No. 15-113267-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

Luke Gannon, *et al.*,

Plaintiffs-Appellees,

v.

State of Kansas, ***et al.***,

Defendants-Appellants.

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

BRIEF OF APPELLANT STATE OF KANSAS

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Oral Argument: 15 minutes

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NATURE OF THE CASE

This is a long-running school finance case. The State first appealed early in 2013 after a three-judge panel held that the State's school finance system violated Article 6 of the Kansas Constitution. After several rounds of review by this Court, and multiple legislative enactments in response to this Court's decisions, this Court in *Gannon v. State*, 308 Kan. 372, 420 P.3d 477 (2018) (*Gannon VI*), mostly approved the remedial legislation enacted by the Legislature. The Court found the legislation inadequate only insofar as it failed to account for certain inflationary increases. In response to this Court's decision in *Gannon VI*, the Legislature has passed, and the Governor has signed, 2019 House Substitute for Senate Bill 16 (SB 16), to achieve constitutional compliance and bring an end to this case.

STATEMENT OF THE ISSUE

Does SB 16 comply with this Court's decision in *Gannon VI* and justify dismissal of this litigation without continued judicial oversight?

STATEMENT OF FACTS

In *Gannon v. State*, 306 Kan. 1170, 402 P.3d 513 (2017) (*Gannon V*), this Court held that Kansas's school funding system was equitable but failed to satisfy the adequacy component of Article 6 of the Kansas Constitution. In response, the Legislature adopted a remedial plan that was based on taking the amount of funding this Court determined to be adequate in *Montoy v. State*, 282 Kan. 9, 138 P.3d 755 (2006) (*Montoy IV*), and adjusting that funding for inflation. This became known as the "Montoy safe harbor" approach. *See Gannon VI*, 308 Kan. at 387-88.

In *Gannon VI*, this Court generally approved of the Legislature's approach but identified two remaining problems:

1. The failure to adjust two years of funding for inflation through the approaching 2018-19 school year. Satisfactory adjustments would result in a higher amount of principal, i.e., more than the $522 million the memo calculates as yet owed to the school districts; and

2. The failure to adjust for inflation until the memo's calculated principal sum ($522 million, plus the adjustment referenced above) is paid in full, e.g., approximately five years. Satisfactory adjustments would result in more than that principal figure being paid during that span. But we acknowledge the first year of payment—for SY 2018-19—need not be adjusted because that inflation has already been accounted for in paragraph 1 above.

308 Kan. at 399. The Court also held that "the State needs to explain whether it included [virtual school] aid in the first step of its analysis when it generated the initial total aid amount of $3,108,690,821. Because if not, we are unable to conceive of a rationale for the State later deducting it to calculate the total target additional aid of $522,244,721." *Id.*

Following the *Gannon VI* decision, Deputy Commissioner of Education Dale Dennis prepared a memo for the State Board of Education calculating the cost of the inflation adjustment described in this Court's opinion. App. at 25-27. Using an inflation rate of 1.44%, which this Court noted was the average inflation rate in the calculations presented to the Court, *see Gannon VI*, 308 Kan. at 390, Deputy Commissioner Dennis calculated that an additional $363.3 million would need to be provided over a four-year period to comply with *Gannon VI*. App. at 25-27. He then calculated the following Base Aid for Student Excellence (BASE) amounts to provide the required funding:

School Year	BASE
2019-20	$4,436
2020-21	$4,569
2021-22	$4,706
2022-23	$4,846

App. at 25-27; *see also* App. at 77-79 (providing the same calculations in a memo to the Legislature). The State Board of Education adopted Deputy Commissioner Dennis's calculation of inflation and corresponding BASE amounts as part of its budget request. App. at 86.

The Division of the Budget independently calculated the funding necessary to comply with this Court's decision and arrived at a result nearly identical to the State Board's.[1] App. at 28. Governor Laura Kelly's budget proposal was based on the State Board's calculations, which were just slightly higher than those of the Division of the Budget:

> The Governor's recommendation[ ] for school finance utilizes the Legislature's "Montoy Safe Harbor" plan and accounts for inflationary increases at the rate of 1.44 percent from FY 2018 through FY 2023. As a result, the Governor's proposal increases funding for the plan approved by the 2018 Legislature by $363.6 million from FY 2020 through FY 2023.

App. at 29-30. As Governor Kelly later explained in signing SB 16: "Using the most recent Supreme Court ruling on school finance as a guide, I adopted a plan that was widely embraced as the best path to ending years of school finance litigation." App. at 31.

