's actions and consistent with the Mandate, found that the State was failing to comply with Article 6 of the Kansas Constitution. Pursuant to the Mandate, the Panel then entered an Order that sought to reconcile the Legislature's Article 2 appropriations power with the positive duty imposed on the use of that power by Article 6. This Court should uphold the Panel's Order and not allow the State to ignore the Mandate simply because this current Legislature would prefer to act unfettered by the positive duties imposed on it by the people of Kansas in their Constitution.

C. The Panel's Order Respected the Non-Severability Clause Adopted By the Legislature in S.B. 7 And Should Be Enforced

The State will likely argue that the Panel's suggested remedy, which includes an injunction against the enforcement of certain sections of S.B. 7 and the reinstatement of SDFQPA's "weightings," cannot act to "automatically reinstate the repealed statutes." *See, e.g.*, R. Vol. 130, pp. 1479-1502. Presumably, the State will "sound the alarm" and tell this Court that affirming the Panel's remedy will result in an "Armageddon-like" scenario. But, this Court's legal precedents lead to the opposite result: enjoining S.B. 7 in the manner set forth in

the Panel's Order results in the reinstatement of the SDFQPA, as amended by H.B. 2506. In *Sedlak v. Dick*, 256 Kan. 779 (1995), the Kansas Supreme Court restated this conclusion, which had first been reached in 1948:

> Where a legislative act expressly repealing an existing statute, and providing a substitute therefor, is invalid, the repealing clause is also invalid unless it appears that the legislature would have passed the repealing clause even if it had not provided a substitute for the statute repealed.

256 Kan. at 805 (citing *City of Kansas City v. Robb*, 164 Kan. 577 (1948) and *State ex rel. Stephan v. Thiessen*, 228 Kan. 136 (1980)).

Thus, for the "Armageddon-like" scenario to play out, the State must prove that the Legislature would have wanted the entire LOB and capital outlay systems abolished, even without providing any substitute for those earlier provisions. Given the centrality of the State's recent reliance on local funding for the schools, that proposition is absurd. The situation is analogous to that examined by this Court in *Topeka Cemetery Ass'n v. Schnellbacher*, 218 Kan. 39 (1975). In that case the Court found that the changes made by the law, which related to a Kansas law enforcement training center, dealt primarily with its funding. The Court found that "we cannot conclude that the legislature would have passed the repealing clauses if it had not provided substitutes for such statutes. Under such circumstances, the repealing clauses are also invalid." *Id.* at 45. Indeed, the Supreme Court reached the same conclusion in *Sedlak*, finding that there was no question that the legislature would not have repealed certain workers compensation statutes "if it had not provided a substitute for the repealed statutes. Thus, it follows that the repeal . . . is invalid, and these two statutes are still in full force and effect as they existed prior to the attempted . . . amendments." *Sedlak*, 256 Kan. at 805.

The State simply fails to recognize the effect of the Panel's Order regarding S.B. 7, although it is straightforward: (1) S.B. 7 is unconstitutional and invalid; and (2) the severability clauses in S.B. 7 prove that the Legislature would not have intended to repeal the SDFQPA without providing a substitute. It is simply not credible that the State would have repealed the SDFQPA without providing a substitute school finance system (which it is constitutionally required to provide). [R. Vol. 140, p.36 (FOF ¶¶105-06)]. Under the clear precedent set forth in *Sedlak* and the other cases cited by the State, if S.B. 7 is invalid, the repeal of the SDFQPA is also invalid and the provisions of the SDFQPA "are still in full force and effect as they existed prior to the attempted … amendments." *Sedlak*, 256 Kan. at 805. Thus, the Panel's Order stands in conformity with this Court's precedents and should be enforced.

VIII. NONE OF THE STATE'S ARGUMENTS DICTATE REVERSAL

In its brief, the State makes twenty-one arguments as to why this Court should reverse the Panel's decision. None of those arguments support reversal.

A. State's Argument No. 1: The Legislature Made an Informed Judgment on What is Required to Make Suitable Provision for Financing of the Public Schools

There is no evidence in support of the State's argument that it made an informed judgment when it adopted S.B. 7. That bill, described as "a model of poor lawmaking," was hastily put together, released on a Friday evening, scheduled for hearing on a Monday morning, and forced through the House via a two hour final-action vote (only after a state plane was deployed in an attempt to find a "yes" voter). [R. Vol. 130, pp. 12, 24]. Nonetheless, whether the State made an informed decision when it adopted S.B. 7 is not the proper measure of whether S.B. 7 complies with Article 6 of the Kansas Constitution. Therefore, even if the

decision was an "informed" one, the Legislature's alleged good intentions do not support reversal of the Panel's decision.

B. State's Argument No. 2: School Spending in Kansas is at Record High Levels

Under the operation of S.B. 7, school districts are receiving less funding and that funding is not designed to have their students meet or exceed the *Rose* standards. *Supra*, Statement of the Facts §II.A.-B. No school district, including the Plaintiff School Districts, will receive *more* money under the operation of S.B. 7. *Id.* Nonetheless, whether spending is at record high levels is not the test for determining the adequacy of funding under the Court's *Rose*-based test. "[T]otal spending is not the touchstone for adequacy." *Gannon*, 298 Kan. at 1237.

Likewise, this Court should reject the argument that funding levels are necessarily constitutional because education funding represents the majority of the expenditures from the State General Fund or is higher than it has been in the past. By comparing only total spending, the State presumes that the cost of providing an education has remained the same. As Plaintiffs have proven and the evidence demonstrates, that is not the case. Focusing only on "total spending" fails to take into account factors that would necessitate the State spending an increased amount on education, such as increased demands, inflation, increased enrollment, etc.

Even if the State could somehow establish that funding had increased (it cannot), "total spending is not the touchstone for adequacy." *Gannon*, 298 Kan. at 1237. It is *expected* that – in the face of the rising costs of education (not to mention inflation) – the State will spend more money on education each year. Obviously, as demands and enrollment increase, it costs more

money to educate more students. Just because the State allegedly spends more money on education each year does not mean that it is meeting the adequacy component of Article 6.

C. State's Argument No. 3: Spending on Instruction and Operation Has Increased, Both in the Aggregate and Per Pupil

Again, "total spending" is not the applicable test. *Gannon*, 298 Kan. at 1237. And, the State's factual assertion that spending has increased is false. *Supra* Statement of the Facts §II.B. This argument should be disregarded.

