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**No. 15-113267-S**

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

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**Luke Gannon, *et al.*,**  
Plaintiffs-Appellees,

v.

**State of Kansas, *et al.*,**  
Defendants-Appellants.

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Appeal from Appointed Panel  
Presiding in the District Court of Shawnee County, Kansas

Honorable Franklin R. Theis  
Honorable Robert J. Fleming  
Honorable Jack L. Burr

District Court Case No. 2010-CV-1569

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**BRIEF OF APPELLANT STATE OF KANSAS**

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Oral Argument: One Hour

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## NATURE OF THE CASE

This is a long-running school finance case. The State appealed after a three-judge panel held that the State's school finance system violated Article 6 of the Kansas Constitution, and on March 2, 2017, this Court affirmed the panel's judgment, although not fully accepting the panel's reasoning. *Gannon v. State*, 305 Kan. 850, 901, 920, 390 P.3d 461 (2017) (*Gannon IV*).

The Legislature responded by passing the Kansas School Equity and Enhancement Act ("KSEEA") in 2017 Senate Bill 19 ("SB 19"). *See* L. 2017, ch. 95. SB 19 attempted to address the concerns expressed in *Gannon IV* by increasing the amount of overall funding allocated to school districts and by directly targeting some of the increased funds to underperforming students. But on October 2, 2017, this Court held that the State failed to satisfactorily demonstrate SB 19 met both the adequacy and equity components of Article 6. *Gannon v. State*, 306 Kan. 1170, 402 P.3d 513 (2017) (*Gannon V*). The Court stayed its mandate until June 30, 2018, to give the Legislature "time and opportunity to reach constitutional compliance." *Id.* at 1236.

In response, the Legislature has passed, and the Governor has signed, 2018 Substitute for Senate Bill 423 ("SB 423") and 2018 House Substitute for Senate Bill 61 ("SB 61"). These bills cure the Article 6 violations identified by this Court.

## STATEMENT OF THE ISSUES

I. Whether SB 423 and SB 61, in conjunction with SB 19, cure the adequacy violations identified by this Court.

II. Whether SB 423 and SB 61 cure the four equity issues identified in *Gannon V.*

## STATEMENT OF FACTS

**The Legislature immediately started work, including convening a pre-session series of hearings, hiring counsel, and retaining an outside educational expert.**

After the Court's decision in *Gannon V.*, the Legislature immediately started working to address the constitutional deficiencies the Court identified. The Legislature formed the 2017 Special Committee on a Comprehensive Response to the School Finance Decision, held three days of hearings in December 2017 before the start of the 2018 session, secured funding for an independent cost study, and hired separate counsel for the Senate and House of Representatives to provide legal guidance through the process.

**Dr. Taylor prepared a report designed to meet KSDE's aspirational goals.**

The Legislature took the words of the Kansas Supreme Court to heart in its efforts to amend the school finance formula to conform with *Gannon V.* In *Gannon V.*, the Court provided the Legislature with the following guidance for its 2018 work:

[M]easured by the length of time the legislature allowed both the A & M and LPA studies to be performed, the State certainly will have ample opportunity for any sufficient studies it may wish to have conducted and then legislatively considered. Those potential results, either in lieu of, or in combination with, the other financial recommendations in the record, together with the various rulings



contained in today's decision, can provide the State with guidance on how to reach constitutional compliance.

306 Kan. at 1235-36. The Legislature embraced the challenge and retained WestEd and Dr. Lori Taylor to conduct a cost study of the Kansas school finance system ("the Taylor Study") and Dr. Jesse Levin with American Institutes for Research ("AIR") to conduct a peer-review analysis of that study and its predecessors.

The Taylor Study performed a cost-function analysis, providing the Legislature with evidence-based estimates of the funding necessary to achieve different levels of student outcomes. The Taylor Study, for reasons explained therein, focuses on three student-performance metrics for Kansas students: graduation rate, reading proficiency, and math proficiency. App. at 684-86 (Doc. #27, Taylor Study at 55-57). The latter two of these metrics are measured by "student performance on the Kansas Assessment Program (KAP) summative evaluations in reading and mathematics in grades 3-8." *Id.* at 56. These metrics are similar to those considered by this Court in prior *Gannon* rulings to measure whether school finance legislation "is reasonably calculated to have all Kansas public education students meet or exceed the standards set out in *Rose*." *Gannon V*, 306 Kan. at 1183; *see also id.* at 1188-89 (relying on the percentage of students achieving levels 2-4 KAP results in ELA (reading) and math when evaluating constitutional compliance); *Gannon IV*, 305 Kan. at 901 (applying graduation rates to a constitutional adequacy analysis).

**Both the House and Senate considered Dr. Taylor’s report and input from other educational stakeholders.**

Throughout the legislative process the Legislature actively engaged with Dr. Taylor, Jason Willis of WestEd, Dr. Levin, and other stakeholders including the Kansas Department of Education. On February 23, 2018, the Senate Select Committee on Education Finance and House K-12 Education Budget Committee held a joint hearing in which Dr. Taylor and Mr. Willis described and answered questions about the methods, data, and plan for the cost study. App. 320-517 (Doc. #22, Taylor Study PowerPoint re: Methods, Data, and Analysis Plan; Doc. #23, transcript). On March 7, 2018, the committees held another joint hearing in which Dr. Levin presented his review of previous education cost studies. App. 576-622 (Doc. #26, transcript). On March 19, 2018, the committees held a second joint hearing with Dr. Taylor and Mr. Willis to give them an opportunity to explain the results of their study and allow legislators to ask any questions they may have. App. 832-998 (Doc. #29, Taylor Study PowerPoint re: Study Results; Doc. #30, transcript). Dr. Taylor and Mr. Willis took questions from legislators and responded in writing to follow-up requests in the Addendum to their report. App. 1206-16 (Doc. #45, April 2, 2018 Follow-up Requests from Committee Members, Responses from Consultants (“Taylor Addendum”)).

**The Senate assembled a plan that sought to capture many attributes of Dr. Taylor’s plan.**

The Kansas Senate attempted to use the Taylor Study as the basis for its school funding plan. Specifically, the Kansas Senate worked to provide overall funding levels consistent with the April 2, 2018, Addendum to the Taylor Study and

the “maintenance” approach outlined in the main Taylor Study. *See* App. 1213 (Doc. #45, Taylor Addendum at 8). The word “maintenance” in this context, however, is a misnomer. The Kansas Senate strove for excellence and increased student proficiency in its efforts. It targeted a level of funding sufficient, according to the Taylor Study, to raise the Kansas graduation rate to 95% by 2023, an amount more than 4 percentage points higher than Iowa (the highest performing state in the nation). App. 1213 (Doc. #45, Taylor Addendum at 8). This same funding amount would also result in a substantial increase in level 2-4 student proficiency in math and reading, driving performance from the most recent proficiency figures of 72.6% for ELA and 72.4% for math to 84.6% and 84.4% proficiency respectively by 2023. *Id.* The Kansas Senate considered five-year proficiency goals in large part based on the Taylor Study’s own recommendation. “[I]t is not practical to make a one-time, significant investment in a statewide public education system and expect at the end of that school year to see dramatic movement from current performance to the aspiration targets. . . . One consideration is to consider these investments over a 5-year period of time.” App. 699 (Doc. #27, Taylor Study at 70).

