

IN THE SUPREME COURT OF THE
STATE OF KANSAS

RYAN MONTROY, *et al.*,

Plaintiffs,

v.

THE STATE OF KANSAS, *et al.*,

Respondents.

Case No. 04-92032-S

**MOTION TO RE-OPEN *MONTROY V. STATE OF KANSAS*, CASE NO. 04-92032-S, AND
MEMORANDUM IN SUPPORT**

Alan L. Rupe #08914
Kutak Rock LLP
Suite 150
1605 N. Waterfront Parkway
Wichita, KS 67206
Telephone: (316) 609-7900
Facsimile: (316) 630-8021

John S. Robb #09844
SOMERS ROBB & ROBB
110 East Broadway
Newton, Kansas 67114-2222
Telephone: (316) 283-4560
Facsimile: (316) 283-5049

Attorneys for Plaintiffs

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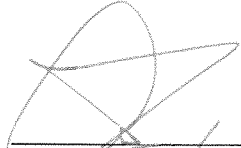
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COMES NOW Plaintiffs, by and through their attorneys of record, and move this Court for an Order re-opening *Montoy v. State of Kansas*, Case No. 04-92032-S, and remanding the case to the district court for further proceedings to determine (1) whether the current educational funding scheme is constitutional; and (2) whether educational funding cuts since the dismissal of *Montoy v. State of Kansas* blatantly violate Article 6, § 6 of the Kansas Constitution, existing state law, and this Court's mandates in *Montoy v. State of Kansas*. Plaintiffs submit a Memorandum in Support simultaneously herewith.

Dated this 11th day of January, 2010.

By



Alan L. Rupe KS #08914
Kutak Rock LLP
Suite 150
1605 North Waterfront Parkway
Wichita, KS 67206
(316) 609-7900 (Telephone)
(316) 630-8021 (Facsimile)

and

John S. Robb #09844
SOMERS ROBB & ROBB
110 East Broadway
Newton, Kansas 67114-2222
Telephone: (316) 283-4560
Facsimile: (316) 283-5049

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of January, 2010, a true copy of the foregoing was served via United States mail, first class, postage pre-paid, addressed to the following:

Mark Ferguson
Gates, Shields & Ferguson, P.A.
10990 Quivira, Suite 200
Overland Park, Kansas 66210

Also served via e-mail to:
markferguson@gsflegal.com

Mike Leitch
Deputy Attorney General
Office of the Attorney General
120 S.W. 10th Avenue
Topeka, Kansas 66612

Also served via e-mail to:
Michael.leitch@ksag.org



Alan L. Rupe

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INTRODUCTION

Chief Justice Kay McFarland – following years of School Finance litigation – said the following on July 28, 2006:

Without doubt, this is the most significant case to come before the Court in my tenure.... This case is not about winners and losers – it is about the children of Kansas. They will be better educated and better prepared to meet the challenges of our rapidly changing society.

Chief Justice Kay McFarland, Remarks regarding *Montoy v. State of Kansas*, Case No. 92,032, (July 28, 2006) (available at <http://www.kasbo.org/pdf/cjstatement72806.pdf>).

In a series of Supreme Court decisions, collectively referred to as the *Montoy* decisions, this Court definitively explained the contours of Art. VI, § 6 of the Kansas Constitution. That provision specifically provides that “[t]he legislature shall make suitable provision for the finance of the educational interests of the state.” In spite of Article 6 of the Kansas Constitution, in spite of Kansas laws dictating how education should be funded in Kansas, and in spite of this Court’s clear mandates regarding school funding in five *Montoy* decisions (which were the basis for the Chief Justice’s remarks), the State of Kansas continues to fail to adequately fund this state’s public schools. Since Justice McFarland’s remarks and the dismissal of *Montoy*, the state has chronically rebuked its school funding responsibilities; it has acted in defiance of its own laws, this Court’s decisions, and the Kansas Constitution.

