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CASE NUMBER: 113267

No. 15-113,267-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. 10CV001569

BRIEF OF APPELLANT CONCERNING LEGISLATIVE CURE

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NATURE OF THE CASE

This Court's February 11, 2016, Opinion ("*Gannon II*") reiterated that the unconstitutional inequities identified by the Court "can be cured in a variety of ways—at the choice of the legislature." Slip op. at 73 (quoting *Gannon v. State*, 298 Kan. 1107, 1181, 1188-89, 319 P.3d 1196 (2014) ("*Gannon I*")). The Legislature took the Court's guidance to heart, first seriously considering whether to restore the old equity funding system, the precise details of which were never constitutionally mandated. When simply reverting to all of the old formulas failed to gain support, the Legislature considered other approaches, all with the predominant goal in mind of creating a constitutionally equitable system of school finance.

Ultimately, after substantial hearings, the presentation of expert testimony, and the careful consideration of neutral, thoughtful, and detailed analyses of various potential options, the Legislature reached consensus on the approach represented by the law now before this Court. Specifically, the Legislature chose to cure the inequities this Court identified by passing 2016 Senate Substitute for House Bill 2655 ("HB 2655"), a law which—by any measure—provides school districts reasonably equal access to substantially similar educational opportunity through similar tax effort. A copy of HB 2655 is included as Appendix A to the State's Notice of Legislative Cure (April 7, 2016).

The bases for the Legislature's determination that HB 2655 complies with Article 6 of the Kansas Constitution are thoroughly documented in the extensive legislative record of the proceedings, including testimony and mathematical analyses, which has been provided to the Court as Appendix B ("App. B") to the State's Notice.

The Legislature's good-faith, careful, reasoned and well-documented determination should be given substantial deference.

Given the Legislature's considered and attentive response to the Court's decision in *Gannon II*, the Article 6 equity requirement now has been satisfied. Even if the Court were to somehow find that HB 2655 does not cure completely the previously found inequities, HB 2655 contains an explicit *severability* clause that would allow this Court to sever any unconstitutional provisions rather than enjoining all school funding. Thus, in the unlikely event the Court finds that HB 2655 still has not satisfied the Article 6 equity requirement, there is absolutely no reason any appropriate and proper judicial remedy would include closing Kansas public schools.

STATEMENT OF THE ISSUES

1. Did the Legislature cure the unconstitutional capital outlay inequities when it restored and fully funded the previous capital outlay equalization formula, something this Court called an "obvious" solution?

2. Did the Legislature cure the unconstitutional local option budget (LOB) inequities by applying the formula this Court approved for capital outlay equalization to LOB equalization, particularly when evidence before the Legislature demonstrated that this action would reduce significantly any existing wealth-based disparities?

3. If for some reason this Court concludes that the capital outlay or LOB inequities have not been cured, is the proper remedy to rely on the severability clause in HB 2655 to sever any unconstitutional provisions rather than taking the unprecedented action of closing the public schools by judicial decree?

STATEMENT OF FACTS

After this Court's decision in *Gannon II*, the Legislature began studying ways to cure the unconstitutional inequities the Court identified. In *Gannon II*, this Court instructed: "One obvious way the legislature could comply with Article 6 would be to revive the relevant portions of the previous school funding system and fully fund them within the current block grant system." Slip op. at 73. Initially, two bills, HB 2731 and SB 512, were introduced in the Legislature to take that very approach. *See*, *e.g.*, App. B at 60, 70-71, 168-69, 172 (testimony of Kansas Education Commissioner Dr. Randy Watson and Dale Dennis, Deputy Commissioner of Education for Fiscal and Administrative Services, that HB 2731 and SB 512 would restore the previous equalization formulas).

But when hearings were held on HB 2731 and SB 512, *no one* showed up to testify as a proponent, nor did any person or any organization (including the Plaintiff Districts) even provide written proponent testimony in support of that approach. *See* App. B at 92, 94-95.[1] The bills also failed to gain political support within the Legislature. The HB 2731 proposal never made it out of the House Appropriations Committee. HB 2731, http://www.kslegislature.org/li/b2015_16/measures/hb2731/. When SB 512 reached the Senate floor, the Senate voted to send it back to the Ways and Means Committee. 2015-16 Journal of the Senate at 2157 (March 21, 2016), *available at* http://www.kslegislature.org/li/b2015_16/chamber/documents/daily_journal_senate_20160321185858.pdf.

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[1] The relevant committee minutes have not yet been finalized and approved. The State will provide those minutes to thr Court as soon as they become available.