The Court has never articulated a specific level of student performance under these three metrics that would “meet or exceed the standards set out in *Rose*.” *Gannon V*, 306 Kan. at 1183; *see also id.* at 1235 (“Consistent with our practice in this case, we decline to provide a specific minimal amount to reach constitutional adequacy. To do so would exalt funding over other constitutional considerations such as equity and structure.”). Thus, neither Dr. Taylor nor the Kansas Legislature

has a definitive “finish line” for constitutional compliance. The Kansas Senate believed that whatever this threshold might be, attaining the nation’s highest graduation rate and cutting the number of underperforming students by roughly 44% in five years (from approximately 27.5% non-proficiency to 15.5%) would be an historic accomplishment that complies with *Rose* and *Gannon V.*

The Taylor Study articulated the funding amount estimated to achieve such student performance. Such student success, according to the Taylor Study, required the expenditure of \$669 million in additional annual funding from school year 2016-17 to 2022-23. App. 1213 (Doc. #45, Taylor Addendum at 8). SB19 passed by the 2017 Legislature contained \$218.5 million in new state K-12 funding in 2017-18, an additional \$98.5 million in 2018-19, and inflationary increases for subsequent years. App. 1249 (Doc. #51, May 1, 2018, KLRD Memo at 2). Thus, the Taylor Study required \$352 million more K-12 funding in 2022-23 than would exist in 2018-19 under 2017 SB19 to attain the performance goals outlined previously.

The 2018 Kansas Legislature substantially exceeded this figure, increasing K-12 funding by \$536 million from that appropriated by 2017 SB19 for 2018-19 to 2022-23.<sup>1</sup> App. 1249 (Doc. #51, May 1, 2018, KLRD Memo at 2). This amount, when combined with the substantial 2017 funding increases, well exceeds the Taylor

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<sup>1</sup> 2017 SB19 also included an inflation index for K-12 funding in 2019-20 and all subsequent years. For sake of clarity in this comparison between the Taylor Study and the school funding approved by the 2018 Legislature, however, this discussion describes all new funding for the next five years as a product of the 2018 legislative action, even though (as the KLRD memo clearly shows) some of it would have occurred under the previously approved inflation index.

Study figures, resulting in 2022-23 school funding over \$853 million greater than 2016-17 levels. This figure does not include increased LOB authority and KPERS contributions of more than \$153 million annually by 2022-23. *Id.* The following chart illustrates the annual state funding increases (excluding KPERS and local LOB spending) under the Taylor Study and SB423/SB61 approaches from 2016-17 to 2022-23:

	Taylor Study	Final Bill
Increase from 2016/17-2017/18	\$46M	\$218.5M
Increase from 2017/18-2018/19	\$119M	\$187.5M
Increase from 2018/19-2019/20	\$122M	\$109M
Increase from 2019/20-2020/21	\$125M	\$112M
Increase from 2020/21-2021/22	\$128M	\$115M
Increase from 2021/22-2022/23	\$131M	\$112M
Total Cumulative Increase <sup>2</sup>	\$671M	\$854M

**The House opted to pursue a safe-harbor option that was similar to the formula and funding approved by this Court in *Montoy*.**

The House took a different path to passing the substantial increases in school funding in SB 423 and SB 16. It aimed at increasing funding based on “applying the 2010 school finance formula to current student enrollment, distribution, and demographics and bringing the spending level forward for inflation.” App. 1221

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<sup>2</sup> The figures stated in this line are slightly different than the ones listed above and in the Taylor Addendum due to rounding.

(Doc. #48, April 23, 2018, KLRD memo at 1); *see also* SB 423 (preamble paragraph 3) (stating that the Legislature provided more than \$4.89 billion for the 2018-19 school year “in an effort to update the school finance funding level and formula to account for student population and inflation, since the last time the Kansas supreme court found the provision of school finance to be acceptable”). Based on these calculations, the House established a target of \$522.2 million in additional school funding, which it used in crafting its school finance proposal, which eventually became SB 423 as modified by SB 61. App. 1221-22 (Doc. #48, April 23, 2018, KLRD memo).

**The Legislature adopted the safe-harbor plan with bipartisan support.**

SB 423 and SB 61, together with SB 19, provide more than one *billion* dollars in additional annual funding to schools by 2022-23 above funding levels in the 2016-17 school year<sup>3</sup> and distribute the funding through a school funding formula materially identical to that in the School District Finance and Quality Performance Act (“SDFQPA”), which this Court approved in *Montoy*. *See* App. 1249 (Doc. #51, May 1, 2018, KLRD Memo at 2).

At the time of trial in Fiscal Year 2012, the base per-pupil amount sum used to calculate base state aid per pupil (“BSAPP”), was \$3,780. *Gannon V*, 306 Kan. at

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<sup>3</sup> “Approximately \$485.5 million of the increase is attributable to 2017 SB 19 for FY 2018 through FY 2023. Approximately \$368.0 million of the increase is attributable to both bills from the 2018 Session for FY 2019 through FY 2023. An additional \$153.3 million is attributable to increases in local aid for local option budgets (LOB) and increased employer contributions for the Kansas Public Employees Retirement System attributable to the increased aid provided by the three bills combined.” App. 1221 (Doc. #48, April 23, 2018, KLRD memo at 1).

1177-78. Under SB 61, “BASE aid” (formerly BSAPP), will be \$4,165 for 2018-19; \$4,302 for 2019-20; \$4,439 for 2020-21; \$4,576 for 2021-22; \$4,713 for 2022-23; and thereafter the previous year’s BASE aid plus an amount equal to the average percentage increase in the consumer price index for all urban consumers in the Midwest region during the three preceding school years. SB 61, § 4(e).

The increases to BASE aid in SB 19, SB 423, and SB 61 add more than \$110 million for 2018-19—on top of the nearly \$114 million SB 19 added in 2017-18. Over the next five school years, the three bills phase-in a BASE aid increase of nearly \$500 million. *See* App. 1249 (Doc. #51, May 1, 2018, KLRD Memo at 2). In addition to BASE aid increases, SB 423 adds \$32.4 million for special education in 2018-19, SB 423 § 1(a), with \$7.5 million increases anticipated in each of the following four school years, *see* App. 1247 (Doc. #50, KSDE SF18-102 at 2); App. 1249 (Doc. #51, May 1, 2018, KLRD Memo at 2). SB 19 also provides \$2 million for preschool-aged at-risk children in 2018-19, with an another \$2 million per year anticipated for Fiscal Years 2020 through 2022—in addition to the \$2 million SB 19 provided for 2017-18—totaling \$10 million over five years. SB 19, §§ 4(ii)(2)(B), 26; SB 423 § 1(a); App. 1247 (Doc. #50, KSDE SF18-102 at 2); App. 1249 (Doc. #51, May 1, 2018, KLRD Memo at 2).

SB 423 also appropriates for 2018-19: \$500,000 for teacher mentoring, more than \$7.5 million for mental health pilot programs, and \$2.8 million to pay for students to take the ACT and ACT WorkKeys once during high school. *See* SB 423, § 1(a); App. 1026-27 (Doc. #37). Taken together, within six years the Legislature

will have increased annual funding for schools by more than one billion dollars. App. 1249 (Doc. #51, May 1, 2018, KLRD Memo at 2).