ARGUMENTS AND AUTHORITIES

I. THE STATE OF KANSAS HAS A CONSTITUTIONAL DUTY TO ADEQUATELY FUND PUBLIC SCHOOLS

The state’s duty to fund public schools is well-settled. The Kansas Constitution imposes a general mandate that our educational system cannot be static or regressive, but must be one which “advance[s] to a better quality or state.” *Montoy v. State of Kansas*, 278 Kan. 769, 773,

120 P.3d 306 (2005) (Montoy II). Although the Supreme Court has stated that the school finance formula can be altered in “literally hundreds of ways” to comply with Art. VI, § 6, there are very specific parameters within which the Legislature may, and must, act. *Montoy II*, 278 Kan. at 775. Specifically, two critical factors which must be taken into consideration before a school finance formula can be deemed constitutional are (1) actual costs of providing adequate education and (2) equity of distribution. *Montoy II*, 278 Kan. at 275; *Montoy v. State of Kansas*, 282 Kan. 9, 10, 138 P.3d 75 (2006) (Montoy V). The mandates of *Montoy*, in conjunction with the clear language of the Constitution and Kansas laws, prescribe certain minimum requirements with respect to the school finance formula – requirements which are clearly defined and which are not subject to discretion.

II. HISTORY OF MONTOY V. STATE OF KANSAS

The *Montoy* cases began in 1999, five years after previous challenges to the Legislature’s school funding scheme. Plaintiffs filed a lawsuit against the State of Kansas, the Governor, the members of the Kansas State Board of Education, and the Commissioner of the Kansas State Department of Education alleging (1) a violation of Art. VI, § 6 of the Kansas Constitution; (2) a violation of equal rights protection under the Kansas Constitution; and (3) a violation of the substantive due process rights under the Kansas Constitution. In 2001, at the district court level, Judge Terry Bullock dismissed the challenge just prior to trial, finding that he was bound by a previous decision regarding the constitutionality of school funding in 1994. *Montoy v. State of Kansas*, 275 Kan. 145, 62 P.3d 228 (2003) (Montoy I) (discussing *Unified School District No. 229 v. State*, 256 Kan. 232, 885 P.2d 1170 (1994)).

On appeal to the Supreme Court, Plaintiffs argued that the District Court erred in dismissing their claims. In what ultimately became the first in a series of decisions in this case,

the Court found genuine issues of material fact to exist, and reversed and remanded the District Court's decision. *Montoy I*, 275 Kan. at 145. Pivotal in that decision was the Court's finding that "the issue of suitability is not stagnant." *Id.* at 153 (citing *Unified School District No. 229*, 256 Kan. at 258).

On remand following a bench trial, the District Court held that the Kansas School District Finance and Quality Performance Act (SDFQPA), K.S.A. § 72-6405, "stands in blatant violation of Article VI of the Kansas Constitution." *Montoy v. State of Kansas*, No. 99-C-1738, 2003 WL 22902963, at *42 (Kan. Dist. Ct. Shawnee County, Dec. 2, 2003). This time, it was Defendants who appealed to the Supreme Court, and in *Montoy II*, the Supreme Court held that the public school financing formula adopted by the Legislature had "failed to meet its [Art. VI, § 6] burden." *Montoy II*, 278 Kan. at 771. In that decision, the Court mandated increased funding for Kansas schools; found that the then-current financing formula increased disparities in funding; and the formula was not based on any cost analysis but was instead based on "political and other factors not relevant to education." *Montoy II*, 278 Kan. at 775. The Court withheld its formal opinion pending corrective action by the Legislature, and stated that "[w]e have in this brief opinion endeavored to identify problem areas in the present formula as well as legislative changes in the immediate past that have contributed to the present funding deficiencies. We have done so in order that the legislature take steps it deems necessary to fulfill its constitutional responsibility." *Id.* at 776.