D. State's Argument No. 4: All Kansas Schools Are Subject to Rigorous Accreditation Standards, and Each and Every Kansas School Presently is Accredited

Ignoring this Court's adequacy test altogether, the State argues that S.B. 7 is constitutional because there is no evidence that any school district could not satisfy accreditation requirements. State's Brief, p. 23. But, accreditation requirements only look to inputs, *i.e.* - the structure of the system. This Court should not allow the State to supplant the *Rose*-based test with accreditation standards.

Based on nothing more than administrative regulations and Board "standards," the State urges this Court to find that it is in compliance with Article 6 of the Kansas Constitution. At most, the statutory language can arguably be said to provide a "structure" for an education that meets the *Rose* standards. But, funding levels are so low that the structure cannot be *implemented*. *See Gannon*, 298 Kan. at 1169. The State can point to no evidence in the record that that standards were implemented, funded, or even met. To the contrary, this Court has already upheld a factual finding regarding Plaintiffs' "failure to meet some of the State's accreditation requirements." *Id.* at 1130.

Moreover, as this Court, and the *Rose* standards acknowledge, a constitutional school finance formula must be funded to assure "outputs." *Montoy IV*, 279 Kan. at 843. "[O]utputs are necessary elements of a constitutionally adequate education and must be funded by the ultimate financing formula adopted by the legislature." *Id.* (emphasis added). This requirement comes directly from the language of Article 6, §1 of the Kansas Constitution. *Id.* A system that only considers "inputs," such as the cost of allowing all schools to be accredited, ignores outputs and "is doomed to be incomplete." *Id*. Thus, while accreditation standards are relevant, simply meeting those standards does not dictate constitutional compliance. After all, this Court has adopted the *Rose* standards – and not the State's accreditation standards – as the adequacy test.

E. State's Argument No. 5: Kansas Standardized Test Results Have Improved in Recent Years

The State contends that *improvement* on assessments dictates that the system is currently constitutional. *See, e.g.* State's Brief, pp. 26-29. However, "improvement" is not the sole measure of an adequate education. While the Kansas Constitution requires that continuous improvement be made such that education in Kansas "advances to a better quality or state" *Gannon*, 298 Kan. at 1146, it also requires that the "public education financing system … through structure and implementation – is reasonably calculated to have *all* Kansas public education students meet or exceed the standards set out in *Rose*…" *Id.* at 1170. If the State's argument that students are "doing well" prevails, that means this Court accepts that fact that only 56.5% of African-American students in Kansas City were at or above proficiency in math as an indication that Kansas students are "doing well." [R. Vol. 26, p.3327 (SOF ¶107); R. Vol. 63, p.2040]. Kansas students are simply not performing well on assessments, despite the State's

arguments. *Supra*, at Arguments and Authorities §I.D. Moreover, rates of improvement on state assessments have significantly decreased and this decrease is attributable to decreased funding. [R. Vol. 26, pp. 3328-29 (SOF ¶110); R. Vol. 126, pp. 15606-07; R. Vol. 116, pp. 8301-12]. Between 2010-11 and 2011-12, the percent of all students meeting AYP on Kansas reading assessments decreased. [R. Vol. 26, pp. 3328-29; R. Vol. 116, p.8313]. Comparatively, between 2005-06 and 2006-07 (when the school districts were able to put to use increased funds pursuant to *Montoy*), the percent of all students meeting AYP increased by 5.4%. *See id.* Thus, assessment scores demonstrate that there has been no continuous improvement towards a "better quality or state" as required by the Kansas Constitution, nor are *all* Kansas public education students receiving an education that meets or exceeds the *Rose* standards. Results on assessment scores do not demonstrate that S.B. 7 meets the adequacy component of Article 6.

F. State's Argument No. 6: Kansas is Closing the Achievement Gap in Recent Years

The State's broad, general statements about achievement and assessment scores obscure the ugly truth behind them: Kansas is failing a significant portion of its students, especially when disaggregated results are considered. Thousands of students in Kansas are not meeting standards on state assessments. [R. Vol. 26, pp. 3329-30 (SOF ¶112); R. Vol. 127, pp. 102-104; R. Vol. 61, pp. 1740-62 (12.2% or 58,218 students, scored below proficiency in reading in 2010-11); R. Vol. 61, pp. 1763-86 (14.6%, or 69,670 students, scored below proficient in 2010-11; approximately one-third of African-American students (or 11,569 students) in the State scored below proficient on math assessments in 2010-11); R. Vol. 61, p.1788 (almost one-fifth (17.4%) of all 11th grade students scored below proficient in 2010-11 on math assessments); R.

Vol. 60, pp. 1577-1695 (in 2011, there were a significant number of Kansas students (more than one-fifth) who did not graduate in either 4 years (19.3%) or 5 years (24.8%))].

G. State's Argument No. 7: The Education Provided to Kansas Students Compares Favorably to the Education Offered in Other States

By focusing on the NAEP scores of Kansas students as a whole, the State again asks this Court to ignore the substandard education being provided to many of Kansas' most disadvantaged schoolchildren. While Kansas may have ranked comparatively better than some states *overall* in some categories, NAEP scores reveal that a significant number of Kansas schoolchildren are not receiving "sufficient levels of academic or vocational skills" to meet the *Rose* standards. For instance, in 2011, more than half of the black students in Kansas (54%), more than half the ELL students (52%), and two-thirds of the students with disabilities (67%) tested below basic on the NAEP 4th grade reading test. [R. Vol. 26, p.3383 (SOF ¶219); R. Vol. 67, pp. 2464-65]. The white students in Kansas fared better, with only 24% of them testing below basic. *Id.* However, that still means that approximately one in every five white students who participated in this NAEP assessment scored below proficiency. The results in 4th grade math, 8th grade reading, and 8th grade math were similar. *Id.* Notably, with the exception of the 4th grade math assessments, more than half of the students with disabilities and more than half of the ELL students scored below proficiency on each of the different assessments. *Id.* In fact, based on the 2009 reading proficiency scores, Governor Brownback, then U.S. Senator, stated, "As you can see from this graph, 28% of our students are below basic levels according to National Assessment of Educational Progress scores. That number is far too high. Only 25% of our students are reading proficiently. That number is far too low." [R. Vol. 26, p.3383-85 (SOF ¶219); R. Vol. 67, pp. 2459-63].