In addition to funding increases, SB 423 and SB 61 make important policy changes. For example, SB 61 requires each school district to maintain an LOB equal to 15% of the school district's total foundation aid, SB 61, § 5, and SB 423 requires a portion of supplemental general State aid be placed in the district's at-risk and bilingual education funds in order to increase accountability for at-risk funding, SB 423, § 3(i)(2).

SB 423 also addresses the four equity issues this Court identified in *Gannon V*. Section 4(f)(2) of SB 423 voids any resolution providing LOB authority of more than 30% of the district's calculated general fund adopted by a local school board before July 1, 2017, when the adoption was not subject to voter protest and/or elector approval, and not otherwise approved in an election. While local districts that had obtained the authority to raise LOB above 30% when subject to protest and election may adopt LOB up to 30.5% of the district's total foundation aid, any district otherwise desiring to raise LOB above 30%, up to 33%, must pass a resolution which is subject to protest petition and election. *Id.* §§ 4(c), (f)(1), (2); SB 61, § 5(b), (l).

Section 5(b) of SB 423 provides that LOB State Aid is calculated from districts' current-year LOB, not the immediately preceding school year's LOB. The expanded use of capital outlay funds in KSEEA was jettisoned, *id.* § 15, so that outlay uses now are those that existed when the Court approved the



constitutionality of supplemental state aid after *Gannon v. State*, 304 Kan. 490, 372 P.3d 1181 (2016) (*Gannon III*). See Sup. Ct. Order, Case No. 113,267 (June 28, 2016) (finding legislation cured equity constitutional infirmities in *Gannon* litigation). And KSEEA's 10% minimum for the at-risk student weighting also was repealed. See SB 423 § 9(a).

Together, SB 423 and SB 61 address the constitutional deficiencies this Court found in *Gannon IV* with respect to both adequacy and equity.

**The State is “Showing its Work” as Best as the Legislative Process Allows**

This Court has clearly and consistently insisted that it looks to the legislative record in evaluating the constitutionality of any remedy. Specifically, at this stage of this case, this Court has directed in *Gannon V*:

The State would help its case by “showing its work.” *Gannon II*, 303 Kan. at 743. This exercise involves considerably more than what it presented to this court in the instant appeal and in *Gannon III*. See 304 Kan. at 515. The State should identify other remedies that the legislature considered but, more important to meeting its burden, explain why it made its particular choice for reaching the constitutional standards for adequacy and equity.

306 Kan. at 1237.

In presenting the Legislature's remedial work to this Court, the State has diligently endeavored to meet this Court's guidance to “show its work” in a manner that differs from what has been done previously. At the same time, the State respectfully reiterates to the Court that the inherent nature of this case involving core functions of two independent branches of state government, including the legislative process, often renders difficult or impossible any such showing. What the

United States Supreme Court has explained in a different context applies here with equal force:

[I]t is often “difficult or impossible for any court to determine the ‘sole’ or ‘dominant’ motivation behind the choices of a group of legislators.” As in every other legislative body, each of the members of [a state legislature] has his or her own agenda and interests . . . . “[R]arely can it be said that a legislature . . . operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the ‘dominant’ or ‘primary’ one. In fact, it is because legislators . . . are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality.”

*Bush v. Vera*, 517 U.S. 952, 1012 n.9 (1996) (Stevens, J., dissenting) (internal citations omitted, some alterations in original).

Consequently, the State endeavors in this brief to “explain why [the Legislature] made its particular choice for reaching the constitutional standards for adequacy and equity,” *Gannon V*, 306 Kan. at 1237, while also acknowledging that doing so is a near impossibility because it sometimes simply cannot be shown that “a legislature . . . operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the ‘dominant’ or ‘primary’ one.” *Bush*, 517 U.S. at 1012 n.9 (Stevens, J., dissenting) (quoting *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977)). What the State can say with confidence is that in enacting the remedial legislation now before this Court, Kansas “legislators . . . [were] properly concerned with balancing numerous competing considerations” and that since this Court has declined the State’s prior urging to “refrain from reviewing the merits of their decisions,” *id.*; see

also *Gannon IV*, 305 Kan. at 864-66, 883-86 (continuing to hold that the Legislature’s policy determination regarding the adequate amount of school funding is not a nonjusticiable political question and is not entitled to virtually conclusive deference), it should at least conclude that the available record is more than sufficient to demonstrate the remedial legislation substantially complies with the Court’s previous guidance in *Gannon IV* and *V. Montoy v. State*, 282 Kan. 9, 24-25, 138 P.3d 755 (2006) (*Montoy IV*) (finding “substantial compliance” with the Court’s order).

In an effort to “show its work,” the State is providing this Court in the Appendix with all documents from the legislative record that counsel for the Legislature have represented are important. While the State readily admits that the link between the final legislation and the concepts considered by the Legislature in some of those documents is not readily apparent, it is fair to assert that each such document was a consideration for one or more legislators in formulating their individual decisions on the remedial legislation before this Court. Further, in this brief, the State is providing this Court with its best understanding of the reasoning that prevailed among the supporters who enacted this remedial legislation, fully acknowledging that “each of the members of [a state legislature] has his or her own agenda and interests.” *Bush*, 517 U.S. at 1012 n.9 (Stevens, J., dissenting). The State reminds the Court that SB 423 was approved without a single vote to spare in either chamber of the Legislature and, thus, each and every reason—most of which are unrecorded, unarticulated and therefore impossible to identify and present to

this Court—that persuaded any one of the members voting “aye” to do so is relevant in “explain[ing] why [the Legislature] made its particular choice for reaching the constitutional standards for adequacy and equity.” *Gannon V*, 306 Kan. at 1237.

## ARGUMENT

The Legislature, after careful study and deliberation, discharged its constitutional duty by passing legislation designed to comply with Article 6 of the Kansas Constitution. The remedial legislation—a combination of SB 19, SB 423, and SB 61—complies with this Court’s determination in *Gannon V* by providing more than \$1 billion annually in new funds for schools by the end of a five-year phase-in period. In addition, SB 423 remedies the four equitable deficiencies this Court identified in *Gannon V*. This Court should find substantial compliance and dismiss this case. *See Montoy v. State*, 282 Kan. 9, 24-25, 138 P.3d 755 (2006) (*Montoy IV*).

### **I. The Remedial Legislation Exceeds Constitutional Standards of Adequacy.**

SB 423 and SB 61, in conjunction with SB 19, cure the adequacy violations identified by this Court. As this Court has stated many times, the question is not whether the Legislature has enacted an ideal school finance system. *See Montoy v. State*, 279 Kan. 817, 847, 112 P.3d 923 (2005) (*Montoy III*) (acknowledging the approved “remedy is far from perfect”). Rather, the Court is evaluating whether the remedial legislation—through structure and implementation—is *reasonably calculated* to have all Kansas public education students meet or exceed the standards set out in *Rose. Gannon V*, 303 Kan. at 1170, Syl. 2. And this “test for

adequacy is one of minimal standards. Accordingly, once they have been satisfied, Article 6 has been satisfied.” *Gannon IV*, 305 Kan. at 917 (citation omitted).