In response to *Montoy II*, the Legislature enacted House Bill 2247, and on June 3, 2005, the Supreme Court issued its Opinion (supplemental to *Montoy II*) on the constitutionality of that bill. *Montoy v. State of Kansas*, 279 Kan. 817, 819, 112 P.3d 923 (Montoy IV). The Court held the funding scheme was not in compliance with the *Montoy II* decision because it did not

appropriately consider (1) actual costs of providing adequate education and (2) the equity of the distribution of that funding. *Montoy IV*, 279 Kan. at 818. Thus, the Court ordered that the Legislature implement a minimum increase of \$285 million above the 2004-05 school year funding level for the 2005-06 school year. Thereafter, the Legislature again enacted changes to the school finance formula through Senate Bill 549.

The funding formula addressed by this Court three and one-half years ago in *Montoy V* provided \$755.6 million in additional funding to schools. This Court found that the legislative process was in substantial compliance with its previous orders. *Montoy V*, 282 Kan. at 24. The Court, however, specifically did not hold that the new funding scheme was constitutional. The Court considered two options available to it in 2006, and stated:

We recognize that we could remand this case to the district court to allow the plaintiffs to amend their pleading to challenge the new funding formula. However, we decline to do so, electing instead to end this litigation. We do so for two reasons.

First, we note the point made by the Chief Justice of the Ohio Supreme Court in *DeRolph v. State*: “A review of sixteen other state Supreme Court decisions that have declared their systems for funding public education unconstitutional reveals that a majority of those decisions remanded the case to a trial court. However, it is those states that have had the most difficulty producing a final plan that met the Supreme Court’s opinion of constitutionality. . . .”

....

Second, S.B. 549 is a 3-year plan; thus, it may take some time before the full financial impact of this new legislation is known, a factor which would be important in any consideration of whether it provides constitutionally suitable funding. Indeed, as the Board’s attorney pointed out at oral argument, we do not even know at this time how districts used the funding increase provided by the 2005 amendments.

Montoy V, 282 Kan. at 34-35. The Court then dismissed the case.

The dissent by Justice Beier, favoring remand, noted that there was no appellate record upon which an “informed review” could take place at that time. Justice Beier additionally noted

that, in the event of a remand to build an appropriate record, “The district court proceedings could include any necessary substitution or realignment of parties, amendment of pleadings, appropriate discovery and finally, trial.” *Montoy V*, 282 Kan. at 53 (Beier, J., dissenting).

The two policy reasons stated by the Court in dismissing the case are no longer applicable.

Apparently, from the legislative activity in the interim, not having a pending court case has not aided the Kansas Legislature in its duty to stay within the bounds of the Kansas Constitution, its own laws, and the orders of this Court when it comes to maintaining a constitutional school funding scheme. Rather, the Kansas Legislature has reneged on the remedies it put forth to induce this Court to dismiss the appeal in the first place. Additionally, the full financial impact of the three year funding plan is now known, as is how districts spent the increased funding. Achievement data is also available from the years in question.

The concurring opinion by Justice Rosen, in opposing remand, raises the concern that “litigation in this case could continue in perpetuity.... Such a process would extend into an indefinite future, and the children of Kansas need a resolution to this matter now.” *Montoy V*, 282 Kan. at 49 (Rosen, J., concurring). Litigation is now upon us again due to the acts of the Kansas Legislature. The question is whether it occurs by completing the task begun in *Montoy*, or whether the entire process and record must be built again from scratch. If for no other reason, efficient use of judicial time and resources dictate that the *Montoy* case now be completed.

III. THE STATE HAS FAILED TO MEET ITS CONSTITUTIONAL DUTIES

At the time that S.B. 549 was adopted in 2006, the Legislature knew that there would be a huge budget deficit in 2009. Kansas Legislative Research produced a State General Fund Profile showing this at the time S.B. 549 was adopted. This legislative document takes into account the

new spending required by that legislation. [Exhibit 1]. The Profile shows that, without increased revenues, the state would have state expenditures above receipts in the amount of \$223.8 million for fiscal year 2007, \$400 million for fiscal year 2008, and \$423.3 million for fiscal year 2009. Taking state balances into account, the Profile shows an ending balance for fiscal year 2009 of *negative* \$426.6 million. Knowing this, the Legislature took no steps to raise the revenue it needed to cover its known expenses. Since then – due to the economy – the situation has become even more grim.