[1] The Division of the Budget calculated that $357.6 million in additional funding was required, *see* App. at 28, compared to the State Board's $363.3 million.

This funding proposal was introduced in the Legislature as 2019 Senate Bill 44 (SB 44). The Senate Select Committee on Education Finance held a hearing on SB 44 over two days. App. at 34-288 (minutes and attached testimony). Schools for Fair Funding ("SFF"), an organization representing the four plaintiff districts in this case, testified in support of SB 44, explaining that the State Board's approach, as adopted by the Governor, would satisfy Article 6 of the Kansas Constitution. App. at 104-05. Other proponents included the Kansas National Education Association, the Kansas Association of School Boards, the Kansas Parent Teacher Association, Game On for Kansas Schools, and a number of school superintendents. App. at 34-36, 138-39. The only opponent testimony was from the Kansas Policy Institute. App. at 138.

SFF later reversed course, indicating it had made an error in supporting the State Board's proposal. App. at 290. Despite SFF's change of heart, the State Board of Education and Governor Kelly stood by their calculations. Reflecting this wide agreement, the inflation adjustment from SB 44 was later placed in 2019 Senate Bill 142 (SB 142), and passed the Senate 32-8 with broad bipartisan support.

When the House Committee on K-12 Education Budget held a hearing on SB 142, many of the same individuals and entities continued to express support for the proposal. App. at 358. Only SFF and the Kansas Policy Institute opposed the bill. App. at 358.

The funding provisions from SB 142 were later incorporated into a conference committee report on SB 16, which passed the House by a 76-47 vote and

the Senate by a 31-8 vote. Governor Kelly signed SB 16 on April 6, 2019. At the bill signing ceremony, she commended the bipartisan efforts to provide adequate funding and resolve this case:

> After a significant increase in funding last year, this plan addresses the Kansas Supreme Court ruling and represents what we all hope to be the final step towards fully funding our schools – and maintaining adequate funding in the years to come.
>
> It is a reasonable, good-faith effort that is based on the plan put forth by the Kansas Department of Education and endorsed by the State Board of Education.
>
> . . .
>
> No one can predict what the court will rule. But one thing is for certain: this legislation represents a significant bipartisan effort to address the last remaining component of last summer's court ruling. It is a meaningful, reasonable plan that maintains the stability of the rest of the state's budget.
>
> The saga over public education funding has been long and hard, and it's time for it to be settled. I believe that this legislation will allow us to finally end the cycle of litigation and move forward.

App. at 31-32.

There is good reason for the near-unanimous belief that the Legislature has met—if not exceeded—its obligation to fund K-12 education. Once SB 16 is implemented, the amount of funding provided in SY 2022-23 by the remedial legislation enacted in 2017, 2018, and 2019 will be approximately $946 million *more* annually than was provided in SY 2016-17.[2] Moreover, the remedial

[2] App. at 74 (showing an $854 million increase in state aid by SY 2022-23 attributable to 2017 SB 19, 2018 Sub. for SB 423, and 2018 House Sub. for SB 61); App. at 79 (calculating that the plan adopted in SB 16 will provide approximately $92 million in additional funding in SY 2022-23).

legislation passed in 2016 to comply with the equity component of Article 6 provided an additional $41.8 million. App. at 434. Thus, *annual* state funding provided for K-12 public education will have increased by approximately $1 billion since the start of this litigation, not even counting increases in LOB and KPERS funding.

ARGUMENT

The Kansas Legislature has enacted legislation that the State Board of Education and Governor Kelly agree complies with this Court's decision in *Gannon VI*. The State asks the Court to reach the same conclusion and to end the cycle of litigation by dismissing this case.

I. SB 16 complies with this Court's decision in *Gannon VI*.

In *Gannon VI*, this Court found that "with some financial adjustments to the State's remediation plan, we basically agree that through structure—and particularly implementation—[the funding mechanism adopted] can bring the K-12 system into compliance with the adequacy requirement in Article 6 of the Kansas Constitution." 308 Kan. at 387. The near-unanimous consensus of all stakeholders is that SB 16 is the final adjustment to bring the K-12 system into compliance with the Kansas Constitution.

The State's remediation plan submitted last year scheduled phasing in new money that by SY 2022-23 will have increased annual state funding by $854 million above the SY 2016-17 level. App. at 74; *see also Gannon VI*, 308 Kan. at 378 (describing this plan). The financial adjustment by SB 16 now provides an infusion of roughly $90 million more each year from FY 2020 through FY 2023—a

cumulative total of $363.6 million over those four years—to account for the inflation concerns identified by this Court in *Gannon VI*. App. at 79. Thus, by SY 2022-23, annual state funding for K-12 public education will be approximately $946 million more than was scheduled before the new enactments in the 2017, 2018, and 2019 legislative sessions. SB 16 directly and appropriately responds to the limited remaining adequacy infirmities the Court identified in last year's school finance legislation.