The Legislature has “considerable discretion in satisfying the requirements of Article 6.” *Id.* at 885. As this Court has recognized, the “constitutional infirmities ‘can be cured in a variety of ways—at the choice of the legislature.’” *See, e.g., Gannon v. State*, 303 Kan. 682, 743, 368 P.3d 1024 (2016) (*Gannon II*) (quoting *Gannon v. State*, 298 Kan. 298 Kan. 1107, 1181, 1188-89, 319 P.3d 1196 (2014) (*Gannon I*); *Gannon I*, 298 Kan. at 1151 (“[O]ur Kansas Constitution clearly leaves to the legislature the myriad of choices available to perform its constitutional duty.”); *see also Gannon IV*, 305 Kan. at 917 (“Our adequacy test, as described in *Gannon I*, rejects any litmus test that relies on specific funding levels to reach constitutional compliance.”). In determining compliance, this Court looks to the record and to the remedial legislation’s history to decide whether the State has carried its burden. *E.g., Gannon III*, 304 Kan. at 499; *Montoy IV*, 282 Kan. at 18-21.

**A. Using the amount of funding and the structure of the funding formula approved by this Court in *Montoy*, the Legislature identified a target of \$522.2 million in additional school funding, which it provided in SB 423 and SB 61.**

The Legislature structured SB 423 based on a belief that the school finance plan approved by this Court in *Montoy* created a safe harbor. To do so, legislators started with the base state aid per pupil of \$4,492 for the 2009-10 school year, a figure which Plaintiffs have repeatedly cited in this litigation. *See* Plaintiffs/Appellees Opening Brief Regarding Adequacy of 2017 Senate Bill 19 at 15, *Gannon v. State*, No. 15-113267-S (Kan. June 30, 2017) (“When the Legislature

adopted the SDFPQA and appropriated a base of \$4,492 for FY10, see *Gannon IV*, 305 Kan. at 880, the State conceded that such a level of funding was both adequate and necessary. This concession was accepted by this Court to conclude the Montoy case.”). “Applying the school finance formula as it existed in 2010, including the base state aid per pupil of \$4,492, to the current Kansas student population, including those students eligible for all of the weightings in the formula as it existed in school year 2009-10, results in a total amount of aid to schools in the district general funds of approximately \$3,108.7 million.” App. 1221 (Doc. #48, April 23, 2018, KLRD memo at 1). The legislators’ calculation then adjusted that amount for inflation and subtracted current aid, including scheduled increases provided by SB 19. *Id.* at 1-2. Based on these calculations, legislators believed they needed to add \$522.2 million to SB 19. *Id.* at 2.

SB 423, as modified by SB 61, exceeded this goal by providing \$548.3 million in additional school funding, phased in over a five-year period. *See* App. 1247 (Doc. #50, KSDE SF18-102 at 2) (total of yearly increases minus the \$95.6 million attributable to SB 19). By relying on both the structure and implementation of the last school funding regime this Court concluded satisfied Article 6, the Legislature has satisfied its duty to “make suitable provision for finance of the educational interests of the state.” Kan. Const. Art. VI, § 6(b).

**B. The Legislature reasonably decided not to adopt the compensatory support scenarios of the Taylor Study, but the study nevertheless supports the conclusion that SB 423 and SB 61 satisfy Article 6.**

Following this Court’s decision in *Gannon V*, the Legislature commissioned a new cost study, “Estimating the Costs Associated with Reaching Student Achievement Expectations for Kansas Public Education Students A Cost Function Approach,” prepared by WestEd: Dr. Lori L. Taylor, Consultant to WestEd, Jason Willis, Alex Berg-Jacobson, Karina Jaquet, Ruthie Caparas, March 15, 2018. *See* App. 623-831 (Doc. # 27, Taylor Study). The Legislature reasonably decided not to implement several of the study’s recommendations, but the study nevertheless supports the conclusion that SB 423 and SB 61 satisfy the adequacy requirement of Article 6.

1. *The study focused on the costs of satisfying the State Board of Education’s aspirational “moon shot,” which exceeds the Rose standards.*

The Taylor Study offered three levels of funding above current amounts, a baseline amount and two “compensatory support” scenarios. The Legislature decided it was not advisable to implement the study’s compensatory support scenarios because the achievement targets Dr. Taylor selected far exceeded the *Rose* standards.

The compensatory support scenarios are designed to achieve certain lofty, aspirational achievement targets. But as Dr. Taylor explained, the selection of achievement targets that will comply with the *Rose* standards is “not in our purview.” App. 913 (Doc. #30, transcript at 41); *see also* App. 905 (Doc. #30,

transcript at 33) (“[W]e definitely are purely advisory in this role. So it is our information to you that we believe these standards would be consistent with the Rose standards, but it’s not our position that these are the only—that you couldn’t have a different opinion.”). Dr. Jesse Levin, who peer-reviewed the study, agreed. He explained: “As economists, we have to cost out some kind of standard that defines adequacy. We are not in the role of determining those standards at all. . . . It’s really up to the policy maker in the state, namely the Board of Education, the state department of education and the legislature to determine that.” App. 1094 (Doc. #40, transcript at 30).

But cost studies necessarily need to select achievement targets that can be measured in available data. *See* App. 424 (Doc. #23, transcript at 39); *see also* Michael A. Rebell, *Safeguarding the Right to a Sound Basic Education in Times of Fiscal Constraint*, 75 Alb. L. Rev. 1855, 1960 (2012). The Taylor Study selected an aspirational metric that the Kansas Board of Education reported to the federal government under the Every Student Succeeds Act (ESSA). *See* App. 885 (Doc. #30, transcript at 13); App. 902 (Doc. #30, transcript at 30) (“[T]here clearly is a significant influence of the ESSA plan on the identification of thresholds . . . .”); *see also id.*, at 77:10-15; 80:3-22. Dr. Taylor said these metrics were used to replace “vague standards which are Rose capacities” with specific outputs. *Id.* at 77:10-78:15.

The State’s ESSA plan sets lofty goals, reflecting the State Board’s Kansans Can vision to “lead[ ] the *world* in the success of each student.” App. 227 (Doc. #21,



ESSA submission at 6) (emphasis added). Kansas Commissioner of Education Dr. Randy Watson has described this vision as a “moon shot.” App. 524, 1250 (Doc. #24, Kansas Can materials; Doc. #52, Kansas Department of Education press release). The graduation rates and assessment test scores targeted in the State’s ESSA plan are aligned to the Board’s aspirational vision. App. 665, 671-72 (Doc. #27, Taylor Study at 36, 42-43). Explaining how the long-term goals are “ambitious,” the Kansas ESSA submission provides:

Kansans vision for education is to lead the world in the success of each student. . . . The rigor of the Kansas state assessments and the ambitious expectations established by the long-term goal demonstrates Kansas’ commitment to its vision for all students. The long-term ambitious goal is an essential component of achieving the Kansas Can vision adopted by the Kansas State Board of Education . . . .

