

NO. 113,267

IN THE SUPREME COURT OF THE STATE OF KANSAS

**LUKE GANNON,
by his next friends and guardians, *et al.*,**

Plaintiffs/Appellees,

vs.

STATE OF KANSAS, *et al.*,

Defendants/Appellants.

RESPONSE TO BRIEF OF APPELLANT STATE OF KANSAS

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

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INTRODUCTION

The State asks this Court to dismiss the case because the “near-unanimous consensus of all stakeholders is that SB 16 is the final adjustment [necessary] to bring the K-12 system into compliance with [the] Kansas Constitution.” State’s Opening Brief, dated 4-15-19 (“State’s Brief”), at p.6. The State further argues that “SB 16 adopts the *exact* BASE amounts as calculated by Deputy Commissioner Dennis and approved by the State Board of Education.” *Id.*, at p.8. Plaintiffs implore this Court to ask one question at oral argument: **Do those bases raise the additional funding necessary to comply with *Gannon VI* and fund the *Montoy Safe Harbor*?** The only truthful answer is “no.”

As such, the State cannot meet its burden to demonstrate that it adopted a school funding formula that complies with the guidance given to it by this Court last year in *Gannon v. State*, 308 Kan. 372 (2018) (“*Gannon VI*”). Plaintiffs ask this Court to declare that S.B. 16 does not comply with this Court’s Order in *Gannon VI*.

ARGUMENTS AND AUTHORITIES

By failing to make the necessary “adjustments” to bring the school funding formula within the protection of the *Montoy Safe Harbor*, the State has adopted a bill that does not provide the level of funding that this Court indicated was necessary in *Gannon VI*. Because the State cannot meet its burden to demonstrate compliance, this

Court should declare that S.B. 16 does not pass the bar of constitutional compliance set by this Court in *Gannon VI*.

The State does not argue in its briefing that it complied with the Court's Order in *Gannon VI*. Rather, it questions whether the Court had authority to enter that Order, points the finger at Plaintiffs for the fact that this lawsuit is on-going (despite the Legislature's failure to constitutionally fund education during the lawsuit), and generally evades any discussion of whether the State complied with *Gannon VI*. It did not.

There is no dispute between the Parties as to what this Court said in *Gannon VI*. See State's Brief, at p.2. There is no dispute between the Parties that Deputy Commissioner of Education Mr. Dennis calculated that "an additional \$363.3 million would need to be provided over a four-year period to comply with *Gannon VI*." *Id.* The Parties only *disagree* over whether the State funded that amount, and – if not – what action this Court should take.

Plaintiffs further agree that "compliance with Article 6 is not a mere mathematical exercise." However, determining whether the State "completed the plan" and fully funded its so-called *Montoy* Safe Harbor is. And, by the State's own mathematical calculations, the State did not fund the full amount that this Court said was needed to fund the *Montoy* Safe Harbor in *Gannon VI*.

I. FUNDING DID NOT INCREASE BY \$363 MILLION AS NECESSARY TO COMPLY WITH GANNON VI

At the July 10, 2018 meeting of the Kansas State Board of Education (“KSBE”), Mr. Dennis submitted a memo regarding “Legislative Matters” to the Board and Commission Mr. Watson. *See* Volume 1 of State’s Appendix (the “July 10, 2018 Memo”), at App. 25-27. That memo contained “options to begin the discussion on recommendations for the FY 2020 and FY 2021 KSDE budgets.” *Id.* at App. 26.

The July 10, 2018 Memo pre-dated the February 6, 2019 Memorandum from Mr. Dennis, which was submitted in writing – along with Mr. Dennis’ oral testimony – to the Senate Select Committee on Education Finance (“Feb. 6, 2019 KSBE Testimony”) (which was attached as Appendix 2 to Plaintiffs’ Opening Brief, dated 4-15-19 (“Pls’ Brief”), and discussed in detail therein). The two documents have significant overlap, but also have two different purposes. The July 10, 2018 Memo was created for the purpose of providing KSBE information on which it could rely to make budget decisions for FY20 and FY21. *See* Vol. 1 of State’s Appx., at App. 25. The Feb. 6, 2019 KSBE Testimony, on the other hand, was created “to review how the State Board of Education determined its recommendations on the [BASE].” In other words, KSBE relied on the July 10, 2018 Memo *before* it made its ultimate base recommendation; the Feb. 6, 2019 KSBE Testimony was an *after-the-fact* explanation of why the recommendation was made.