During this same time period, the Legislature continued the practice of reducing state revenues with massive tax cuts and tax exemptions. [Exhibit 2]. Legislative Research produced a spreadsheet showing that new tax cuts between fiscal year 2005 and fiscal year 2010 have reduced state revenues by at least \$180 million per year for fiscal year 2010. The cumulative effect of those cuts through fiscal year 2013 is \$1.135 billion. These cuts were embraced by the Legislature, knowing that the state could not keep its promises to schools. When previous tax cuts are added into the picture for the time period between 1995 and 2005, the annual additional depletion of revenues through tax cuts totals \$933.6 million per year. [Exhibit 3]. When the 1995-2005 cuts are added to the 2005-2010 cuts, the annual depletion of revenues reaches \$1.113 billion per year.

The point is not that the Legislature does not have authority to cut taxes if it so chooses. It most certainly has that authority. The point is that it cannot do so and then claim lack of funds when it comes to funding constitutionally required funding increases for schools. The Kansas Legislature, in concert with the Governor, hold the state purse strings and have the clear ability to raise sufficient revenues to meet the state obligations if it is so inclined. In fact, the Constitution requires the Legislature to raise enough money to fund government operations. Art.

XI, § 4 provides “[t]he legislature shall provide, at each regular session, for raising sufficient revenue to defray the current expenses of the state for two years.” This provision has clearly been violated. Kansas statutes setting the level for school funding have not been amended to cut state funding. Rather, the Legislature has simply under-appropriated the amount necessary to follow their own statutes (see K.S.A. 2008 Supp. 72-6410(b), setting the Base state aid per pupil at \$4433 for 2008-09 and \$4492 for 2009-10. Base state aid has been cut \$421 to \$4012 at this point. *See* discussion *infra*). The Legislature then relied on the under-appropriation provisions of K.S.A. 2008 Supp. 72-6410(2) to cut funding to schools for fiscal years 2009 and 2010. This under-appropriation mechanism might pass constitutional muster, were it not for the mandatory nature of the school funding increases in the first place.

The state has not only stalled the “advance[s] to a better quality or state,” as dictated in *Montoy II*, but has taken actions to retreat from the financing formula approved in *Montoy V*, and has backslid to a formula as equally unconstitutional as the one contemplated in *Montoy II*.

There are five specific actions at issue.

The first funding cut occurred February 12, 2009, with the enactment of S.B. 23. Thirty-three dollars was cut from the base state aid per pupil (lowering the base from \$4433 to \$4400), and the funding for special education was reduced by one percent. [Exhibit 4]. This cut reduced school funding statewide in the amount of \$25,345,039 for fiscal year 2009.

The second funding cut occurred March 31, 2009. With H.B. 2354, the Legislature cut an *additional* \$33 from the base state aid per pupil (lowering it from \$4400 to \$4367), and cut an *additional* one percent from the special education budget. [Exhibit 5]. This cut reduced school funding statewide in the amount of \$27,009,474.

The third funding cut occurred May 7, 2009 with the adoption of H.B. 2373. It cut

another \$87 from the base state aid per pupil (lowering it from \$4367 to \$4280), and eliminated equalization aid for capital outlay. [Exhibit 6]. This cut reduced school funding statewide in the amount of \$54,630,111 for the cut to the base, and an additional \$22,338,825 for the loss of capital outlay equalization aid. The elimination of equalization for capital outlay, which does not affect wealthier districts, resulted in a \$22.3 million loss to poorer districts only. [Exhibit 7].

The fourth funding cut occurred July 2, 2009, when Governor Mark Parkinson approved a budget allotment which cut an *additional* \$39,327,580 from school funding. It cut another \$62 from the base state aid per pupil, lowering it from \$4280 to \$4218. [Exhibit 8].