App. 237 (Doc. #21, ESSA submission at 16). In addition, the plan’s “95 percent graduation rate would put Kansas among the countries currently leading the world in secondary graduation rates.” *Id.* at 19. These aspirational goals are reminiscent of No Child Left Behind. *See* Rebell, *supra*, 75 Alb. L. Rev. at 1918-19 (“The one hundred percent proficiency standard mandated under the federal No Child Left Behind Law is clearly unreasonable, and the federal law’s adequate yearly progress requirements have also proved impractical . . .”).

While the State Board’s vision is admirable, it sheds no light on the constitutional inquiry at issue in this case. For instance, while the State Board’s vision includes attaining a state-wide 95% graduation rate, the highest graduation rate in the country (Iowa) is only 91%. *See* National Center for Education Statistics, Public High School Graduation Rates, [https://nces.ed.gov/programs/coe/indicator\\_](https://nces.ed.gov/programs/coe/indicator_)

coi.asp. The *Rose* standards cannot possibly demand outcomes that *no other State* has ever been able to achieve. As this Court has explained, “the *Gannon I* test for adequacy is one reflecting minimal standards. Once they are satisfied, the requirements of Article 6 are satisfied and the court’s role ends. Whether the legislature chooses to exceed these minimal standards is up to that deliberative body and ultimately the people of Kansas who elect those legislators.” *Gannon IV*, 305 Kan. at 856-57. Article 6 does not demand a moon shot.

Equally important, the targets in the State’s ESSA Plan are for 2030, not the next two or even five years. App. 227 (Doc. #21, ESSA submission at 26 & Appendix A). As a result, the Taylor Study attempts to estimate costs for achieving much more aggressive and optimistic graduation and assessment test improvements than even those inherent within the State Board’s Kansans Can aspirational goals for a world-leading education.

Because the study’s achievement targets exceed the *Rose* standards and even the State Board’s lofty vision, the Legislature reasonably decided it was not necessary—and certainly not constitutionally required—to implement the study’s compensatory support scenarios.

2. *The Legislature declined a one-time short-term surge of funding in favor of a predictable long-term funding stream.*

To launch the “moon shot,” the Taylor Study recommended an immediate surge of funding that would go away in future years. The compensatory support scenarios in the Taylor Study do not reflect long-term funding levels. Instead, the compensatory support scenarios “are best understood as *temporary transitional*

*funding . . . to get to the point of a long-run scenario where the maintenance level is required to sustain . . . .*” App. 933 (Doc. #30, transcript at 61) (emphasis added). As the consultants’ response to the follow-up requests explained:

[T]he compensatory support scenarios identify the necessary investment to support individual school districts to close the gap between their current performance and the identified performance threshold over a period of five years. And further, that once the investment was made in a school district that they would be able to close the gap and then having achieved that threshold be able to return to a spending level in line with the maintenance scenario. *That is, the compensatory scenarios can be considered a remedial, one-time investment in the public education system (spread out over a five-year period) to support school districts and their respective students to ‘catch-up’ and achieve the identified performance thresholds.*

App. 1209 (Doc. #45, Taylor Addendum at 4) (emphasis in original).

The Legislature reasonably decided it would not be wise to provide one-time funding that would be taken away from districts in the near future. Doing so would have put districts in the position, for instance, of hiring teachers only to have to fire them at the end of the compensatory support term, or giving existing teachers temporary raises only to cut their salaries on return to the maintenance levels. Instead, the Legislature reasonably decided to provide sustainable, long-term funding above the study’s maintenance levels.

3. *The Taylor Study indicates that SB 423 and SB 61, in conjunction with SB 19, will significantly improve student achievement.*

Although the Legislature decided not to implement the Taylor Study’s compensatory support scenarios, the study nevertheless supports the conclusion that SB 423 and SB 61, in conjunction with SB 19, will satisfy Article 6’s adequacy

requirement. The Legislature could have reasonably concluded that providing more than one billion dollars in additional funding would lead to substantial gains in student performance.

In addition, the Legislature has provided more funding than the study's no-compensatory-support scenario of \$5.103 billion. *See* App. 698 (Doc. #27, Taylor Study at 69). The study identified current K-12 spending as \$4.652 billion, but this was for the 2016-17 fiscal year and therefore did not include SB 19's funding increases. *Id.* Because SB 19, SB 423, and SB 61 collectively provide for \$1.007 billion in additional funding annually by 2022-23, *see* App. 1249 (Doc. #51, May 1, 2018, KLRD Memo at 2), this would bring total school funding at the end of the phase in period to \$5.659 billion, well above the \$5.103 billion no compensatory support scenario.

While the no-compensatory-support scenario has sometimes been described as "maintenance" funding, Dr. Taylor explained that the term "maintenance" may be "inartful[ ]," App. 893 (Doc. #30, transcript at 21), in that it does not mean that the so-called maintenance level of funding will have no effect on current student performance. In fact, the maintenance levels of funding will "improve overall statewide achievement" according to the consultants. App. 1209 (Doc. #45, Taylor Addendum at 4). For instance, the study's maintenance scenario—which the Legislature has exceeded—is based on achieving a 95% graduation rate, a rate that would far exceed the graduation rate in any other State. *Id.*

The consultants' alternative achievement calculations further demonstrate that the Legislature's response will lead to significant gains in student performance. For instance, using a 91% graduation rate (which would currently be tied for the highest graduation rate in the country), the consultants calculated that the provision of \$5.090 billion in funding by the 2022-23 school year would lead to roughly 84.5% of students scoring at level two or above on the State's English and math assessments, an increase of approximately 12% over the roughly 72.5% of students at or above level two in 2016-17. App. 1214 (Doc. #45, Taylor Addendum at 9). And SB 19, SB 423, and SB 61 provide approximately \$569 million more than that calculation (\$5.659 billion minus \$5.090 billion), increasing student performance even more. Thus, the Taylor Study provides additional support for concluding that the Legislature has satisfied Article 6's adequacy requirement.

**C. The five-year phase-in is a reasonable and responsible legislative judgment.**

In SB 423 and SB 61, the Legislature has substantially increased BASE aid over five years, from \$4,165 for Fiscal Year 2019 to \$4,713 for Fiscal Year 2023, with increases after that based on the consumer price index for all urban consumers in the Midwest region. SB 61, § 4(e) (amending SB 423, § 2(e)). The decision to phase in the BASE aid and other increases over five years—which will result in an increase of more than \$1 billion in total annual education funding within five years under SB 19, SB 423, and SB 61, *see* App. 1249 (Doc. #51, May 1, 2018, KLRD Memo at 2)—is well-supported. Indeed, this Court has previously approved as

multi-year phase-in of additional funding to satisfy Article 6. *See Montoy IV*, 282 Kan. at 24-26.

As this Court has recognized, “there are limits on the amount the system can absorb efficiently and effectively at this point in the budget process.” *Montoy III*, 279 Kan. at 845. For this very reason, Dr. Taylor and her colleague Jason Willis recommended phasing in any funding increase over “five or ten years.” App. 957 (Doc. #30, transcript at 85). Because “education systems are extraordinarily complex,” understanding “how additional resources can have a direct impact on the outcome takes time,” and a “phase-in period would create an opportunity for school and district leaders to identify ways in which those dollars can be used most effectively.” App. 939-40 (Doc. #30, transcript at 67-68). The best use of additional funds may be “lowering class size to allow students to be pulled out for different instruction,” or perhaps “providing a mental health counselor that can provide social and emotional support to students,” but local districts and leaders need time to “think about how they might use that money.” App. 940 (Doc. #30, transcript at 68).