Again, the July 10, 2018 Memo has significant overlap with the Feb. 6, 2019 KSBE Testimony: both conclude that the cost of compliance with the *Montoy* Safe Harbor is \$3.742 billion; both conclude that to fund this will require an additional \$363 million in “new money”; and both contain the bases that were ultimately adopted in S.B. 16. *Compare* July 10, 2018 Memo: Vol. 1 of State’s Appx., at App. 26-27 *with* Feb. 6, 2019 KSBE Testimony: Appx. 2 to Pls’ Brief, at KSDE158346-348. Notably, the bases contained in both documents fall short of the \$363 million in “new money” that is needed to comply with *Gannon VI*.

The July 10, 2018 Memo has only limited importance in terms of determining whether S.B. 16 comports with this Court’s Order in *Gannon VI*. But, it does provide the genesis of the bases adopted in S.B. 16, which is important for purposes of determining why S.B. 16 fails to do what this Court ordered and for demonstrating why SFFF, including the Plaintiffs, initially supported the earlier versions of S.B. 16 with identical bases.

The top section of the second page of the July 10, 2018 Memo sets forth the “History” of bases applicable from years FY06 to FY18. It also includes the bases for year FY19 to FY23, as those bases would be calculated under 2018’s S.B. 61:

BASE STATE AID PER PUPIL (BSAPP)

History:	2005-06	\$ 4,257	
	2006-07	\$ 4,316	
	2007-08	\$ 4,374	
	2008-09	\$ 4,400	Reduced from \$4,433
	2009-10	\$ 4,012	
	2010-11	\$ 3,937	
	2011-12	\$ 3,780	
	2012-13	\$ 3,838	
	2013-14	\$ 3,838	
	2014-15	\$ 3,852	
	2015-16	\$ 3,852	
	2016-17	\$ 3,852	
	2017-18	\$ 4,006	<u>Cost</u>
	2018-19	\$ 4,165*	\$ 95,695,000
	2019-20	\$ 4,302*	\$ 95,695,000
	2020-21	\$ 4,439*	\$ 95,695,000
	2021-22	\$ 4,576*	\$ 95,695,000
	2022-23	\$ 4,713*	\$ 95,695,000

As the memo shows, these bases – enacted by 2018’s S.B. 61 – will cost the State an additional \$95,695,000 each year. And, this is exactly what S.B. 61 did – it increased the base during the phase-in period by \$95,695,000 each year. In FY20, the increased base would generate *an additional* \$95,695,000 in funding; in FY21, the base incorporates FY20’s increase and then adds *an additional* \$95,695,000 to it. In FY21, the base incorporates the prior two years’ increases and then adds an additional \$95,695,000 to it. The base would continue to increase each year in the same manner: the previous years’ increases would be incorporated and *an additional* \$95,695,000 would then be added. Plaintiffs take no issue with this methodology; this is the methodology that has always been used for multi-year phase-ins of increases in the base. Plaintiffs agree with the calculations included in this portion of the July 10, 2018 Memo.

However, as the Court noted in *Gannon VI*, these bases, when fully phased-in, only supply the amount of resources to reach ““total target additional aid,” i.e., extra

funding needed, of \$522,244,721.” *Gannon VI*, 308 Kan. at 389. The Court expressed its disagreement “with the state’s notion of a principal sum of only \$522 million being owed today.” *Id.* at 390. The Court then specifically identified the inflationary adjustments that would needed to be added through any phase-in period to meet the *Montoy* Safe Harbor. Thus, merely funding these bases was not an option for compliance with *Gannon VI*.

The July 10, 2018 Memo addresses this need for additional funding in the next section “Options to Comply With Kansas Supreme Court Decision: (add funding for inflation).”