SB 16's new money squarely addresses this Court's primary concern with the Legislature's "*Montoy* Safe Harbor" plan. The amount of funding to account for inflation and comply with this Court's decision in *Gannon VI* was calculated by Kansas State Department of Education Deputy Commissioner Dale Dennis, approved by the State Board of Education, approved by and incorporated into the Governor's Budget Recommendation, and ultimately approved by large bipartisan majorities in the Legislature.

In calculating the cost of the required inflation adjustment, Deputy Education Commissioner Dennis took the $3,434,941,542 total aid target presented to this Court in *Gannon VI*, *see* 308 Kan. at 388, and inflated this amount by 1.44% annually through the end of the phase-in period in 2022-23. App. at 27, 77-78. This resulted in a new net amount of $3,742,611,899 for the 2022-23 school year. App. at 27, 78. Dennis then subtracted current aid to schools and scheduled increases in aid previously provided by the Legislature, and determined that $363,636,068 in additional aid is required over the four-year period from the 2019-20 school year to

the 2022-23 school year. App. at 27, 78-79. He used this figure to calculate the BASE amounts mentioned above. App. at 26, 79.

SB 16 adopts the *exact* BASE amounts as calculated by Deputy Commissioner Dennis and approved by the State Board of Education. Of course, neither the Legislature nor this Court is bound by the State Board of Education's funding positions. But when the Legislature, the Governor, and the State Board are in accord, this Court should give great weight to the considered decisions of both the education officials and the People's representatives. That is particularly true here given the widespread, bipartisan consensus that SB 16 brings the State into compliance with Article 6.

This Court is not a fact-finding body. *See Montoy v. State*, 282 Kan. 9, 18, 138 P.3d 755 (2006) (*Montoy IV*). Even assuming, arguendo, the Kansas Constitution were construed to require inflation adjustments, this Court is not in a position to resolve disputes about the proper method for calculating inflation. By relying on the Department of Education's inflation calculation, approved by the State Board and the Governor, the State has met its burden of sufficiently "explain[ing] its rationales for choices made to achieve compliance" and thereby showing that its chosen remedy in SB 16 is "reasonably calculated" to meet the adequacy requirements of Article 6 as explained by this Court. *Gannon V*, 306 Kan. at 1181-82, 1186.

Some disagree with this conclusion and wish this Court to afford any plaintiff a heckler's veto. But that is inconsistent with the principles of

representative democracy and the independence of the three branches of our government. Specifically, SFF, after initially agreeing that the additional funding enacted would satisfy Article 6, could not resist the urge to part ways with just about every other stakeholder and demand more money. But just because some plaintiff districts will always want more money, they should not be allowed to single-handedly override the Governor's and Legislature's reasonable and considered funding determinations that are in accord with the analysis of the State Board and that were made in light of the many competing demands on limited state funds. As this Court has explained, compliance with Article 6 is not a mere mathematical exercise. After all, the "Kansas Constitution clearly leaves to the legislature the myriad of choices available to perform its constitutional duty." *Gannon v. State*, 298 Kan. 1107, 1151, 319 P.3d 1196 (2014) (*Gannon I*); *see also Gannon V*, 306 Kan. at 1237 ("[T]here is no 'specific level of funding' for adequacy and no 'particular brand of equity' that is mandated.").

This Court should hold that SB 16 complies with *Gannon VI* and Article 6 and dismiss this case. *See Montoy IV*, 282 Kan. at 24-25 (finding "substantial compliance" with the Court's order and dismissing the case).

II. Virtual school state aid was included in the calculation of the initial total aid amount.

In *Gannon VI*, this Court stated "the State needs to explain whether it included [virtual school state aid] in the first step of its analysis when it generated the initial total aid amount of $3,108,690,821. Because if not, we are unable to

conceive of a rationale for the State later deducting it to calculate the total target additional aid of $522,244,721." 308 Kan. at 399.

The response to this Court's question is that:

> [P]rior to 2015 legislation, virtual school state aid operated within the funding formula as a formula weighting. This weighting was eliminated by 2015 SB 7 and replaced with virtual school state aid as categorical aid outside of the formula. Therefore, since the initial total aid amount of $3.109 billion was based on the formula as it existed in school year 2009-2010, virtual school state aid was included as a weighting within the formula at that time and, accordingly, was included in the first step of the analysis generating the target aid amount of $522.2 million.