The fifth funding cut occurred on November 23, 2009, when Governor Mark Parkinson approved a second budget allotment which cuts an *additional* \$134,355,363 from school funding. It cut another \$206 from the base state aid per pupil, lowering it from \$4218 to \$4012. [Exhibit 9].

All totaled, these cuts represent a reduction from 2008-09 beginning funding levels of \$303,006,392. The *Montoy* reforms have been cited by this Court as adding an estimated \$755.6 million to school funding. *Montoy V*, 282 Kan. at 19. Yet, the five rounds of cuts enacted thus far have reduced the funding provided by the *Montoy* reforms by 40%. [Exhibit 10].

It will get worse. The Legislature's own budget projections for fiscal years 2011 and 2012 indicate the magnitude of future cuts. Legislative research created a State General Fund Profile for fiscal year 2011 showing that the 2010 Legislative session will have to raise revenues or cut an additional \$358.7 million to balance the budget. [Exhibit 11]. If schools are forced to suffer one-half of these cuts, or \$179.4 million, the base will be reduced another \$269 for 2010-11. The base would reduce from \$4012 to \$3743. The State General Fund Profile for fiscal year 2012 is even worse. The Federal Stimulus dollars will be gone and the state will have to raise

revenues or cut an additional \$855.5 million to balance the budget. [Exhibit 12]. If schools are forced to suffer one-half of these cuts, or \$428 million, the base will be reduced an additional \$642, from \$3743 to \$3101. [Exhibit 13]. This would be \$499 less than the base in 1992 when the school finance scheme was first adopted. If these cuts come to pass, combined with the current \$303 million cut, education will see a total annual cutback of \$910 million. This would more than completely erase the entire \$755.6 million *Montoy* gain.

The effect of these cuts on all school districts, including Plaintiff districts Salina U.S.D. 305 and Dodge City U.S.D. 443, are significant. Salina's funding has been cut \$4,600,710 and Dodge City's funding has been cut \$4,383,303. [Exhibit 14]. There has been absolutely no study or data showing that the cost to educate their students has decreased. To the contrary, education costs have actually *increased* due to the effects of the current recession. If the future cuts are enacted to fill the state budget holes, Salina can expect to see an additional \$2.9 million cut for fiscal year 2011 and then an additional \$6.9 million cut for fiscal year 2012. When all cuts are combined, the grand total of cuts for Salina are forecasted to be \$14.3 million per year. [Exhibit 15]. As a result of the *Montoy* reforms, Salina gained a total of \$16.2 million per year. [Exhibit 16]. The same scenario holds true for Dodge City. Dodge City can expect to see an additional \$2.7 million cut for fiscal year 2011 and then an additional \$6.5 million cut for fiscal year 2012. When all are combined, the grand total of cuts for Dodge City are forecast to be \$13.5 million per year. As a result of the *Montoy* reforms, Dodge City gained a total of \$18.2 million per year. The *Montoy* gains are on the verge of extinction.

These cuts were made, and continue to be made, without regard to the *actual costs of providing adequate education*. In fact, the Legislative Post Audit study (which was used as a basis for the accepted formula in *Montoy V*), was updated in the summer of 2008 to show that

Kansas schools need an *additional* \$386.8 million to be adequately funded for 2009-10. [Exhibit 17, at page 4]. These cuts are in clear defiance of the *Montoy* decisions, which explained the constitutional mandate for inclusion of *actual costs* in any funding formula.

These cuts were made in contradiction to the advice of the Kansas State Board of Education. At the July 15, 2009 meeting of the Kansas State Board of Education, the State Board considered education budget recommendations. The cuts (to that date) were reviewed and upon motion duly made, seconded, and carried, by a vote of 8-1, the State Board voted to recommend that the Legislature replace the cut funding and return the Base to its statutory level of \$4492, at a cost (then) of \$281,780,223. [Exhibit 18, at page 3].