Dr. Randy Watson, the State Commissioner of Education, also has advised the Legislature that large, single-year funding increases made late in the budget cycle will do little to meet the most pressing need of most schools—hiring new personnel. Brief of Appellant State of Kansas at 13, *Gannon v. State*, No. 15-113267-S (Kan. June 30, 2017).

It “is not practical to make a one-time, significant investment in a statewide public education system and expect at the end of that school year to see dramatic movement from current performance.” App. 699 (Doc. #27, Taylor Study at 70). Rather, “ongoing and incrementally larger investments in the system over time with established targets” would allow school districts to “plan and determine the appropriate ways to invest the funding.” *Id.*

The Legislature’s decision to phase in funding increases over five years was a reasonable and prudent approach to making suitable provision for financing the educational interests of the State.

**D. Kansas students are doing well overall and the Legislature has targeted funding to underperforming subgroups.**

Selecting a *Montoy* safe-harbor method of funding schools is further justified by the success enjoyed by Kansas schools under *Montoy* funding levels. In *Gannon IV*, the Court acknowledged that the “improved achievements between 2003 and 2011-12,” which came during increased funding—and its aftermath—as a result of extensive litigation in *Montoy*,” were “laudable and encouraging.” *Gannon IV*, 305 Kan. at 903. And even now, Kansas students are doing well overall relative to their counterparts in other States. According to the Kansas Association of School Boards, Kansas ranks 10th in the nation on 15 measures of educational performance, including postsecondary outcomes, graduation rates, and scores on various tests including the National Assessment of Educational Progress (NAEP), and ACT test. KASB Comparing Kansas 2017, <https://kasb.org/wp-content/uploads/2016/12/>

ComparingKS17.pdf at 3, 6 (Sept. 2017). Kansas’s graduation rate of 85.7% ranks 20th in the nation, and the State has above-average graduation rates for subgroups of students who are economically disadvantaged, have limited English proficiency, and have disabilities. *Id.* at 14. In 2016, 74% of Kansas graduates took the ACT test and 31% scored at the “college ready” benchmark on all four subjects (English, math, reading, and science). The nationwide average was 67.4% of graduates taking the test and 29.1% meeting all benchmarks.

While Kansas students are doing well overall, this Court found an adequacy violation in *Gannon IV* based on the performance of certain subgroups of students the Court described as “underperforming” and “harder-to-educate.” 305 Kan. at 855. Thus, in addition to phasing in BASE aid increases of nearly \$500 million over five years, App. 1249 (Doc. #51, May 1, 2018, KLRD Memo at 2), the Legislature targets this funding, and provides additional funding outside BASE aid, to address these subgroups. These subgroups include English Language Learners (ELL), students with disabilities, and students receiving free and reduced lunch.

In SB 19, the Legislature provided additional funding for students receiving free meals under the National School Lunch Act by increasing the at-risk student weighting from 0.456 (which was the weighting in *Montoy IV*) to 0.484, which increased the total amount of at-risk funding by \$21 million for 2017-18. App. 1249 (Doc. #51, May 1, 2018, KLRD Memo at 2). SB 423 and SB 61 retain the 0.484 at-risk weighting, and by increasing the BASE provide additional increases in at-risk funding. SB 423 § 9(a)(2). SB 423 also retains the high-density at-risk student



weighting enacted in SB 19 and extends the school-specific high-density at-risk weighting pilot through the 2019-20 school year (it was scheduled to sunset in July 2019 under SB 19). SB 423 § 9(b).

In addition, as this Court recognized in *Gannon V*, the Legislature’s decision in SB 19 to fully fund all-day kindergarten—to the tune of more than \$60 million in Fiscal Year 2018—which remains fully funded under SB 423, frees up at-risk funding for other purposes because many districts had been using at-risk money to fund all-day kindergarten. *See Gannon V*, 306 Kan. at 1208-09; *see also* SB 423 § 2(l)(4). The Court recognized this benefit in *Gannon V*, but assumed the “change will not result in ‘new money’ for all districts” because “some districts were charging parents for the portion of all-day kindergarten costs not covered under the prior law.” *See Gannon V*, 306 Kan. at 1209. But only 21 districts charged all-day kindergarten fees in the 2016-2017 school year. App. 160 (Doc. #9 at 2). And while the exact benefit of this change may vary from district-to-district depending on how the district used to pay (or charge) for all-day kindergarten, there can be no doubt that the increased at-risk weightings and fully funding all-day kindergarten are reasonably calculated to make suitable provision for financing the State’s educational interests.

To ensure the underperforming subgroups this Court identified in *Gannon IV* receive the funding intended for them, the Legislature required each school district to establish an at-risk education fund and a bilingual education fund, and required that all expenses directly attributable to at-risk and bilingual education programs

be spent through the respective funds. *See* SB 19 §§ 25, 93 (K.S.A. 2017 Supp. 72-5153 and 72-3613). SB 423 also requires that a portion of supplemental general State aid be placed in the district's at-risk and bilingual education funds, SB 423 § 3(i)(2), which responds to the Court's concern that an increasing reliance on LOB relative to BASE aid would diminish statutory weightings. *See Gannon V*, 306 Kan. at 1204-05. And starting in the 2018-19 school year, all at-risk funds must be spent on best practices to be developed and identified by the State Board of Education. *See* SB 19 § 25 (K.S.A. 2017 Supp. 72-5153).

But the Legislature did not stop there; SB 423 retains and expands other targeted funding as well. It expands the definition of preschool-aged at-risk students to include three-year-olds, with \$2 million per year to this group anticipated for Fiscal Years 2020 through 2022—on top of the additional \$2 million in Fiscal Years 2018 and 2019 provided by SB 19—for a total of \$10 million over five years. SB 19, §§ 4(ii)(2)(B), 26; App. 1247 (Doc. #50, KSDE SF18-102 at 2); App. 1249 (Doc. #51, May 1, 2018, KLRD Memo at 2). The Legislature also focused additional funding on students with disabilities by increasing special education funding by \$32.4 million for the upcoming 2018-19 school year, SB 423 § 1(a), with an additional \$7.5 million anticipated in each of the following four years. App. 1247 (Doc. #50, KSDE SF18-102 at 2); App. 1249 (Doc. #51, May 1, 2018, KLRD Memo at 2). SB 423 invests more than \$7.5 million in a mental health pilot program, SB 423 § 1(a). *See* App. 510 (Doc. #23, February 23, 2018 Senate Select Committee on Education Finance Hearing Transcript at 125) (economically disadvantaged

students often arrive at schools with a set of emotional/mental health/behavioral needs that require “dollars . . . in excess of the base level of spending for general education students”). And it adopts the Kansas Department of Education’s recommendation to invest \$2.8 million to pay for students to take the ACT and ACT WorkKeys once during high school. *See* SB 423 § 1(a); App. 1026-27 (Doc. #37).