A major reason these bills failed to gain traction was that restoring the previous equalization formulas would have had the effect of significantly cutting overall state aid for numerous districts. As Commissioner of Education Dr. Randy Watson testified, the bills would have created "some real hardships with the number of districts that will lose funding." App. B at 175. These hardships were by no means limited to "wealthy" districts; a number of districts with low Assessed Valuation Per Pupil (AVPP) would have suffered reduced funding. For instance, U.S.D. No. 234 (Fort Scott)—which is ranked 255 out of 286 districts in terms of AVPP—would have lost $112,514 in LOB aid and $28,319 in capital outlay aid. *Id.* at 256, 261. There also was concern that the LOB aid in the proposed bills was inflexible, in the sense that it could be used only to reduce LOB mill levies (*i.e.*, provide tax relief) and would never make it to the classroom. *See id.* at 340, 381, 625.

Given the lack of support for HB 2731 and SB 512, and this Court's admonition in *Gannon II* that "the State would help its case by showing its work in how it determined that any other proposed [equity] solution complies with *Gannon I*," slip op. at 74, the Legislature convened a meeting of the Joint Legislative Budget Committee for the purpose of gathering information and evaluating possible solutions to curing any Article 6 equity problems. The Legislative Budget Committee received testimony and evidence from a number of experts, including (1) a Senior Assistant Revisor of Statutes, (2) a Research Analyst from the Legislative Research Department, (3) the Kansas Commissioner of Education, (4) the Deputy Commissioner of Education for Fiscal and Administrative Services, (5) a school district superintendent, (6) the Kansas Association of School Boards' Associate Executive Director for Advocacy, (7) the President of the

Kansas Policy Institute, and (8) a former Speaker of the Kansas House of Representatives with extensive knowledge of Kansas school finance history and policy.

Two critical propositions—supported by virtually all of the experts—emerged from that Legislative Budget Committee hearing. *First*, multiple witnesses testified that a "hold harmless" provision was absolutely necessary as part of any equity cure in order to provide school districts certainty in budgeting for the 2016-2017 school year, the start of which at that time was only about three months away, and now is little more than two months away. App. B. at 69-70 (Dale Dennis, Deputy Commissioner of Education for Fiscal and Administrative Services), *id.* at 121-23 (Dr. Jim Hinson, Superintendent of the Shawnee Mission School District); *id.* at 173-79 (Dr. Randy Watson, Kansas Commissioner of Education); *id.* at 205-06 (Mark Tallman, Kansas Association of School Boards). In other words, the experts' consensus was that any equity cure should not result in reduced overall funding for any school district. Dr. Hinson testified that a hold harmless provision would not create additional inequity:

> I don't see any scenario by holding harmless where you create additional inequity, and I'll give you an example: The block grant formula. The block grant formula held harmless school districts that were declining in enrollment. I think it worked really well; it was the right thing to do. And so we have precedent where we've held school districts harmless in that regard, and I think ideally that would occur again at this time. So, no, I do not believe that it would create additional inequity.

Id. at 123.

Second, multiple witnesses testified that there was no basis in educational policy for the different formulas for equalizing capital outlay aid and for equalizing LOB aid. The Committee received testimony that of the three "buckets" of equalization aid under the pre-SB 7 financing system—capital outlay, bond and interest (officially known as "capital improvement" aid), and LOB (officially known as "supplemental general state

aid")—one equalization formula applied to both capital outlay aid and bond and interest aid, but an entirely different formula applied to LOB equalization aid. *Id.* at 24, 96. The capital outlay and bond and interest formula in place before July 1, 2015, calculated state aid by multiplying the amount of funds generated from a district's mill levy by a state aid percentage factor. The state aid percentage factor was calculated as follows: (1) start by calculating the median of all districts' AVPP in the previous fiscal year, rounded to the nearest $1,000; (2) a state aid computation percentage of 25% was then assigned to the median AVPP; (3)(A) for every $1,000 a district's AVPP was above the median AVPP, its state aid percentage factor was decreased by 1%; (3)(B) for every $1,000 a district's AVPP was below the median AVPP, its state aid percentage factor was increased by 1%. *Id.* at 22-23; *see also* K.S.A. 2014 Supp. 72-8814; K.S.A. 2014 Supp. 75-2319.