The State's comparison of Kansas' results on NAEP assessments to other states does not compare funding levels among the states. Presumably, this is because no State that outperforms Kansas spends less money on education per pupil. This Court should not allow the State to continue to fund education at a level that prevents a significant number of Kansas schoolchildren from receiving an education that meets or exceeds the *Rose* factors.

H. State's Argument No. 8: Statewide, Kansas Graduation Rates Have Improved, Both for All Students and in the Major Subgroups

The State's own graduation data supports the same conclusions that Plaintiffs reach: there is substantial, competent evidence before this Court, like there was before the Panel, that Kansas students do not even graduate from high school, much less graduate college and career ready. The data shows that, for all subgroups, between 15 and 30% of students do not even graduate. State's Brief, p. 37-39. Even if these graduation rates reflect improvement, they do not reflect that the current system is reasonably calculated to have them graduate, or meet any of the *Rose* standards. The State's graduation data does nothing to demonstrate that current levels of funding are reasonably calculated to meet or exceed the *Rose* standards.

I. State's Argument No. 9: More Students Are Prepared for College Than in the Past

Again, "improvement" is not the sole measure of an adequate education. Under the current funding levels, the State cannot and does not prepare a significant number of students for college. *Supra*, at Statement of the Facts, §I.D. The State's data does nothing to demonstrate that current levels of funding are reasonably calculated to meet or exceed the *Rose* standards.

J. State's Argument No. 10: Any Change in Funding From the Great Recession Did Not Affect the Classroom

First, any suggestion by the State that the "Great Recession" caused the funding reductions that began in 2009 should be disregarded. [R. Vol. 14, p.1867]. More importantly, there is simply no support in the evidence for the State's contention that the cuts to funding that started in 2009 did not affect the classroom. *Supra*, at Statement of the Facts §I. Rather, the evidence demonstrates that these cuts had significant effects on the classroom, resulting in the elimination of necessary programs, services, and staff, including, but not limited to, the elimination of teaching positions, learning coaches, paraprofessionals, speech therapists, librarians, extracurricular activities, band and orchestra programs, reading recovery programs, one-on-one reading instruction, technology, textbooks, athletics programs, physical wellness programs, school nurses, counselors, band and vocal music programs, drama programs, debate and forensics programs, art and graphic design programs, foreign language programs, fine arts, language arts, and family and consumer science programs. The State's arguments have no support and should be disregarded.

K. State's Argument No. 11: Many Districts Have Unspent Reserves that Should Be Considered Part of Their Overall Funding

The State defends the unconstitutionality of S.B. 7 by arguing that local school districts should have elected to use their cash balances "to increase spending on providing all students the education required by the *Rose* standards." State's Brief, p. 41. The State, in making this argument, again attempts to abdicate its constitutional responsibility. The Panel properly determined that the existence of cash balances does not replace the State's obligation to provide adequate levels of funding:

> The State consistently points to USDs contingency reserve funds as widely available. However, as we have pointed out in previous *Opinions*, the source of these contingency reserve funds comes principally out of operations funds, which have been, and are, inadequate to the task overall. Article 6 of the Kansas Constitution places the responsibility for operating and maintaining Kansas schools with local school boards to be overseen by the Kansas State Board of Education. The legislature is principally directed to assure the necessary funding for K-12 education. As Dr. Lane of USD 500 testified, its costs over a million dollars a day to run that school district, its contingency reserves holding approximately a 30 day supply of cash. To assert that local school boards should abandon their constitutional duties to K-12 students by failing to hedge the risks inherent in inadequate funding through maintaining reserve funds so as to continue their constitutional duties as long as possible in the face of the failure of others to fulfill theirs is a grossly misplaced proposition. If funding is inadequate to begin with, fund flexibility is merely a question of which funds should be used first, not which funds can be used better.

[R. Vol. 136, pp. 1436-1437].

Cash reserves exist for legitimate, fiscally responsible reasons and are a necessary part of cash management for school districts. [R. Vol. 140, pp. 10-11 (FOF ¶¶22-23)]. Cash balances are not properly considered as "offsets" for the reduced funding caused by S.B. 7. This Court should not require the districts to cannibalize cash balances in order to make up for S.B. 7's failure to comport with the adequacy component of Article 6 of the Kansas Constitution. *See id.*

This is especially true in light of the State's continued, repeated efforts to reduce the overall funding available to Kansas school districts. School district administrators are facing constantly shrinking funds to educate an ever-growing number of increasingly-harder-to-educate students. Kansas school districts have faced over $511 million in cuts annually since FY2009. [R. Vol. 14, pp. 1788-89; R. Vol. 90, p.5486]. They are now facing a three-year freeze in funding that eliminates any cost-based system that recognizes the differing costs of students, further compounding those decreased funds. In the face of unstable and ever-

decreasing state funding, cash balances are even more important. The State should not be able to require school districts to exhaust their cash reserves just because the State does not want to comply with its constitutional obligation.

L. State's Argument No. 12: Deciding Whether the Legislature Has Made Suitable Provision for the Financing of the State's Educational Interests Under Article 6 is a Nonjusticiable Political Question

The State argues that "[t]he adequacy component of this case is nonjusticiable under the political question doctrine." State's Brief, p. 43. That argument, which the State unsuccessfully made in the first appeal of this matter, should be disregarded. This Court has already held that the adequacy component of this lawsuit is justiciable. *Gannon*, 298 Kan. at 1118-61. In doing so, it specifically held that the applicable standards are judicially discoverable, manageable standards. *Id.* at 1149-56. The State raises no new case law or circumstances that justify reversal of this Court's previous decision that the matters raised in this appeal are justiciable.

M. State's Argument No. 13: The Legislature is Entitled to Substantial Deference. Applying that Standard Here, the Legislature Has Provided "Suitable" Funding

The State argues that it is entitled to substantial deference – both as to its policy judgments and to its actual and presumed findings of fact. There is no support for this position in either the Mandate, *supra* Arguments and Authorities §IV., or the case law cited by the State. And, granting such deference would be nonsensical. Consider, for example, the following argument by the State:

> The Legislature had the Kansas assessment test score data, but it also considered the reduction of "gaps" between subgroups on students on the NAEP, SAT, and ACT assessments, and expert opinions to reasonably conclude that its students were doing quite well and that the amount of funding provided to schools was sufficient to ensure the opportunity of a quality education for every child in

this state. **The Panel was required to defer to the Legislature's policy judgments and its actual and presumed findings of fact, but it did not.**

State's Brief, p. 58. In other words, the State wants this Court – in the face of overwhelming evidence otherwise – to assume that students are performing well and the funding levels allow them to do so. This is not the result dictated by the Mandate or the Kansas Constitution.