All of this substantial new funding benefits underperforming subgroups directly and is reasonably calculated to cure the constitutional inadequacies this Court found in *Gannon IV*. By increasing the amount of BASE aid dramatically over five years, increasing at-risk weightings, and adding funds outside the BASE that target underperforming subgroups, the Legislature has reasonably responded to this Court’s adequacy concerns regarding these subgroups.

**E. All sources of funding should be considered in determining whether the Legislature has made suitable provision for financing the State’s educational interests.**

The Court reiterated in *Gannon V* that the “Kansas Constitution clearly leaves to the legislature the myriad of choices available to perform its constitutional duty” of making suitable provision for financing the State’s educational interests. Any concern this Court had that choices made by the Legislature in SB 19 made that approach an “outlier,” 306 Kan. 15 1206, should be allayed by the Legislature’s new choices now before this Court. SB 19, SB 423, and SB 61 provide a system for funding education that, when all sources of funding are considered, is in all major respects a system that this Court previously approved in dismissing the *Montoy* litigation. In determining whether the Legislature has made suitable provision for

financing the educational interests of the State in SB 19, SB 423, and SB 61, the Court should take into account *all* funding the Legislature directs to the State’s educational interests. *See, e.g.*, App. 724 (Doc. #27, Taylor Study at 95) (including everything from general and supplemental general fund monies to federal funds and KPERS, to professional development and worker’s compensation in the cost function analysis). This Court recognized as much in *Gannon IV* when it said that “the panel should have given greater consideration and some value to the other various sources of funds”—beyond just base state aid per pupil, including LOB, KPERS, and federal funds—“and not rejected their applicability to the adequacy calculus.” 305 Kan. at 893.

With respect to LOB funds, the Court specifically held that such funds should be considered in determining whether the Legislature has made suitable provision for financing the educational interests of the State. *Id.* Sensing that the Court seemed to signal some retreat from this holding in *Gannon V*, the Legislature made clear in SB 61 that LOB is part of its system for making suitable provision for financing the State’s educational interests. *See Gannon V*, 306 Kan. at 1205; SB 61 § 1; *see also* Kan. Const. Art 6, § 6(b). SB 61 requires all school districts to maintain an LOB “equal to 15% of the school district’s total foundation aid.” SB 61 § 5. Thus, any perceived structural impediment to including the LOB revenue guaranteed by SB 61, *see Gannon V*, 306 Kan. at 1205, has been addressed.

In addition to the more than \$4.89 billion the Legislature has invested in school year 2018-19 to “update the school finance funding level and formula to

account for student population and inflation, since the last time [this Court] found the provision of school finance to be acceptable,” the Legislature also has invested more than \$188.6 million for support services outside the classroom, much of which directly impacts student learning and achievement. *See* SB 423 (preamble paragraph 3). These efforts demonstrate the Legislature’s comprehensive approach to making suitable provision for financing the State’s educational interests. For example, the Governor’s budget recommendation for Fiscal Years 2018 and 2019 includes more than \$9 million each year for Kansas Early Head Start Program; more than \$100,000 each year for the Urban Scholastic Center, which provides literacy, after-school, and evening educational programs for “inner-city children and youth”; the Kansas Reading Roadmap, which focuses on achieving reading proficiency by the third grade, which “is considered one of the most important predictors of high school graduation,” and Communities in Schools, which partners with public schools to improve high school graduation rates by providing services to at-risk students, among others. App. 1038-40, 1057-59 (Doc. #39, March 28, 2018, KLRD Memo re: State Expenditures on School Readiness at 8-10, 27-29); *see also* SB 423 (preamble paragraph 7).

All of these funds, whether formally included in the education budget or not, must be taken into account when determining whether the Legislature has made suitable provision for financing the State’s educational interests.

**F. SB 423 provides accountability to ensure funding is spent to improve student performance.**

When substantially increasing funding in a relatively short period of time, as the Legislature has done in SB 19, SB 423, and SB 61, a robust accountability system is needed to ensure the additional funding is spent efficiently and as intended. *See* App. 700 (Doc. #27, Taylor Study at 71) (“Finding #9: Pair support strategies with accountability measures”). SB 19 and SB 423 do just that by requiring a series of reports by the Legislative Division of Post Audit (LPA) that the Taylor Study called a “significant effort to ensure not only that the state’s public education system will meet the needs of today’s students, but that it will continue to meet the needs of students in years to come.” App. 665 (Doc. #27, Taylor Study at 36); *see also* SB 423 §§ 11, 12, 13.

SB 423 requires the State Board of Education to hold all school districts and schools accountable to target outcomes set by the Board and to establish “rigorous accountability measures in the areas of social emotional learning, kindergarten readiness, individual plans of study, graduation and postsecondary success.” SB 423 § 11(a)(1), (2). The Board must also prepare reports on education funding and achievement.

The reports include a performance audit to provide a reasonable estimate of special education costs and services (SB 423 § 13(f)); a performance audit to provide a reasonable estimate of the cost of providing educational opportunities for every public school student in Kansas to achieve the performance standards adopted by the State Board of Education in Fiscal Years 2021 and 2024 (SB 423 § 13(e));

performance audits of at-risk education funding and bilingual education funding in Fiscal Year 2022 (SB 423 § 13(b), (c)); and a study of statewide virtual school programs administered in other states in Fiscal Year 2023 (SB 423 § 13(d)). These reports not only ensure the funds distributed are spent efficiently and for their intended purpose, they will provide insights regarding “process, culture and performance” and provide opportunities for sharing best practices across districts. *See App. 701 (Doc. #27, Taylor Study at 72).*

These reports will provide the Legislature, Governor, and the public opportunities to hold each other accountable to ensure that funding remains sufficient to satisfy Article 6.

## **II. SB 423 Cures Each of the Equity Infirmities Found to Exist in SB 19.**

In *Gannon V*, this Court identified four equity infirmities with SB 19. *See* 306 Kan. at 1214-35. The Legislature has cured all four by passing SB 423 and SB 61.

### **A. Capital outlay spending is now limited to the uses approved by the Court after *Gannon III*.**

First, this Court held that SB 19 violated the equity standard of Article 6 by expanding the purposes for which capital outlay monies could be used. *Gannon V*, 306 Kan. at 1222; SB 19, § 91 (amending K.S.A. 2016 Supp. 72-8804). The Court’s concern arose from the varying abilities of districts to raise capital outlay funds and the potential for growth in capital outlay spending to pay for district needs previously categorized as operational expenses. *Id.* at 1220-22.

SB 423 repeals SB 19’s amendment of K.S.A. 2016 Supp. 72-8804 (transferred to K.S.A. 2017 Supp. 72-53,116), returning the statutory uses of capital

outlay to those in place when the Court approved as constitutional the formula for capital outlay state aid payments. *See* SB 423, § 15(a); Sup. Ct. Order, *Gannon v. State*, No. 15-113267-S (Kan. June 28, 2016).