The old, pre-SB 7 formula for LOB equalization aid was very different from the capital outlay formula. The LOB formula provided state equalization aid to districts that had an AVPP under the 81.2 percentile of statewide AVPP (not the median starting point of the capital outlay and bond and interest formula). The amount of LOB equalization aid then was determined as follows: (1) divide the AVPP of the particular district by the AVPP at the 81.2 percentile, (2) subtract the quotient from 1, and (3) multiply by the amount of a district's LOB-generated funds. App. B at 22-23; *see also* K.S.A. 2014 Supp. 72-6434(a).

Not a single witness was able to offer an educational policy justification for the different equalization formulas, nor was any other form of evidence presented to support the difference. Testimony made clear that, in particular, the 81.2% standard used in the old LOB equalization formula had no basis in educational policy. *See, e.g.*, App. B. at 76-

77 (Dale Dennis) ("[P]art of it was property tax driven and part of it was they chose, the legislators did, to try to equalize as high as they could go at that time . . . ."); *id.* at 96-97 (Dave Trabert, President of the Kansas Policy Institute) ("I have been told that it was simply a matter of we had this much money we wanted to spend and so we drew the line [at 81.2%], and these are inherently political decisions."); *see also id.* at 136 (Dr. Hinson); *id.* at 213-14 (Mark Tallman).

Given this information and testimony, the Legislature determined that a more sound educational policy would be to use the same formula for both capital outlay and LOB equalization. *See* HB 2655 § 2(c)(2). As a result, following the Legislative Budget Committee hearing, two new bills—HB 2740 and SB 515—were introduced in the Legislature. These bills were identical, and contained several important provisions.

First, both bills restored and fully funded the capital outlay equalization formula as it existed in K.S.A. 2014 Supp. 72-8814, before block-grant funding was implemented in SB 7. *Second*, the bills applied that same capital outlay equalization formula to LOB equalization. *Third*, to avoid harming districts that would otherwise see a net loss under these changes, both bills provided for hold harmless aid (or "school district equalization state aid") to districts so that each district will receive for the 2016-2017 school year *at least as much* funding as it would have received under SB 7. *Fourth*, the bills transferred administration of the extraordinary need fund created by SB 7 to the State Board of Education (instead of the State Finance Council) and authorized the Board to use the approximately $15 million in that fund to equalize funding further between districts.

Finally, the bills repealed the nonseverability clause from SB 7 and replaced it with an express *severability* clause.[2]

The House Appropriations Committee and the Senate Ways and Means Committee held hearings on HB 2740 and SB 515 over two days—March 22 and 23, 2016. App. B at 263-315 (Senate Ways and Means Committee hearing); *id.* at 316-71 (House Appropriations Committee hearing); *id.* at 457-572 (continued Senate Ways and Means hearing); *id.* at 573-674 (continued House Appropriations hearing).

During these hearings, the committees received detailed and illuminating testimony and mathematical evidence from Eddie Penner, a Research Analyst with the nonpartisan Kansas Legislative Research Department. *Id.* at 458-72, 574-78. Mr. Penner provided the committee with a spreadsheet showing the disparities between the wealthiest and poorest districts over the last few years, in terms of the mills required to generate the non-state portion of a 25% adopted LOB, as well as estimates of these disparities if HB 2740 or SB 515 were to be adopted. *Id.* at 548-49; 652-53. According to this research, during the 2013-14 school year (before the legislative response to this Court's decision in *Gannon I*), the poorest 20% of districts would have been required to levy 15.855 more mills than the wealthiest 20% to raise the non-state portion of a 25% LOB. In 2014-15, after the Legislature responded to *Gannon I*, this disparity shrank

[2] HB 2655 § 10 ("K.S.A. 2015 Supp. 72-6481 is hereby amended to read as follows: 72-6481. (a) The provisions of K.S.A. 2015 Supp. 72-6463 through 72-6481, *and sections 3 through 5,* and amendments thereto, shall ~~not~~ be severable. If any provision of K.S.A. 2015 Supp. 72-6463 through 72-6481, *and sections 3 through 5,* and amendments thereto, *or any application of such provision to any person or circumstance* is held to be invalid or unconstitutional by court order, ~~all provisions~~ *the invalidity shall not affect other provisions or applications* of K.S.A. 2015 Supp. 72-6463 through 72-6481, *and sections 3 through 5,* and amendments thereto, ~~shall be null and void~~ *which can be given effect without the invalid provision or application.*").

dramatically to 4.225 mills. In 2015-16, it rose slightly to 5.456 mills under SB 7. *Id.* at 462-64, 576. Mr. Penner testified that if HB 2740 and SB 515 were adopted, the disparity between the wealthiest 20% and the poorest 20% of districts would fall to only 3.148 mills. *Id.* at 461, 465-67, 576. The results are shown below.