Admittedly, in deference to the Legislature, this Court begins any constitutional analysis with a presumption of constitutionality of the legislature's actions. *See Gannon*, 298 Kan. at 1147-48. Both this Court and the Panel have afforded the State that deference when it is due. Here, because the litigation is in the remedy phase and the burden is on the State to demonstrate compliance, no such deference is warranted. But, even if it were, this presumption of constitutionality is a far cry from the "*substantial* (if not virtually conclusive)" deference that the State asks for in its Brief. State's Brief, p. 49. None of the case law cited by the State supports the application of "*substantial* (if not virtually conclusive)" deference in evaluating the constitutionality of a statute. Rather, the broad deference that the State seeks is a function of the "rational basis" test. *See e.g. Injured Workers v. Franklin*, 262 Kan. 840, 847 (1997) ("The rational basis standard is a very lenient standard. All the court must do to uphold a legislative classification under the rational basis standard is perceive any state of facts which rationally justifies the classification."). Because this Court already rejected the application of a rational basis test in *Gannon I*, where the State made similar arguments, the State is not entitled to the broad deference that results from the application of that test.

In support of its request for the application of a "rational basis" test, the State cites to *Neely v. W. Orange – Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746 (Tex. 2005). While this Court, in *Gannon I*, largely relied on *Neely* for purposes of addressing the State's justiciability

arguments, it did not adopt the *Neely* Court's constitutional standard of review. In fact, the Court made clear that it is the language of the Kansas Constitution and not the Texas Constitution that dictates the duties of the Kansas Legislature. *See Gannon*, 298 Kan. at 1140 ("we obviously look to the language of our own constitution"). Because there are differences between the constitutional requirements imposed on the Texas Legislature by the Texas Constitution and the constitutional requirements imposed on the Kansas Legislature by the Kansas Constitution, it makes sense that the constitutional tests would differ. *See Gannon*, 298 Kan. at 1145 (noting differences between the two constitutions, including – for instance – that the term "efficient" does not appear in Article 6 of the Kansas Constitution); *Neely*, 176 S.W.3d at 783-785 (describing the standard of review applied in *Neely* as a "test of arbitrariness"). Presumably, it is the distinction between the constitutional language that caused the Kansas Supreme Court to adopt the *Rose*-based test, unlike the Texas Supreme Court, which applies an arbitrariness test (which is quite similar to a rational basis test). *Id.*; *see also Owens Corning v. Carter*, 997 S.W.2d 560, 581-582 (Tex. 1999) ("the findings play a limited role ***in rational basis review***") (emphasis added); *Barshop v. Medina Cty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 625 (Tex. 1996) ("we conclude that the rational basis test applies to Plaintiffs' equal protection claims" at issue); *Texas Workers' Compensation Comm'n v. Garcia*, 893 S.W.2d 504, 520 (Tex. 1995) (explaining that the "limited role [of factual] findings" is based upon a presumption "that the Legislature has not acted unreasonably or arbitrarily").

Even the cases the State cites from Kansas involve a rational basis review of legislation pursuant to an equal protection challenge. *See Injured Workers v. Franklin*, 262 Kan. 840, 847, 942 P.2d 591 (1997) ("The rational basis standard is a very lenient standard. All the court must

do to uphold a legislative classification under the rational basis standard is perceive any state of facts which rationally justifies the classification."); *Downtown Bar and Grill, LLC v. State*, 294 Kan. 188, 195, 273 P.3d 709 (2012) ("We have recognized that the rational basis standard is a 'very lenient standard' [and] we [have] defined the limits of this very lenient standard . . . [as requiring plaintiff to demonstrate] that 'no set of circumstances exist' that survive constitutional muster.")[6]; *State ex rel. Mitchell v. Sage Stores Co.*, 157 Kan. 404, 412, 141 P.2d 655 (1943) ("The constitutionality of an act may be challenged on the ground that it has no rational basis, as applied to a particular article, or that the facts which existed when the statute was enacted have ceased to exist, but such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts, either known or which could reasonably be assumed, affords support for the act.").

The State argues that, in applying the *Rose*-based test, this Court must give "*substantial* (if not virtually conclusive)" deference to the particular level of funding that the Legislature has chosen. State's Brief, p. 49. However, by analyzing the cases that the State relies on to reach this conclusion, it is clear that such a conclusion arises only as a function of the very lenient rational basis test and not as a function of the presumption of constitutionality. There is no reason that this Court should replace the objective *Rose*-based standards with a rational basis test.

Finally, to the extent the State takes issue with the "impracticality" and "irrationality" of applying this test, those arguments should be disregarded. This Court has already determined

[6] The *Gannon* Court cited *Downtown Bar* with approval for a different proposition, namely that the Kansas Supreme Court initially presumes the constitutionality of challenged legislation. *See Gannon*, 298 Kan. at 1147-48.

that the *Rose*-based test provides judicially discoverable and manageable standards for resolving the constitutionality of school finance in Kansas. *See Gannon*, 298 Kan. at 1149-57. Even if the State were correct, and it was truly difficult to apply the constitutional standard here, that would not alleviate the Court's responsibility to do so. "[C]ourts are frequently called upon, and adept at, defining and applying various, perhaps imprecise, constitutional standards." *Gannon*, 298 Kan. at 1155. And, these standards need to be flexible and open to adaptation. For example, if the *Mock* Court or *U.S.D. 229* Court several years ago had adopted a rigid, precise measure of a suitable education, that standard might not include a computer literacy or technical component. Today, however, technology is an essential component of an adequate education. [R. Vol. 26, pp. 3336; R. Vol. 70, pp. 2771-72]. If the Constitution incorporated the precise, unchanging standard that the State calls for, it would easily become outdated and useless every five to seven years. The *Rose* standards are not just judicially discoverable, objective, and manageable standards; they are also calculated to meet the changing needs and conditions of our society.

The State's disagreement with the *Rose*-based test was not a reason for the Panel to abandon the test mandated by this Court. And, it is not a reason for this Court to amend the test that it determined applied in *Gannon I*. The Panel applied the proper test to the evidence to determine the constitutionality of S.B. 7. It found that S.B. 7 did not meet that test. That finding – reached by applying the proper test – should be affirmed.