**B. An LOB above 30% cannot be adopted unless it has been or will be subject to an election or protest petition.**

The Court also concluded that the State failed to meet its burden of establishing that school districts have reasonably equal access to substantially similar educational opportunity through similar tax effort by imposing different procedures for certain districts to raise their maximum LOB. *Gannon V*, 306 Kan. at 1223-29. Specifically, SB 19 grandfathered resolutions made between 2014 and 2016 to raise LOB beyond 30% of the district's state financial aid so that any grandfathered district enjoyed higher LOB authority without facing a possible voter protest and election. *Id.* at 1225. This Court determined the grandfathering was inequitable because only certain districts were permitted increase their LOB authorization above 30% without having to be concerned about an election process, while potentially more than 200 other districts had to clear the structural hurdle imposed by the SB 19's protest-petition process. *Id.* at 1228.

SB 423, § 4(f) cures this problem by amending K.S.A. 2017 Supp. 72-5143 to provide:

(f) (1) Except as provided in paragraph (2), the board of any school district authorized to adopt a local option budget prior to July 1, 2017, under a resolution that authorized the adoption of such budget in accordance with the provisions of K.S.A. 2017 Supp. 72-6471, prior to ~~its expiration~~ July 1, 2017, may continue to operate under such resolution for the period of time specified in the resolution or may abandon the resolution and operate under the provisions of this



section. Any such school district shall operate under the provisions of this section after the period of time specified in any previously adopted resolution has expired.

*(2) Any resolution adopted prior to July 1, 2017, pursuant to K.S.A. 72-6433(e)(2), prior to its repeal, that authorized the adoption of a local option budget and that was not subsequently submitted to and approved by a majority of the qualified electors of the school district voting at an election called and held thereon shall expire on June 30, 2018, and shall have no force and effect during school year 2018-2019 or any subsequent school year.*

By this amendment, SB 423 removed the advantage given to theoretically grandfathered districts. Now the law provides that the only districts which retain authority for an LOB over 30% are those that obtained that authority subject to a protest petition or election. SB 423, § 4(b)(1), (f)(1) & (2). All districts are now on the same footing.

**C. LOB state aid is now calculated from local districts' current year adjusted enrollments.**

*Gannon V* also held that SB 19, § 4(k) and (x), violated Article 6's equity requirement by calculating LOB state aid with a formula which used a school district's LOB percentage from the preceding school year. The Court determined that this provision, which it labeled a "lookback," created inequity because an aid-qualifying district that increased its LOB authority would not receive a corresponding increase in LOB state aid in the current year. *Gannon V*, 306 Kan. at 1230-32.

SB 423 cures this inequity by computing a district's LOB state aid using the district's LOB adopted in the same school year. *See* SB 423, § 5.

On and after July 1, 2018, K.S.A. 2017 Supp. 72-5145 is hereby amended to read as follows: 72-5145. (a) In each school year, each school district that has adopted a local option budget is eligible to receive supplemental state aid. Except as provided by K.S.A. 2017 Supp. 72-5146, and amendments thereto, supplemental state aid shall be determined by the state board as provided in subsection (b).

(b) The state board shall:

~~(1) (A) For school year 2017-2018, determine the amount of the assessed valuation per student in the preceding school year of each school district; and~~

~~(B) for school year 2018-2019 and each school year thereafter,~~ Determine the average assessed valuation per student of each school district by adding the assessed valuation per student for each of the three immediately preceding school years and dividing the resulting sum by three;

(2) rank the school districts from low to high on the basis of the amounts of assessed valuation per student determined under subsection (b) (1);

(3) identify the amount of the assessed valuation per student located at the 81.2 percentile of the amounts ranked under subsection (b)(2);

(4) divide the assessed valuation per student of the school district as determined under subsection (b)(1) by the amount identified under subsection (b)(3); and

(5) (A) if the quotient obtained under subsection (b)(4) equals or exceeds one, the school district shall not receive supplemental state aid; or

(B) if the quotient obtained under subsection (b)(4) is less than one, subtract the quotient obtained under subsection (b)(4) from one, and multiply the difference by the amount of the local option budget of the school district ~~for the immediately preceding school year~~. The resulting product is the amount of supplemental state aid the school district is to receive for the school year. . . .

**D. SB 19's 10% floor for the at-risk student weighting is repealed.**

The fourth and final inequity identified in *Gannon V* concerned § 23(a)(3) of SB 19, which added a floor for the at-risk student weighting. Under the section, no district's at-risk weighting was less than 10% even if fewer than 10% of a district's students qualified for federally funded free meals (the at-risk weighting test). The Court held the State failed to establish the at-risk floor complied with the equity standard of Article 6. *Gannon V*, 306 Kan. at 1235.

SB 423 corrected this equity problem by repealing the at-risk floor. See SB 423, § 9.

On and after July 1, 2018, K.S.A. 2017 Supp. 72-5151 is hereby amended to read as follows: 72-5151. (a) The at-risk student weighting of each school district shall be determined by the state board as follows:

(1) Determine the number of at-risk students included in the enrollment of the school district; and

~~(2) for a school district with an enrollment that consists of 10% or more at-risk students, multiply the number determined under subsection (a)(1) by 0.484. The resulting sum is the at-risk student weighting of the school district; or~~

~~(3) for a school district with an enrollment that consists of less than 10% at risk students, multiply the number of students equal to 10% of such school district's enrollment by 0.484. The resulting sum is the at-risk student weighting of the school district. A school district whose at-risk student weighting is determined pursuant to this paragraph shall submit a report to the state board in such form and manner as required by the state board that identifies those students enrolled in such school district who are receiving at-risk program services and the criteria each such student satisfies in order to receive at-risk program services. The state board shall adopt rules and regulations that establish the criteria for eligibility for at-risk program services. The provisions of this paragraph shall only apply to those school districts that offer instruction in kindergarten and grades one through 12.~~

**III. If this Court Concludes that the Legislature Has Not Fully Satisfied Article 6, the Court Should Accept At Least the First Year of the Plan and Allow the Legislature to Address any Remaining Issues During the 2019 Regular Legislative Session.**

The Legislature has satisfied Article 6 by phasing in more than \$1 billion in additional annual state funding for schools. If for some reason this Court were to conclude that this massive funding increase still does not satisfy Article 6, the proper remedy—given the inherently political nature of legislation, concern for the separation of powers, and the importance of continuing to educate Kansas students in an orderly fashion—is to do away with the Court’s prior warning that it will lift the stay on any Court-ordered remedy on June 30, 2018, and instead permit any further legislative response in the ordinary course of the legislative calendar.

While the Legislature has decided to phase in large funding increases over a five-year period, those funding increases are front-loaded, with a \$187.5 million increase for 2018-19 and \$109 million to \$115 million increases in future years. *See supra* table on page 7. Particularly given school districts’ inability to effectively absorb large funding increases, as discussed above, the Court should at a bare minimum accept the 2018-19 funding increase as the first step of a multi-year plan and require the Legislature to address any remaining issues during the 2019 regular legislative session.

In no event should the Court order a remedy that would have the effect of closing the schools. As the State has previously explained, such an extreme “remedy” would itself violate the Kansas Constitution, a Kansas statutory

prohibition on closing schools, and federal law. *See* State's Motion for Rehearing or Modification, *Gannon v. State* (filed June 10, 2016).

## CONCLUSION

For the reasons above, the State urges the Court to find substantial compliance and dismiss this case.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7th day of May 2018, the above brief was electronically filed with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to registered participants, and copies were electronically mailed to:

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