Mills Required to Generate Non-State Portion of 25% Adopted LOB

	2013-14	2014-15	2015-16	2016-17 Est.
Wealthiest 20%	14.659	14.832	13.733	15.510
20%	22.160	20.802	20.673	20.125
Middle 20%	22.879	20.923	19.610	19.734
20%	23.169	18.238	18.213	17.999
Poorest 20%	30.514	19.058	19.190	18.658
Difference Between Poorest 20% and Wealthiest 20%	15.855	4.225	5.456	3.148

Id. at 653. Mr. Penner also explained that if the State Board of Education were to use the extraordinary needs fund for equalization purposes, as HB 2740 and SB 515 explicitly authorize the Board to do, the disparities would shrink even more. *Id.* at 468.

Following Mr. Penner's testimony, proponents, opponents, and a neutral conferee provided testimony on the bills. Despite some other disagreements, both proponents and opponents praised the bills' hold harmless provisions. For instance, Dr. Cynthia Lane, Superintendent of the Kansas City, Kansas, school district—one of the Plaintiff Districts in this lawsuit and an opponent of the overall bill—told the committee: "[W]e want to celebrate the hold harmless piece, we think that's critically important so there aren't consistent winners and losers in the process . . . ." *Id.* at 500; *see also id.* at 558 (written testimony of Dr. Lane) ("I applaud the fact that this bill attempts to 'hold harmless' districts, so that they do not receive less than last year.").

After the hearing on SB 515, the Senate Ways and Means Committee amended the bill to add a preamble and findings of fact to better "show its work" for this Court and to explain the bases for the Legislature's conclusion that the bill satisfies the equity component of Article 6 of the Kansas Constitution. *Id.* at 373-95, 402-03. The four findings were as follows:

> (1) That, based on testimony from the state department of education and other parties involved in the public education system, a hold harmless fund is necessary in light of the fact that many school budgets are set based upon the provisions of the classroom learning assuring student success act [SB 7];
>
> (2) that the prior equalization formulas used for capital outlay state aid and supplemental general state aid [LOB aid] had no basis in educational policy, and that it is preferable to apply a single equalization formula to both categories of state aid;
>
> (3) that this act fully complies with the supreme court's order, but that there is an untenable risk the act may be found to be unconstitutional and, as a result, all educational funding could be enjoined. The risk of disrupting education in this regard is unacceptable to the legislature, and as a result, the provisions of this act should be considered as severable; and
>
> (4) that, based on testimony from the state department of education, the state board of education may be able to more quickly respond to and address concerns raised by the school districts, including, without limitation, emergency needs or a demonstrated inability to have reasonably equal access to substantially similar educational opportunities through similar tax effort.

Id. at 403. Committee members carefully examined and discussed these findings in detail before adopting them. *Id.* at 373-96. The Committee then voted to remove the original contents of HB 2655, replace them with the contents of SB 515, and pass Senate Substitute for HB 2655 favorably out of committee. *Id.* at 398-99.

Like the Senate Ways and Means Committee, the House Appropriations Committee, after concluding its hearing on HB 2790, amended the bill to include a

preamble and findings of fact. App. B at 425-31, 448-49. The Committee then voted to remove the original contents of another bill, SB 59, replace them with the contents of HB 2790, and pass House Substitute for SB 59 favorably out of committee. *Id.* at 431-46. Various committee members explained their reasons for voting in favor of or against the bill. *Id.* at 433-42.

On March 24, 2016, the full Senate considered HB 2655, and overwhelmingly approved it on a 32-5 vote (with 3 Senators passing) that same day. *Id.* at 678. Later that day, the House voted 93-31 to concur and sent the bill to the Governor. *Id.* at 728. The House and Senate Journals contain explanations of votes from both proponents and opponents of the bill. *Id.* at 678-701, 728-29, 733-54.

Governor Brownback signed HB 2655 into law on April 6, 2016. In a signing statement, he explained that the bill resolves the equity issue identified in *Gannon II* "by adopting the capital outlay equalization formula previously approved by the court itself." *Id.* at 755. His statement also observed that "the hold harmless language contained in this bill was endorsed by the Kansas Commissioner of Education and the Deputy Commissioner for Fiscal and Administrative Services as being necessary for school district budgeting purposes." *Id.* at 755-56. Noting that the bill was a product of deliberate and well-informed legislative choices, Governor Brownback urged this Court to review the bill with appropriate deference. *Id.*

ARGUMENT

HB 2655 cures the Article 6 equity violations this Court previously identified by ensuring that school districts now have reasonably equal access to substantially similar educational opportunity through similar tax effort. HB 2655 accomplishes this "cure" for

capital outlay equalization by restoring and fully funding the previous capital outlay equalization formula, an action which this Court called an "obvious" solution. HB 2655 also cures LOB inequities by applying that same capital outlay equalization formula (previously approved by this Court) to LOB equalization. Finally, the result of HB 2655 according to reliable and uncontroverted data from the non-partisan Kansas Legislative Research Department, will be to reduce wealth-based disparities to a very low level, with the opportunity for the State Board of Education to reduce those small disparities even more by carefully utilizing and dispensing the millions of dollars in the extraordinary need fund created by SB 7.