N. State's Argument No. 14: The Panel's Finding that *Some* Students Have Not Scored "Proficient" on State Assessment Tests Does Not Supports its Legal Conclusion that Present Funding is Unconstitutional

The State makes several related arguments regarding student performance on state assessment tests, none of which dictate reversal of the Panel's judgment. The adequacy test articulated by this Court requires that funding levels be "reasonably calculated to have **all** Kansas public education students meet or exceed the standards set out in *Rose*." *Gannon*, 298 Kan. at 1170. The legislative duty imposed by the Kansas Constitution is a duty *to each school child of Kansas, equally.* [R. Vol. 46, pp. 84, 86 (excerpts from *Mock v. State of Kansas*, No. 91-cv-1009 (1991)) (citing *Provance v. Shawnee Mission U.S.D. No.* 512, 231 Kan. 636, 643 (1982), which stated "[t]he ultimate State purpose in offering a system of public schools is to provide an environment where quality education can be afforded to all") (emphasis added)); *State v. Smith*, 155 Kan. 588, 595 (1942) ("The general theory of our educational system is that every child in the state, without regard to race, creed, or wealth shall have the facilities for a free education")].

First, the State contends that Kansas standardized tests do not measure whether a student is receiving an education that meets or exceeds the *Rose* standards. State's Brief, p. 53. Yet, it was the State – and not Plaintiffs – that first linked performance on statewide assessments to whether Kansas students were receiving an education that comported with Article 6 of the Kansas Constitution. *Montoy II*, 278 Kan. at 773; K.S.A. 72-6439. In either event, the State should not be allowed to prevail on appeal merely because it does not know whether the State assessments are in line with the *Rose* standards.

Second, the State contends that evidence of poor performance on assessments does not indicate whether funding levels are adequate because there is no promise of student performance found in the *Rose* standards. State's Brief, pp. 53-54. Despite the State's arguments otherwise, the *Rose* standards are not ***just*** goals. The Kansas Supreme Court did not "expressly describe" the standards as goals, as the State claims. Instead, while both the Kansas *Legislature* and the *Kentucky* Supreme Court regularly refer to them as "goals," the *Kansas Supreme Court* deliberately referred to them as "standards." For instance, the Court stated:

> Although we approvingly discussed *Rose* in several prior decisions . . . we have never expressly adopted the *Rose* court's articulated ***standards*** like other supreme courts. We do so now – for the education adequacy requirement we have held is contained in Article 6 of the Kansas Constitution. And like the *Rose* court, we consider them minimal ***standards.*** See *Rose*, 790 S.W.2d at 212 n. 22 ("[T]hese seven characteristics should be considered as minimum ***goals*** in providing an adequate education.").

Gannon, 298 Kan. at 1170 (emphasis added). *See also id.* at 1169-72, 1198-99 (referring to "the standards set out in *Rose*").

This Court has already rejected the State's arguments (raised again here) that the mandates of Article 6 of the Kansas Constitution only impose general aspirational goals on the Legislature. And it has done so multiple times. In this regard, the Court stated:

> [W]e also specifically reject the State's argument that Article 6, Section 1 contains only a "general *aspirational* goal of seeking societal improvement" or is merely "hortatory" . . . .
>
> Obviously the 1966 amendment's legislative drafters – at least two-thirds of both of the legislature's chambers which are required for a constitutional amendment, and the people of Kansas wanted more from the legislature. Otherwise these word changes – requiring "suitable provision" for finance instead of simple "provision and "provid[ing] for" improvement instead of merely "encourag[ing]" it – were meaningless . . . .

> In addition, we have essentially made this same point in our prior decisions about the importance of the presence of "shall" and "improvement" in Article 6, Section 1. With the people's approval of these words, "[t]he Kansas Constitution thus imposes a *mandate* that our educational system cannot be static or regressive but *must* be one which 'advance[s] to a better quality or state.'"

Gannon, 298 Kan. at 1146.

When testing the *Rose*-based standards to the evidence, as the Panel did, this Court should ignore the State's arguments that these "standards" are *merely* goals.

Third, the State contends that the fact that some students score less than proficient on state assessments is not necessarily attributable to a lack of funding. State's Brief, p. 55. This is contrary to the evidence, the findings by this Court, and the Panel's findings. *Supra* Statement of the Facts §I.D.

O. State's Argument No. 15: The Panel's Finding that Present Funding Falls Short of Averaged Cost Studies Does Not Support its Legal Conclusion that the Level of Funding is Unconstitutional

The State's failure to fund education at the level estimated in the average cost studies is obviously relevant, albeit not determinative, as to whether the State is complying with Article 6 of the Kansas Constitution. "[A]ctual costs remain a valid factor to be considered" when evaluating whether a funding system is constitutionally adequate. *Gannon*, 298 Kan. at 1170. Knowing this, the State attempts to undermine the Panel's decision by characterizing it as one that "treat[ed] cost studies as the absolute measure of seeking to achieve the *Rose* standards." State's Brief, p. 58. A simple review of the Panel's December Order, however, demonstrates this is false. [R. Vol. 24, pp. 3094-3132]. Rather, the Panel used the cost studies to demonstrate that the cuts to funding, beginning in 2009, put school districts in a financial bind, rendering them unable to fund an education system that was reasonably calculated to have all

students meet or exceed the *Rose* standards. [R. Vol. 24, p.3129]. And, this conclusion was supported by evidence other than the cost studies, including the cuts in staffing and programs that started in 2009. *Id.*

There is no evidence that the State's adoption of S.B. 7, which decreased funding in the face of overwhelming evidence that the then-current levels were inadequate and too low, was reasonably calculated to have all Kansas public education students meet or exceed the *Rose* standards. The Panel appropriately relied on these cost studies because they were ***the only evidence in the record that even attempts to estimate what that would cost***. *See, e.g., Montoy IV*, at 844-45 ("This case is extraordinary, but the imperative remains that we decide it on the record before us. The A&M study, and the testimony supporting it, appear in the record in this case. The State cites no cost study or evidence to rebut the A&M study. . . . Thus the A&M study is the only analysis resembling a legitimate cost study before us. Accordingly, at this point in time, we accept it as a valid basis to determine the cost of a constitutionally adequate public education in kindergarten through the 12th grade. The alternative is to await yet another study . . . and the school children of Kansas would be forced to await a suitable education."). The cost studies certainly do not support a conclusion that *less funding* would be reasonably calculated to have all Kansas public education students meet or exceed the *Rose* standards.