These cuts were made in contradiction to the advice of the 2010 Commission. The 2010 Commission is the statutory body created by the Legislature during the pendency of the *Montoy* case to “[c]onduct continuous and on-going monitoring of the implementation and operation of the school district finance and quality performance act and other provisions of law relating to school finance and the quality performance accreditation system. . . .” K.S.A. 2008 Supp. 46-3402(a). Its purpose was stated by this Court in relation to the obligation of the Legislature to keep the school funding scheme current.

Clearly, the legislature’s obligation will not end there; the costs of education continue to change and constant monitoring and funding adjustments are necessary. H.B. 2247’s provisions regarding establishment of the 2010 Commission and mandating annual increases based upon the Consumer Price Index may satisfy these demands, but the legislature may seek other means to assure that Kansas school children, now and in the future, receive a constitutionally adequate education.

Montoy IV, 279 Kan. at 58.

The 2010 Commission Report advised the Legislature as follows:

The Legislature should refocus its revenue and funding priorities to make education Priority Number One. Education is the single most important function

provided by state government. It is at its essence how we prepare for the future. The Commission has heard repeatedly that education spending has a direct and positive impact on student performance, most recently in the 2006 Legislative Post Audit report entitled "Elementary and Secondary Education in Kansas: Estimating the Costs of K-12 Education Using Two Approaches." That report stated, in part, "We found a strong association between the amounts districts spend and the outcomes they achieve...." **The Commission also has received information regarding the state's dire economic situation. However, we also know the Legislature has made tax policy decisions that have contributed to these dire circumstances.** Tax cuts made by the Legislature from FY 2005 through FY 2010 have totaled \$180 million. By FY 2011, that total will rise to nearly \$209 million.

In summary, the Commission believes we cannot sacrifice a generation of Kansas students because the economy is weak. It is time for the Legislature to take steps to ensure that the revenue and funding policies of the Legislature allow every Kansas student to achieve his or her full potential.

[Exhibit 19, at page 1] (emphasis added).

IV. THE STATE HAS FAILED TO MEET ITS STATUTORY DUTIES

The Legislative cuts are not only unconstitutional, but are also in violation of the Legislature's statutory duties. First, K.S.A. § 72-64c03 provides:

The appropriation of moneys necessary to pay general state aid and supplemental general state aid under the school district finance and quality performance act and state aid for the provision of special education and related services under the special education for exceptional children act shall be given first priority in the legislative budgeting process and shall be paid first from existing state revenues.

K.S.A. § 72-64c03 (emphasis added).

During the formulation of the legislative *Montoy* response, the Legislature set rules for itself for future education appropriation decisions. These reforms, along with others, were directed at convincing the Court that education funding would maintain the appropriate priority in future budget years. This statute has not been followed as evidenced by the cuts that have been made to school funding by the Legislature and the allotments that have been made by the Governor. Schools were not give first priority in budgeting process and were not paid first from

existing state revenues. In failing to do so, the State ignored its own laws.

Secondly, K.S.A. § 72-64c04 requires the Legislature to increase state aid to schools by not less than a percentage equal to the percentage increase in the Consumer Price Index (urban) during the preceding fiscal year. Prior to the 2009 legislative session, this calculation was provided to the Legislature by the Kansas Department of Education as required by the law. The calculation showed that the base should be increased by \$164, from \$4433 to \$4597. Rather than honor the statutory promise to schools and the Court, the Legislature began the rounds of cuts discussed above.

Taken together, these provisions prescribe certain minimum requirements with respect to the school finance formula – requirements which are clearly defined and which are not subject to discretion. The Legislature is in violation of both of these statutory provisions.

V. THE SUPREME COURT SHOULD EXERCISE ITS JURISDICTION TO RE-OPEN MONTROY V. STATE OF KANSAS, CASE NO. 04-92032-S AND REMAND TO THE TRIAL COURT FOR RULING ON THE CONSTITUTIONALITY OF THE CURRENT SCHOOL FINANCING FORMULA.