If for some reason this Court were to conclude that HB 2655 does not fully satisfy the equity aspect of Article 6 of the Kansas Constitution in every respect, despite the Legislature's good-faith efforts and well-supported conclusion to the contrary, the Court nonetheless should hold that HB 2655 is in "substantial compliance" (as the Court did in the *Montoy* litigation ultimately) and uphold HB 2655, which by definition is a one-year interim measure that operates while the Legislature continues to develop a new school funding system. Alternatively, a possibly appropriate judicial remedy would be to sever any unconstitutional provisions without enjoining all education funding. The severability clause in HB 2655 (unlike the non-severability clause in SB 7), readily permits the Court to employ severability if necessary and plainly expresses the intent of the Legislature that the Court do so rather than disabling the entire school-funding law and halting the flow of the vast majority of school funds, which are not at issue in this appeal. There simply is no need nor justification for closing all Kansas public schools as a remedy for any possible Article 6 violation in the circumstances now presented to the Court.

The State respectfully requests the Court to declare that HB 2655 satisfies the equity requirements of Article 6, and then permit the "adequacy" portion of this case to proceed. In the event the Court finds that HB 2655 does not fully satisfy the Article 6 equity requirement, the State requests that the Court use the severability clause in the law to order only such targeted, narrow, and traditional relief as is necessary to remedy any constitutional violation.

I. HB 2655 Cures Any Capital Outlay Inequities by Restoring and Fully Funding the Previous Capital Outlay Equalization Formula Which This Court Already Has Declared to be Constitutional.

In *Gannon II*, this Court stated: "One obvious way the legislature could comply with Article 6 would be to revive the relevant portions of the previous school funding system and fully fund them within the current block grant system." Slip op. at 73; *see also Gannon I*, 298 Kan. at 1198 (holding that capital outlay inequities will be cured if the Legislature "fully funds the capital outlay provision as contemplated in K.S.A. 2013 Supp. 72-8814").

HB 2655 does exactly that with regard to capital outlay equalization aid. Section 4 of the bill adopts the capital outlay equalization formula as it existed in K.S.A. 2014 Supp. 72-8814 before SB 7, and that formula has been fully funded. *See* HB 2655, §§ 1(b) and 4; App. B at 284. Accordingly, following this Court's own prior words, there is only one inescapable conclusion regarding capital outlay equalization aid under HB 2655: any Article 6 violation has been cured.

II. HB 2655 Cures Any LOB Inequities by Adopting and Fully Funding for LOB Equalization Aid the Same Formula This Court Previously Approved as Constitutionally Equitable for Capital Outlay Equalization Aid.

A. The Legislature had a reasoned and considered basis for altering the old LOB equalization formula.

The Legislature also cured any unconstitutional LOB inequities. The Legislature did so by adopting for LOB equalization purposes the very same equalization formula this Court approved as constitutional for capital outlay equalization aid. The Legislature's careful and considered decision was eminently reasonable and certainly consistent with this Court's admonitions that (1) the unconstitutional inequities "can be cured in a variety of ways—at the choice of the legislature" and (2) the Legislature's "voluntary revival of [the previous equalization formulas] and funding consistent with them is certainly not the only path to compliance." *Gannon II*, slip op. at 73.

During the Joint Legislative Budget Committee hearing, multiple education funding experts testified that the previous equalization formulas—in particular the arbitrary 81.2% standard contained in the old LOB equalization formula—had no basis in educational policy. Nor did (or could) a single witness articulate any rationale for using a different formula for LOB equalization than for the other two categories of equalization, capital outlay aid and bond and interest aid. When asked whether he would favor a single equalization formula for all equalization aid, Shawnee Mission Superintendent Dr. Jim Hinson explained:

> In Shawnee Mission we're at eight mills [capital outlay levy], so we're at the ceiling. We don't receive any equalization for capital outlay. We have significant debt in bond and interest. No equalization from the state for bond and interest. But we received equalization for LOB because we fell in that great category of the 81.2. Honestly, I'm not sure how that makes sense. We love the state relief, but does it really make sense. I don't know that that's equitable in the process because the formulas are different.