Despite the State's arguments otherwise, the cost studies are a reliable method for estimating what it actually costs to have all Kansas public education students meet or exceed the *Rose* standards. Regardless of whether the Legislature "had ample reason to question the validity of the estimates in the A&M and LPA Studies," *see* State's Brief, p. 60, the State still has not produced any evidence suggesting that *lowering funding* levels was reasonably

calculated to have all Kansas public education students meet or exceed the *Rose* standards. Therefore, even if the estimates are not precise, to the dollar, the State simply cannot rebut the fact that, *all of the estimates* suggest funding must increase. [R.Vol.90, p.5389; R.Vol.14, pp. 1777, 1801, 1803-04; R.Vol.14, p.1777; R.Vol.13, p.1634, 1661-63]. Nonetheless, regardless of whether the Legislature doubts the validity of these studies, they are both valid and reliable, as the Panel concluded in both January of 2013 and December of 2014, stating:

> [W]e have scrutinized both studies, but particularly, focused on the study consultants' recommendations since they were, in fact, the only demonstrated experts. We have considered their reports and accepted them, after review, as valid. Properly viewed, both are quite compatible, each one supportive of the other. . . . Certainly, the recommendations reflected by the cost studies could support a finding for a higher value for the BSAPP . . .

[R. Vol. 14, pp. 1957-58; *id.* at 1828] ("[S]imply no evidence has been advanced to impeach the underpinnings of those studies nor the costs upon which they were based.")); *id.* at 1869 ("[N]o evidence has been presented that would act to impeach the reliability of the A&M cost study[.]"). That finding was reiterated in December of 2014:

> The experts whose studies propounded the costs to sustain a constitutionally adequate education similarly stood unimpeached as to either qualifications, expertise, or their conclusions reached. Nothing advanced here subsequent has undermined their opinions.

[R. Vol. 24, p.3137].

Moreover, there is reliable evidence that the cost studies estimate what it costs to provide students with a *Rose*-based education. As the Panel explained, the evidence demonstrates that the *Rose* factors guided the cost study reports. [R. Vol. 24, p.3100].

Finally, the State's arguments presuppose the Panel used the cost studies as its only evidence that S.B. 7 was unconstitutional. While the Panel did rely on the cost studies in

reaching that conclusion, those cost studies were just one factor the Panel relied on in reaching its conclusion. The main purpose of the cost studies, however, is to allow the courts and the Legislature to craft a remedy in light of the State's violation of Article 6 of the Kansas Constitution. This Court can give particular weight to these cost studies in its "evaluation of a remedy." *Gannon*, 298 Kan. at 1163.

P. State's Argument No. 16: The "Expert" Testimony at Trial Does Not Support the Panel's Legal Conclusion that Funding is Unconstitutional

The State takes issue with the use of the phrase "suitable education" and suggests that Plaintiffs have improperly equated that term with the *Rose*-based test. As a result, the State takes issue with testimony from educators and administrators that used the phrase "suitable education." This argument should be disregarded. At all stages of this litigation, Plaintiffs have made clear that they equated the term "suitable education" with an education that met the *Rose* standards. The testimony of the educators that the State challenges all equated a "suitable education" with an education that meets the *Rose* standards. The educators testified regarding K.S.A. §72-1127 where the *Rose* factors are codified. [R. Vol. 52, p. 707]. The Superintendent of Kansas City, Kansas' schools testified that K.S.A. §72-1127 constituted what she and her educators are trying to accomplish "as providing the kids in Kansas City, Kansas a suitable education." [R. Vol. 29, pp. 108-10]. Dodge City's Superintendent testified that K.S.A. §72-1127 showed what was required by law to provide a "suitable education" and went on to say that these standards were "required for my students to be successful." [R. Vol. 36, pp. 1909-10]. The focus should not be on what the test is called, but rather, whether the standard is met.

When this Court remanded the matter, it instructed the Panel that it could enter judgment on the current record without reopening to make additional findings. *Gannon*, 298 Kan. at

1171, 1199. The Court further indicated that there was "substantial competent evidence" that "each superintendent essentially testified his or her district did not have the resources to provide all of its students with what they described as 'a suitable education.'" *Id.* at 1129-30. As the factfinder, it was appropriate for the Panel to conclude that, based on the substantial, competent evidence before it, the system is unconstitutional. The Panel's decision should be affirmed.

Q. State's Argument No. 17: Article 6 Does Not Require that "Suitable" School Funding Include the Funding of General Social Services

The State contends that it is not obligated to provide basic social services, such as food, clothing, healthcare, and psychological counseling to Kansas schoolchildren. State's Brief, p. 72. The Court should treat this for what it is: an admission that S.B. 7 is not reasonably calculated to develop the mental and physical wellness of Kansas schoolchildren. There is no basis for the State to wholly ignore this requirement imposed upon it by Article 6 of the Kansas Constitution.

Even if the *Rose* standards did not incorporate the development of the mental and physical wellness of Kansas schoolchildren as a factor in developing an adequate school funding system, the evidence demonstrates that educators – when they are obliged to educate all students, regardless of background, to the same standards – can only reach certain students after first making sure that their basic needs are met.

This is especially true in light of the fact that educators are being obliged to educate students who have limited access to food outside of school, are homeless, or do not have necessary supplies, such as school supplies, gym shoes, clothing, and tissue paper. [R. Vol. 26, p.3310 (SOF ¶54-55); R. Vol. 36, pp. 1773-74; R. Vol. 32, pp. 844-45; R. Vol. 34, pp. 1237-38;

R. Vol. 31, pp. 645-48]. The State's position asks the school districts to ignore those needs, but doing so completely undermines their ability to educate a subset of students. *Id.*

Likewise, educators are required to educate "children that have severe medical needs" or who suffer from mental illness. [R. Vol. 26, pp. 3345, 3347; R. Vol. 36, pp. 1769-7; R. Vol. 41, pp. 2883-84, 2889-90; R. Vol. 42, pp. 3045, 3134; R. Vol. 31, pp. 587-90].