App. at 427. Accordingly, there was no problem with the treatment of virtual school state aid as presented to this Court in *Gannon VI*.

III. The Court should dismiss this long-running lawsuit.

The State has now achieved constitutional compliance, and this Court should dismiss this lawsuit. This lawsuit was filed more than eight years ago and the trial occurred in June 2012. Any evidence relevant to the issues in this case has long gone stale and no longer reflects the current state of K-12 schools. Since this case was filed, the Legislature in good faith and in response to this Court's opinions on this subject, has increased *annual* state funding by approximately a *billion* dollars, not even counting increased LOB and KPERS payments.

For at least two reasons, retaining jurisdiction is unjustified, unnecessary, and counterproductive. *First*, it is antithetical to the concept of the separation of powers, *see Gannon I*, 298 Kan. at 1148 (recognizing that the separation of powers requires this Court to presume that statutes are constitutional), and inconsistent with the architecture of our State's constitutional system. Under the Kansas

Constitution, neither the Legislature nor the Governor should be compelled to operate under this Court's supervision any longer than absolutely necessary once constitutional compliance is achieved. *See* Kan. Const. Art. 2, § 1 (vesting legislative power in the House of Representatives and Senate); Kan. Const. Art. 3, § 1 (vesting judicial power exclusively in one court of justice); Kan. Const. Art. 2, § 14 (providing the Governor a role in enactment of laws); *see also State ex rel. Stephan v. House of Representatives*, 236 Kan. 45, 51, 687 P.2d 622 (1984) (authority of the Legislature to enact law should not be subject to interference by the Judiciary even if an enactment is in disregard of its clearly imposed constitutional duty or is the enactment of an unconstitutional law). There can be no doubt that this Court's exercise of jurisdiction over this matter has consistently affected and, at least in part, shaped legislative and gubernatorial school funding proposals and decisions since at least 2014 when *Gannon I* was decided.

Likewise, the Court should not be required to shoulder the burden of ongoing supervision of the K-12 public education system. Of course, this Court traditionally exercises authority to ensure its remedial orders are followed. But in a case like this, which necessarily involves supervision of core constitutional powers and duties assigned to other branches of state government, this Court's continuing supervision eventually becomes so far removed from the constitutional violation identified by the judiciary at the outset of litigation that further guidance from this Court takes on the concerning appearance of a prohibited advisory opinion. *See State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 912, 179 P.3d 366

(2008). Extended and continuing jurisdiction risks transforming the Court's role from that of an appellate court focused on resolving questions of law into that of a super-legislature that second-guesses—or that at least is *asked* by parties claiming to be aggrieved by future policy debates to second-guess—the educational and fiscal policy choices of the People's representatives. *Cf. Montoy IV*, 282 Kan. at 25-26 (approving the New Jersey Supreme Court's observation that the States which retained jurisdiction were those that have had the most difficulty producing a final plan that met their Supreme Court's opinion of constitutionality).

Second, continuing jurisdiction justified as a means to ensure ongoing compliance with Section 6 of Article 6 itself impedes—and, some would say, has been impeding—the Legislature's ability to provide for future educational improvement. *See* Kan. Const. Art. 6, § 1 (directing the Legislature to provide for "educational, vocational and scientific *improvement*" (emphasis added)); *Gannon I*, 298 Kan. at 1146. Remaining in the remedial stage of litigation, in which the State must perpetually bear the burden of justifying to the Court any future changes the Governor and the Legislature may wish to make to the K-12 funding formula, will inevitably have a chilling effect on attempts to improve K-12 public education through legislative enactment unless the four school districts that are plaintiffs in this case consent.

In the legislation responding to this Court's decisions, the Legislature has mandated the preparation of reports and studies on various aspects of K-12 education. *See, e.g.*, SB 16, § 15 (requiring audits of transportation services

funding, at-risk education funding, bilingual education funding, unencumbered cash balances, a study of virtual school programs in other states, and "[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 outcome standards adopted by the state board of education"); SB 16, §§ 3, 6, 13, 14 (requiring certain reports from the State Department of Education). Forcing the State to bear the burden of justifying any future changes to school finance statutes based on those reports or chilling the ability to meet the needs identified in any of the 282 other school districts would stifle innovation and deter the Legislature from adopting potentially beneficial improvements, out of fear the four plaintiff school districts might object. Continuing jurisdiction will only create incentives for the school funding system to remain static, to the detriment of Kansas schoolchildren.