App. B at 136-37. The Legislature evidently agreed that the prior LOB equalization formula did not make sense, and thus explicitly found "that it is preferable to apply a single equalization formula to both categories of state aid." HB 2655 § 2(c)(2).

Rather than resurrect the old LOB formula, or create an untested new formula, the Legislature instead reasonably and deliberately decided to adopt the equalization formula this Court already has approved as constitutional for capital outlay equalization. It is difficult, if not impossible, to argue with the logic that, if the formula used for capital outlay equalization is constitutional, why would that same formula not also be constitutional for equalizing LOB? Certainly none of the opponents of the bill were able to offer a persuasive reason why Article 6 would require using a different formula for LOB equalization than for capital outlay equalization. Instead, their concerns and objections were focused on total amounts of funding (from all sources), which at most may be an adequacy concern, but is not part of the Article 6 equity inquiry.

B. The Legislature considered precise mathematical evidence which demonstrated that adopting the capital outlay equalization formula for LOB equalization would reduce disparities to their lowest level in recent years.

Moreover, the Legislature also considered concrete and detailed evidence that applying the capital outlay equalization formula to LOB equalization would satisfy Article 6. Specifically, the Legislature carefully reviewed and considered the following spreadsheet from the non-partisan Kansas Legislative Research Department:

Mills Required to Generate Non-State Portion of 25% Adopted LOB

	2013-14	2014-15	2015-16	2016-17 Est.
Wealthiest 20%	14.659	14.832	13.733	15.510
20%	22.160	20.802	20.673	20.125
Middle 20%	22.879	20.923	19.610	19.734
20%	23.169	18.238	18.213	17.999
Poorest 20%	30.514	19.058	19.190	18.658
Difference Between Poorest 20% and Wealthiest 20%	15.855	4.225	5.456	3.148

App. B at 653. This spreadsheet measures the mills a school district in various AVPP quintiles would need to levy to generate the non-state portion of a 25% LOB. Eddie Penner (with the Legislative Research Department), testified that although he used a 25% LOB as an example, "[y]ou could choose to use any percent adopted LOB and the disparity between the numbers would look the same on a percentage basis." *Id.* at 575, 578.

According to this spreadsheet, in 2013-14 (before the legislative response to *Gannon I*), a district in the poorest quintile would have been required to levy 15.855 mills more than a district in the wealthiest quintile to fund the non-state portion of a 25% LOB. But in 2014-15, that disparity fell to only 4.225 mills. Mr. Penner estimated that if the provisions of HB 2740 and SB 515 were enacted (which they were in the form of HB 2655), the disparity would shrink to only 3.148 mills. Importantly, from 2013-14 to 2016-17, the disparity in relative taxing power has declined dramatically from 15.855 mills to 3.148 mills, precisely as a result of the Legislature's efforts to respond in good faith to this Court's *Gannon* decisions.

In fact, the disparity likely will be reduced even further by another provision of HB 2655. Mr. Penner testified that the State Board of Education could reduce the disparity below 3.148 mills by using part or all of the approximately $15 million in extraordinary need funding to address any remaining equity concerns, a process authorized by HB 2655. *See* HB 2655 § 9 ("[I]n lieu of any of the forgoing considerations, [the State Board of Education shall consider] whether the applicant school district has reasonably equal access to substantially similar educational opportunity through similar tax effort."). One reason for transferring administration of the extraordinary need fund to the Board of Education, as expressed in the Legislature's findings of fact, was that the Board "may be able to more quickly respond to and address concerns raised by the school districts, including, without limitation, emergency needs or a demonstrated inability to have reasonably equal access to substantially similar educational opportunities through similar tax effort." HB 2655 § 2(c)(4). After all, the Board of Education meets year round and has a full time staff in the Department of Education to assist in distributing equalization aid.

In light of the objective and uncontroverted evidence that applying the capital outlay formula to LOB equalization would reduce wealth-based disparities to the lowest level in recent years, and the State Board of Education's ability to provide up to an additional $15 million in extraordinary need funding for equalization purposes throughout the coming school year, the Legislature reasonably concluded that HB 2655 cures any Article 6 equity violation with respect to LOB equalization aid. That determination is entitled to substantial deference. *See* Brief of Appellant at 15-17, filed Sept. 2, 2015.