Educators do not share the State's "shoot the wounded" philosophy. Educators are required to provide these students with the same level of education; these students are subject to the same standards as their peers. The "[school district's] expectations are the same across the board for all of [their] students." [R. Vol. 36, p.1700; R. Vol. 26, pp. 3345, 3347]. Irrespective of differences among children, the adequacy test articulated by this Court requires that funding levels be "reasonably calculated to have **all** Kansas public education students meet or exceed the standards set out in *Rose*." *Gannon*, 298 Kan. at 1170. The State is not excused or exempted from its constitutional obligations because a student is difficult to educate or struggles with outside factors that influence his or her achievement. [R. Vol. 46, pp. 84, 86) (excerpts from *Mock v. State of Kansas*, No. 91-cv-1009 (1991)) (citing *State v. Smith*, 155 Kan. 588, 595 (1942) ("The general theory of our educational system is that every child in the state, without regard to race, creed, or wealth shall have the facilities for a free education") (emphasis added)). Yet, the State intends to – and does – wholly disregard the mental and physical wellness of its students in providing them with an education. Such a result should not be tolerated.

R. State's Argument No. 18: The Panel Erred by Refusing to Accept Current Evidence, and Instead Considered Only Dated Information and Select Documents the Panel Judicially Noticed

The Panel made no mistake and did not abuse its judicial discretion when it managed this litigation. This Court instructed the Panel to "***promptly*** make findings as appropriate" considering "whatever evidence it deems relevant – ***whether presently in the record or after reopening***" by applying the "adequacy test articulated in" the Court's opinion. *Gannon*, 298 Kan. at 1199 (emphasis added). The Court further stated, "We express no opinion whether the panel needs to reopen the record to make its adequacy determination. That decision is best left to the panel as the factfinder." *Gannon*, 298 Kan. at 1171-72. If the Court thought the most current data was necessary to make an adequacy determination, it would not have contemplated that a decision could be made on the existing record and instead would have required the Panel to reopen the record. *Gannon*, 298 Kan. at 1171, 1199. It did not. It specifically ordered that the finding be entered "promptly," gave the Panel the discretion to determine whether the record needed to be reopened, and contemplated the very result that occurred here. *Gannon*, 298 Kan. at 1252.

The State contends that it "was precluded from presenting new evidence." *See* R. Vol. 25, p.3188. This is false. Following the Mandate, both parties presented new evidence to the Panel and the Panel took judicial notice of some of that evidence in making its ultimate adequacy determination. [R. Vol. 24, pp. 3078-79 (taking judicial notice of documents submitted by State as Exhibits 1521, 1523-24); R. Vol. 128, p. 12 (indicating the State proffered evidence)]. The State further contends that "the Panel needed the latest available information about the current system of finance and revenues" in order to make an adequacy determination.

Brief, p. 75. But, it wholly fails to provide this Court with a specific identification of what *current* information the Panel needed but did not have. *See also* R. Vol. 128, p. 12 (indicating that the State "now apparently claims some reservoir of undisclosed evidence, yet still not proffered, that needs to be considered," but "present nothing unknown" and nothing not "thoroughly considered"). Instead, the State generally and vaguely contends that the Panel needed additional evidence. State's Brief, p. 75. These allegations do not support reversal. This is especially true, here, when the State admits that much of the "evidence" that it wanted to put on simply does not exist. For instance, the State offers no evidence that assessment results have improved since trial. Instead, the State merely complains that the most recent assessment results (for 2013-14) are unreliable. *See* State's Brief, p. 35-36. This Court should reject the State's argument; the Panel made clear that it "reviewed fully all the State's submissions and found none would aid, alter, or change [its] prior opinions." [R. Vol. 128, p.12].

The State also ignores the time that would be wasted in getting the "latest available information" – which is wholly unnecessary to resolve the question of whether S.B. 7 is constitutional. Everyone but the State is mindful that delaying a decision in this matter harms Kansas schoolchildren. As Justice Rosen noted in his concurring opinion in *Montoy*, the most current evidence is not always necessary for purposes of resolving a school funding case. Requiring the most up-to-date evidence "would extend [this litigation] into an indefinite future, and the children of Kansas need a resolution of this matter now." *Montoy V*, 282 Kan. 9, 33 (2006) (J., Rosen, concurring). These words remain true today, especially when every day brings the reality of underfunding to Kansas schoolchildren's classrooms.

Finally, the State contends that "[t]he Panel stated it had requested 'proffers for the facts or issues that would alter [its] original judgment or change the course of the one [it ultimately] issue[d]." State's Brief, p. 77. This is not what the Panel stated. The Panel stated, "We diligently searched the State's proffers for facts or issues that would alter our original judgment or change the course of the one we now issue and found none would be of material, controlling significance." [R. Vol. 24, pp. 3054-55]. In other words, the Panel reviewed and considered all of the information provided by the State prior to entering its Order. The fact that the Panel did not find the State's proffers convincing or reached conclusions different than the ones proffered by the State is not an indication that the Panel abused its discretion. The Panel's decision should be affirmed.

S. State's Argument No. 19: The Panel Erred When it Adjudicated the Suitability of School Funding Under S.B. 7

The Panel did not err when it adjudicated the constitutionality of S.B. 7. *Supra* Arguments and Authorities § III. "The Panel had Authority to Adjudicate the Constitutionality of House Substitute for Senate Bill 7." Rather, the Panel had the authority to do so when, on April 30, 2015, this Court specifically invoked the jurisdiction of the Panel and tasked it with considering Plaintiffs' Motion for Declaratory Judgment and Injunctive Relief. *Id.* The State's arguments in this regard should be disregarded.

T. State's Argument No. 20: The Legislature Has Made Suitable Provision for the Financing of the State's Educational Interests and Kansas Schools Are Performing Well by Numerous Measures

The State argues that it is making suitable provision for the financing of the State's educational interests. Given the Court's Mandate sets forth the *Rose*-based test, Plaintiffs certainly expected that the State would support its argument that it has made suitable provision

consistent with Article 6 by demonstrating compliance with the *Rose*-based test. It did not. *See, e.g.*, State's Brief, pp. 81-85. Instead, the State has merely repeated its earlier arguments, each of which should be – as before – discredited by this Court.

First, the State claims that "Kansas public K-12 schools are receiving funds *at record high levels* and districts have held unspent money in reserve." As Plaintiffs have already demonstrated, these arguments are just wrong. *Supra*, Arguments and Authorities §§ B ("State's Argument No. 2: School Spending in Kansas is at Record High Levels"), C ("State's Argument No. 3: Spending on Instruction and Operation Has Increased, Both in the Aggregate and Per Pupil"), and K ("State's Argument No. 11: Many Districts Have Unspent Reserves that Should Be Considered Part of Their Overall Funding").