A. It is Appropriate for the Supreme Court to Exercise its Jurisdiction to Re-Open Montroy.

It is the duty of this Court to “engage in judicial review and, when necessary, compel the legislative and executive branches to conform their actions to that which the constitution requires.” *Montroy v. State of Kansas*, 279 Kan. 817, 826-27, 102 P.3d 1158 (2005) (Montroy III). Since 1995, the Legislature has passed tax cuts resulting in annual loss to state revenues in excess of \$1.1 billion dollars. These tax cuts are being allowed to continue, knowing the state cannot meet its constitutional obligations. The extent and nature of the Legislature’s failures with respect to school funding are such that it is not only appropriate, but necessary for the Court to re-open the *Montroy* case in order to remedy them. This is not a new concept. In her

dissent to the *Montoy V* decision, Justice Beier stated her belief that “[t]he appropriate way to respond is not to throw the plaintiffs out of court. It is to retain jurisdiction, acknowledge the factual deficiencies of the record, and remand to the district court for further proceedings focused on the constitutionality of the finance system. . . .” *Montoy V*, 282 Kan. at 34 (Beier, J., dissenting).

Furthermore, in *Knowles v. State Board of Education*, 219 Kan. 271, 547 P.2d 699 (1976), it was the Legislature who took advantage of the Court’s ability to re-open a previous judgment. *Id.* at 273. In *Knowles*, the Court allowed the case to be re-opened to permit the introduction of new evidence which was relevant to material changes to school financing. *Id.* Similarly, in this case, there have been material changes to school financing which justify re-opening the *Montoy* case. The *Montoy V* decision held that the Legislature had substantially complied with the mandates of the *Montoy* orders. *Montoy V*, 282 Kan. at 25 (majority opinion). However, the Legislature has retreated from the *Montoy V* funding scheme in such a way that it is more akin to the unconstitutional scheme in place pre-*Montoy*. At the present time, the base state aid per pupil has been rolled back to \$4012. This is \$245 less than the \$4257 base that existed at the time that the three-year plan, S.B. 549, was adopted. [Exhibit 20]. The base is the “driver” of the entire school finance scheme, but as soon as the Court left the Legislature to its own devices, it returned to a funding scheme which implicates the same constitutional issues as the *Montoy II* legislation. For this reason, “it is no longer equitable that the judgment should have prospective application.” *See* K.S.A. 60-260(b).

Under similar circumstances, the Arkansas Supreme Court took steps to re-open a school funding issue that it determined required additional examination. *Lake View School District No. 25 of Phillips County, Arkansas v. Huckabee*, 210 S.W.3d 28 (Ark. 2005). In that case, the Court

was called on to consider whether the Arkansas General Assembly had retreated from its prior actions to comply with the Court's school funding orders. The Supreme Court found it appropriate to recall its mandate and appoint masters to consider special findings with respect to the Legislature's actions subsequent to its previous ruling in a school finance case. In so finding, the Court stated that "we wrote about the laudable steps taken by the General Assembly to chart a constitutional course. This court is committed to assuring that that course remains fixed and true." *Id.* at 30. In reaching that conclusion, the Court specifically stated that it could not sanction additional delays by failing to address the then-current issues. *Id.* An equal reaction is appropriate in this instance. This Court was aware during *Knowles*, as it should be aware now, that "[t]he nature of this controversy is such that the rights of the parties continue to be affected by the law. It is an ongoing controversy which can be adjudicated in the present action as well, if not better, than in a new action filed." *Knowles*, 219 Kan. at 279-280.