III. The Hold Harmless Provision Was Supported by All Who Testified About the Bill and Is Both Necessary and Appropriate.

In *Gannon II* and again in its recent Order (dated April 8, 2016), this Court emphasized the importance of minimizing the threat of disruptions to public education funding. *See Gannon II*, slip op. at 72; Order at 2-3. Just like the Court, the Legislature is very concerned about providing budgetary certainty to the districts. Indeed, that was the point of the two-year budgeting adopted in SB 7. To mitigate some of the uncertainty associated with transitioning to the new LOB equalization funding formula under HB 2655, the Legislature included a one-year appropriation of more than $61 million in hold harmless funding for school year 2016-17. HB 2655 §§ 1(a), 5. The hold harmless appropriation ensures that the amount of equalization aid a school district receives in school year 2016-17 under HB 2655 is no less than the amount it received for school year 2015-2016. *Id.* § 5.

The Legislature specifically found, "based on testimony from the state department of education and other parties involved in the public education system, [that] a hold harmless fund is necessary in light of the fact that many school budgets are set based upon the provisions of the classroom learning assuring student success act [SB 7]." HB 2655 § 2(c)(1). The Governor strongly agreed. App. B at 755-56.

Experts, proponents, and opponents alike all favored and praised the hold harmless provision, including two of the Plaintiff Districts: the Kansas City, Kansas, and Wichita school districts. Deputy Commissioner of Education for Fiscal and Administrative Services Dale Dennis testified that a hold harmless provision is a tool the Legislature logically and commonly has used to smooth the transition to a new funding formula and to avoid an "abrupt change" in property taxes. App. B at 70. Dr. Jim Hinson

(Shawnee Mission District Superintendent) testified that a hold harmless provision is "very important" for providing budgetary certainty for school districts. *Id.* at 121-22. Dr. Cynthia Lane (Kansas City, Kansas, District Superintendent) "celebrate[d]" and "applaud[ed]" the provision, which she described as a "critically important" part of the bill. *Id.* at 500, 558. She explained that the provision will ensure districts "do not receive less than last year" and that the Legislature has used such provisions "during a change in the school funding formula . . . for the past 20 years." *Id.* at 558. Jim Freeman, the Chief Financial Officer of Wichita Public Schools, testified that he "appreciate[s] efforts to hold districts harmless." *Id.* at 560.

Importantly, the hold harmless appropriation also provides school districts substantial flexibility in how the funds can be used. Responding to concerns that equalization funds could be used only to reduce property taxes, *see* App. B at 340, the Legislature specified that hold-harmless funds "shall [be] credit[ed] . . . to the general fund of the school district to be used for the purposes of such fund." HB 2655 § 5(c). This allows each school district to decide for itself—based on local needs, concerns, and considerations—how to spend the money. *See* App. B at 344-45.

Further, there is no basis in the legislative record to support any argument that the provision will "benefit[] wealthier school districts at the expense of poorer districts." App. B at 680, 733. To the contrary, as discussed and demonstrated above, the HB 2655 funding formula for LOB equalization reduces the disparity between the wealthiest 20% and the poorest 20% of school districts to the lowest level in years. Moreover, any relatively minor inequity that may result from school districts' actions in response to HB 2655 can be mitigated by the State Board of Education which now has the authority

to award some or all of the $15 million extraordinary need fund to ensure equalization. *See* HB 2655 § 1, 9; App. B. at 270, 383-384, 468.

The hold harmless provision is a critical component of HB 2655. Proponents and opponents of the bill, as well as neutral experts, uniformly supported the provision, and HB 2655 likely would not have been enacted without that provision. Critically, the provision ensures stability and predictability (as well as provides improved spending flexibility) in school district budgets, budgets which for the most part already have been set for the rapidly approaching 2016-17 school year (less than two months away by the time this Court hears oral argument on the equity cure).

IV. HB 2655, At a Minimum, Substantially Complies with This Court's *Gannon I & II* Directives. If This Court Nonetheless Determines that a Remedy Is Required, the Correct Remedy Would Be to Sever Any Unconstitutional Provisions in the Most Narrow and Targeted Way Necessary to Eliminate the Constitutional Violation. Ordering that Kansas Schools Be Shut Down Is Neither a Necessary Nor a Judicially Proper Remedy.