This is no abstract concern. As illustrated by SFF's decision to reverse course during the legislative process on SB 16 and oppose in March the exact legislation it supported in February, the ability of Plaintiffs to force the State to justify *any* statutory changes—rather than Plaintiffs bearing the burden to challenge changes in the traditional manner afforded by the presumption of constitutionality—affects and potentially skews the legislative process. The ability of SFF to demand legislative acquiescence to its point of view lest it drag the State back before this Court to meet its burden of justifying any future legislative change would give the minority of school districts that are members of SFF, and

particularly those that are Plaintiffs in this lawsuit, an outsized and unjustified role in the legislative process. After all, the Kansas Constitution vests in the Legislature, the Governor, the State Board, and this Court various duties related to the structure and implementation of K-12 public education—it does not grant these duties to the 4 of the State's 286 school districts that are plaintiffs in this case.

Fifteen years ago, a Kansas court considering the constitutionality of the State's school finance system reasonably observed "there must be literally hundreds of ways the Legislature could constitutionally structure, organize, manage, and fund public education in Kansas." *Montoy v. State*, No. 99-C-1738, 2004 WL 1094555, at *11 (Kan. Dist. Ct. May 11, 2004), order clarified, No. 99-C-1738, 2004 WL 1152825 (Kan. Dist. Ct. May 18, 2004); *accord Gannon I*, 298 Kan. at 1151 ("[The] Kansas Constitution clearly leaves to the legislature the myriad of choices available to perform its constitutional duty."); *Gannon v. State*, 304 Kan. 490, 500-01, 372 P.3d 1181 (2016) (*Gannon III*) ("[W]e do not dictate to the legislature how it should constitutionally fund K-12 public school education."). But with the benefit of hindsight, those judicial assurances ring hollow. The reality is that in the years since then, the Legislature repeatedly, and probably inevitably, has settled for the only way that has passed grade with this Court. In 2006, it adopted a funding system that led to the dismissal by this Court of *Montoy*. In 2018, after numerous other attempts to adopt a funding system this Court would conclude satisfies the Kansas Constitution, the Legislature retreated once again to

the "*Montoy* safe harbor" that this Court ultimately approved subject to the inflation adjustment now at issue. It may in the abstract be true that there are "literally hundreds of ways" to "structure, organize, manage, and fund public education in Kansas," giving the Legislature a "myriad of choices" that are "not dictate[d]" by this Court, but the history of the past two decades demonstrates convincingly that as long as intensive judicial supervision persists, the practical reality is that only one such way will emerge from the Kansas Legislature.

This is unfortunate. While this litigation has been pending, the State Board, which has "general supervision of . . . all the educational interests of the state," Kan. Const. Art. 6, § 2, announced a "new vision" that recognizes "the need to move away from a 'one-size-fits-all' system" and sets as its bold mission "[t]o prepare Kansas students for lifelong success . . . according to each student's gifts and talents," *see Kansans Can* (available at https://www.ksde.org/Board/Kansas-State-Board-of-Education/Board-Goals-and-Outcomes). Continued judicial supervision that repeatedly and inevitably leads to the same calcified debate and static outcome tends to trap K-12 public education in the stale debates of the past. As this Court wisely recognized a generation ago when it upheld the "[r]evolutionary change" in how Kansas funds its K-12 public schools that since has become the school-funding status quo, "[t]he funding of public education is a complex, constantly evolving process." *USD 229 v. State*, 256 Kan. 232, 265, 885 P.2d 1170 (1994). With constitutional compliance now achieved, this Court should dismiss this case and allow the public policy debate in Kansas to move beyond "what will

satisfy the Supreme Court" and reach "serious policy questions" that lie outside this Court's role in ensuring compliance with Article 6, Section 6. *See USD 229*, 256 Kan. at 258.

All litigation—even school finance litigation—must eventually end. In Kansas, that time has come. If any current or future stakeholder believes that the State is not complying with Article 6 and is unable to convince the Legislature and the Governor of their concerns, they should bear the burden of filing a lawsuit and establishing with proof at trial that the educational formula is denying the delivery of a suitable education. Returning Kansas school finance deliberations to a more normal status is justified by the current constitutional compliance and is the right thing to do to allow the State and its education system to move forward.

CONCLUSION

For the reasons above, this Court should find that SB 16 complies with this Court's decision in *Gannon VI* and dismiss this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 15th day of April 2019, 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 a copy was electronically mailed to:

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