Second, the State contends that it can demonstrate compliance with the *Rose*-based test because (1) the State has accreditation standards; (2) those standards are reasonably calculated to meet the *Rose* standards; and (3) Kansas school districts meet those standards. However, this Court should not allow the State to supplant the *Rose* standards with lesser accreditation standards. *Supra* Arguments and Authorities §VIII.D ("State's Argument No. 4: All Kansas Schools Are Subject to Rigorous Accreditation Standards, and Each and Every Kansas School Presently is Accredited.")

Third, the State supports its argument by relying on the fact that "Kansas students are performing well" on state and national assessments. State's Brief, p. 82. Despite the fact that this stands in blatant contradiction to its persistent arguments that results on state assessments do not reveal whether students are receiving an education that meets or exceeds the *Rose* standards, it is also factually inaccurate. *Supra.*

Fourth, the State contends that the Legislature "had grounds to determine that the funding that it provided was not being spent efficiently." It does not support this claim with any evidence. That alone warrants ignoring this argument. But, this argument – even if the State could demonstrate it was true – does not dictate reversal of the Panel's decision. Presumably, the State wants this Court to conclude that the State is relieved of providing a constitutional level of funding until all schools reach maximum efficiency at lowered funding levels. This arguments fails to acknowledge the State's general constitutional obligations under Article 6 to establish and maintain public schools and to do so *in harmony* with the state board of education. *See* KAN. CONST., Art. 6; *U.S.D. No. 443 v. Kansas State Board of Education*, 266 Kan. 75, 96 (1998) (citing *State ex rel. Miller*, 212 Kan. 4842, 483 (1973)). Plaintiffs' make clear there are no school inefficiencies. But, if there is a failure in whether school districts are operating efficiently, it is the State's failure to establish and maintain public schools in such a way that effectively manages the districts and holds schools accountable. Such a failure on the State's part, if it even exists, cannot be a basis for excusing the State from performing its other, equally important, constitutional obligation to make suitable provision for the finance of the educational interests of Kansas.

Fifth, the State relies on Dr. DeBacker's testimony that, despite reductions in funding, Kansas teachers were able to "make do." *See* State's Brief, p.83. Dr. DeBacker is correct that Kansas teachers were able to "make do" immediately after *Montoy*; the momentum she discusses was certainly due, at least in part, to the influx of money that school districts received following the *Montoy* litigation. But, since the State's decision to reduce funding for five years straight, Kansas is not longer able to "meet the mark" as reflected in assessment scores. *Supra.*

Sixth, the State contends that it is providing a constitutional level of funding because achievement gaps are decreasing. The evidence does not support this. *Supra* Arguments & Authorities § VIII.F ("State's Argument No. 6: Kansas is Closing the Achievement Gap in Recent Years.")

Seventh, the State once again contends that it has increased funding, despite the fact that no school district has received increased funding under S.B. 7. As the Panel found, "[e]ven with the increase of the LOB BSAPP cap . . . the total increase in the combined statewide general funds and supplemental general funds . . . is . . . a net loss in purchasing power from 2012 of $65,910,252." [R. Vol. 24, pp. 3125-26]. The State's arguments that it increased funding should be disregarded.

None of the State's arguments support that S.B. 7 is providing a level of funding that comports with Article 6 of the Kansas Constitution.

U. State's Argument No. 21: Supreme Courts in Other States Give Substantial Deference to Their Legislatures with Respect to School Funding Determinations

The State contends that, because other states give substantial deference to their Legislatures, that this Court should too. State's Brief, p.86. This is a reiteration of its argument that this Court should apply a rational basis test. *See, e.g., id.* (indicating that, in *Lobato v. State of Colo.*, the Colorado Supreme Court "applied a rational basis test"). This Court has already rejected that argument. *Supra* Arguments and Authorities § VIII.M ("State's Argument No. 13: The Legislature is Entitled to Substantial Deference. Applying that Standard Here, the Legislature Has Provided "Suitable" Funding.") It is the language of the Kansas Constitution – and not the constitutions analyzed in the cases cited by the State – that dictate the duties of the

Kansas Legislature. *See Gannon*, 298 Kan. at 1140 ("we obviously look to the language of our own constitution"). Because there are differences between the constitutional requirements imposed on legislatures based on the language of their constitutions, it makes sense that the constitutional tests and amount of deference due would differ.

IX. THIS COURT SHOULD EXERCISE ITS INHERENT POWER TO ISSUE SANCTIONS AND AWARD PLAINTIFFS' ATTORNEYS' FEES

This Court has inherent power to sanction a party based on that party's conduct in bad faith, regardless of statutory provisions. *See e.g., Schoenholz v. Hinzman*, 295 Kan. 786, 787 (2012) (citing *Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 926 (2006)) (courts have inherent powers to impose sanctions for bad-faith conduct, irrespective of statutory provisions). As Plaintiffs have shown, the State has acted in bad faith by continually dodging its constitutional obligation to properly fund education in Kansas. [R.Vol.14, p.1867 (the State acted with "what appears now to be an obvious and continuing pattern of disregard of constitutional funding obligations under Article 6")]. Furthermore, the State's course of conduct since this Court's Mandate has essentially amounted to willful disobedience leading to unnecessary expenditures by Plaintiffs in seeking to enforce this Court's (and the Panel's) decisions. Adopting S.B. 7 to lower funding despite knowing that the funding levels were already unconstitutional may be the State' most recent effort to avoid constitutional compliance, but, it is certainly not the only one.

Even absent bad faith on the part of the State, attorneys' fees would be appropriate because "plaintiffs have contributed to the vindication of important constitutional rights." *Claremont School Dist. v. Governor*, 144 N.H. 590, 598, 761 A.2d 389 (1999). Under similar circumstances, the Supreme Court of New Hampshire exercised its "inherent equitable powers"

and awarded reasonable attorney's fees to plaintiff school districts. *Id.* This Court has the inherent authority to award attorneys' fees regardless of the statutory authority. *In re Vioxx Products Liability Litig.*, 760 F. Supp. 2d 640, 647-49 (E.D. La. 2010); *In re Nuvaring Products Liability Litig.*, 2014 WL 7271959, *2 (E.D. Mo. Dec. 18, 2014).

CONCLUSION

For reasons stated above, Plaintiffs request that this Court affirm the decisions by the Panel, entered below, finding that S.B. 7 is unconstitutional.

Dated this 12th day of January, 2016.

Respectfully submitted,

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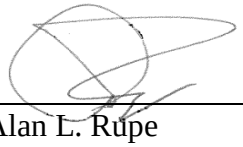

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