As stated by this Court, "the final decision as to the constitutionality of legislation rests exclusively with the courts." *Montoy III*, 278 Kan. at 826. Including *Montoy*, the last four times that the Legislature violated its duty to fund schools, it has taken court intervention to make the Legislature live up to its obligations. *See Knowles v. State Board of Education*, 219 Kan. 271 (1976); *Mock v. State*, No. 91-CV-1009 (Kan. Dist. Ct. Shawnee County, Oct. 14, 1991); *Caldwell v. State*, No. 50616 (Kan. Dist. Ct. Johnson County, Aug. 30, 1972). This Court was not then, and is not now, "at liberty to abdicate [its] own constitutional duty." *Montoy III*, 278 Kan. at 827. Because this is an issue of statewide importance that mandates immediate review, the Court should exercise its authority to re-open the *Montoy* case and remand for review by a trial court. The overwhelming importance of this issue is apparent from the language of *Montoy V*, which described the issue as funding for the "education of the State's most precious asset –

our children.” *Montoy V*, 282 Kan. at 25. In *Montoy II*, the decision in which the Legislature’s formula was first found to be unconstitutional, this Court stated that the Legislature’s “failure to act in the face of this opinion would require this court to direct action to be taken to carry out that responsibility.” *Montoy II*, 278 Kan. at 776. Although the Legislature took action initially to “substantially comply” with the Court’s orders, it has since taken actions which negate its initial attempts at compliance. These actions clearly violated the Court’s orders, and in hindsight, the Legislature’s attempts at substantial compliance were only an effort to appease this Court and end the litigation. Since the closing of *Montoy V*, the Legislature has obviously chosen to disregard the mandates that govern the financing of school funding. It is now within the ability of this Court to remedy the Legislature’s failures. Failure to do so will force the “most precious asset” of our state, its children, to be at the mercy of the Legislature who refuses to follow its constitutional duties, the mandates of statute, and the mandates of this Court.

B. Following Re-Opening of the Montoy Case, the Court should Remand to the District Court.

Plaintiffs request that the Court remand this action to a trial court upon re-opening, in order to allow the Petition to be amended to update the caption and to amend the causes of action in accordance with this Motion. Plaintiffs seek the ability to proceed at law and in equity, including mandamus against Defendants, to determine the constitutionality of the school finance formula. Plaintiffs ask that the trial court take evidence and answer two questions:


1. Is the current Kansas school finance funding scheme constitutional?
2. Have funding cuts since dismissal of the *Montoy* case violated Article 6, § 6 of the Kansas Constitution, state law, or this Court’s mandates in *Montoy v. State of Kansas*?

Judicial efficiency would be served by completing the *Montoy* case rather than by the filing of a new lawsuit. The policy reasons cited by this Court in support of the *Montoy V dismissal* are no longer applicable.

CONCLUSION

The actions taken by the state with respect to school finance are in *blatant disregard* of their constitutional duties, Kansas law, and this Court's orders. The Court should exercise its authority to re-open *Montoy v. State of Kansas*, Case No. 04-92032-S, for remand to the trial court to determine the constitutionality of the school financing formula.

Dated this 11th day of January, 2010.

By  _____

Alan L. Rupe KS #08914
Kutak Rock LLP
Suite 150
1605 North Waterfront Parkway
Wichita, KS 67206
(316) 609-7900 (Telephone)
(316) 630-8021 (Facsimile)

and

John S. Robb #09844
SOMERS ROBB & ROBB
110 East Broadway
Newton, Kansas 67114-2222
Telephone: (316) 283-4560
Facsimile: (316) 283-5049

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

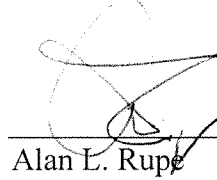
I hereby certify that on this 11th day of January, 2010, a true copy of the foregoing was served via United States mail, first class, postage pre-paid, addressed to the following:

Mark Ferguson
Gates, Shields & Ferguson, P.A.
10990 Quivira, Suite 200
Overland Park, Kansas 66210

Also served via e-mail to:
markferguson@gsflegal.com

Mike Leitch
Deputy Attorney General
Office of the Attorney General
120 S.W. 10th Avenue
Topeka, Kansas 66612

Also served via e-mail to:
Michael.leitch@ksag.org



Alan L. Rupe