In *Gannon II*, this Court warned that it might order all Kansas schools closed on June 30, 2016, unless the Legislature complies with the equity requirement of Article 6 by enacting an education funding formula that gives school districts reasonably equal access to substantially similar educational opportunity through similar tax effort. *See Gannon II*, slip op. at 74. The Court repeated this warning in its recent Order, dated April 8, 2016. Order at 3. By enacting HB 2655, the Legislature has promptly and in good faith cured the inequities this Court identified in *Gannon II*. The Legislature has no wish to see the schools close; rather, it strongly desires to have Kansas schools open for the start of the 2016-17 school year. The Legislature's intent in this respect is explicit and irrefutable. HB 2655 § 2(c)(3) ("The risk of disrupting education in this regard is

unacceptable to the legislature, and as a result, the provisions of this act should be considered as severable.").

If the Court were to find the Legislature's cure not completely sufficient in some respect, the Court nonetheless should find that HB 2655 substantially complies with this Court's *Gannon* decisions. *Cf. Montoy v. State*, 282 Kan. 9, 24-25, 138 P.3d 755 (2006) (finding substantial compliance with the Court's prior orders). Given that HB 2655 necessarily is intended to be only a short-term solution, coupled with the uncontroverted and indisputable evidence that HB 2655 substantially reduces the wealth-based disparities the Court identified in *Gannon I*, a sensible and appropriate judicial action would be to permit HB 2655 to go into effect while the Legislature writes a new, permanent school finance formula. *See* Brief of Appellant at 42-46 (filed September 2, 2015).

Ordering the Legislature to return to the old LOB equalization formula would raise serious separation of powers concerns this Court wisely and properly has avoided in the past. Such a remedy also would have the undisputed effect of reducing funding for numerous school districts just as the 2016-17 school year is about to begin, a counterproductive (and ironic at best) result given the requirements of Article 6 and the shared goal of providing funding for public education in Kansas.

Alternatively, if the Court declines to follow the substantial compliance approach, the Court should at most order a remedy that in a targeted fashion severs only any offending provision(s) of HB 2655, rather than the extreme, disruptive, unprecedented, and utterly unnecessary remedy of effectively ordering the closure of Kansas schools because the Court has invalidated the entire Kansas school funding system. Any order

severing part of the law should take effect July 1, 2016, when the law itself (including its severability clause) is scheduled to become effective. *See* HB 2655 § 13.

In an equitable relief setting, this Court has "inherent power to enforce [its] holdings," *Gannon II*, slip op. at 67, but "even where equity jurisdiction exists, it generally is recognized that the equitable remedial powers of the court are not unlimited," *Rice v. Garrison*, 258 Kan. 142, 151, 898 P.2d 631, 637 (1995) (internal quotation marks omitted). Striking down the entire funding formula—and thus forcing the schools to close—ironically and necessarily would result in this Court itself causing an unprecedented violation of the adequacy requirement of Article 6. Zero funding for Kansas public schools cannot comply with Article 6, and the only reason zero funding would exist would be as a result of this Court's orders and decisions. A Court ordered remedy that itself violates the Kansas Constitution is not part of the equitable powers of this Court, or the Court's powers under Article 3 of the Kansas Constitution. Moreover, if Kansas schools were defunded and shuttered by court order, serious issues of compliance with various federal educational and funding requirements would arise.

Any equitable remedy must be "limited 'to remedies required by the nature and scope of the violation.'" *Essex v. Kobach*, 874 F. Supp. 2d 1069, 1084 (D. Kan. 2012) (quoting *White v. Weiser*, 412 U.S. 783, 793 (1973)). Here, the severability clause requires the Court, if it finds any inequities exist, to limit its relief to severing the unconstitutional provision(s) rather than taking the legally unnecessary and unprecedented step of depriving Kansas public schools of all funding for 2016-17.

In any event, the Court should not consider (and lacks the constitutional authority to order) any remedy—including the Panel's attempted remedy—that would direct the

Legislature to amend or repeal statutes, or to appropriate particular funds. Any such remedy would be a clear usurpation of constitutionally granted legislative authority, and necessarily would violate the separation of powers. *See* Brief of Appellant at 39-42, filed Sept. 2, 2015; Response Brief of Appellant State of Kansas at 25-29, filed Oct. 2, 2015.

CONCLUSION

The Legislature's good faith, deliberate, and carefully considered determination that HB 2655 cures the Article 6 equity violations previously identified by this Court is amply supported by the legislative record, which includes the testimony of experts, objective studies and analyses, and thoughtful deliberations. The Legislature's solution also is supported by reason and logic. This Court should defer to the Legislature's determinations embodied in HB 2655 and dismiss the Plaintiffs' Article 6 equity claim.

Respectfully submitted,

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The undersigned hereby certifies that on the 15th day of April 2016, 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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