			<u>Cost</u>
Options to Comply With	2019-20	\$ 4,436	\$ 92,659,017
Kansas Supreme Court Decision:	2020-21	\$ 4,569	\$ 89,659,017
(add funding for inflation)	2021-22	\$ 4,706	\$ 89,659,017
	2022-23	\$ 4,846	\$ 91,659,017

Each of those bases also have an annual cost attributable to them, which ranges from \$89,659,017 to \$92,659,017. Based on the fact that this information was displayed in the exact same manner as the increases attributable to S.B. 61, Plaintiffs understood this memo to indicate that the bases listed on this portion of the memo would generate approximately \$91 million in additional funding *per year* (for a funding increase that totaled the \$363 million that KSBE concluded was needed to comply with *Gannon VI*).

Within the July 10, 2018 Memo, the bases to be included in S.B. 16 are set out in an identical format to the bases included in 2018’s S.B. 61. The cost column, to the

right of the bases, is included with both, with no indication that the costs were calculated any differently. See Vol. 1 of State’s Appx., at App. 26. The presentation of the information made an obvious implication: for FY20-FY23, there would be an additional “new money” increase in funding of approximately \$91 million per year.

	2017-18	\$ 4,006	<u>Cost</u>
	2018-19	\$ 4,165*	\$ 95,695,000
	2019-20	\$ 4,302*	\$ 95,695,000
	2020-21	\$ 4,439*	\$ 95,695,000
	2021-22	\$ 4,576*	\$ 95,695,000
	2022-23	\$ 4,713*	\$ 95,695,000
			<u>Cost</u>
Options to Comply With	2019-20	\$ 4,436	\$ 92,659,017
Kansas Supreme Court Decision:	2020-21	\$ 4,569	\$ 89,659,017
(add funding for inflation)	2021-22	\$ 4,706	\$ 89,659,017
	2022-23	\$ 4,846	\$ 91,659,017

Id., at App. 25-27.

When Plaintiffs first reviewed this information, in the manner presented, they noted that the base recommended by Mr. Dennis increased annually each year for FY20-FY23. Plaintiffs incorrectly assumed that – like the calculations for FY19-FY23 under 2018’s S.B. 61 – the cost column to the right indicated the additional “new money” increase that would result each year, totaling the \$363 million in “new money” needed to comply with *Gannon VI*.

However, the bases – which are the bases that were incorporated into S.B. 16 – only include an additional “new money” increase for one year: FY20. Each subsequent year’s base increase includes no increase for inflation.

			These are the yearly calculated increases to the base.
			<u>Cost</u>
		2019-20 +137 \$ 4,302*	\$ 95,695,000
		2020-21 +137 \$ 4,439*	\$ 95,695,000
		2021-22 +137 \$ 4,576*	\$ 95,695,000
		2022-23 +137 \$ 4,713*	\$ 95,695,000
			<u>Cost</u>
Options to Comply With Kansas Supreme Court Decision: (add funding for inflation)	→	2019-20 +271 \$ 4,436	\$ 92,659,017
		2020-21 +133 \$ 4,569	\$ 89,659,017
		2021-22 +137 \$ 4,706	\$ 89,659,017
		2022-23 +140 \$ 4,846	\$ 91,659,017

See Appendix 9: Plaintiffs’ Annotated Version of July 10, 2018 Memo, at App. 26.

As a result, these bases do not, as the memo suggests, actually phase-in funding by approximately \$91 million *per year* for a total of \$363 million. Instead, they only provide a one-time increase of approximately \$92 million. Pls’ Brief, at pp. 13-14.

The State argues that “SB 16 adopts the *exact* BASE amounts as calculated by Deputy Commissioner Dennis and approved by the State Board of Education.” State’s Brief, at p. 8. While the State can truthfully maintain that it adopted the exact base calculated by Mr. Dennis and approved by KSBE, **those bases do not raise the additional \$363 million that Mr. Dennis calculated was necessary to comply with *Gannon VI* and fund the *Montoy Safe Harbor*.**

Deputy Commissioner Mr. Dennis confirmed this, explaining that to raise the additional funding that was necessary to comply with *Gannon VI* would require higher bases. The bases adopted by S.B. 16 will only generate approximately \$3.4 billion. See

Appx. 3 to Pls' Brief, at SFFF001206, 1216. To reach the target aid amount of \$3.742 billion by 2023, the following (higher) bases would need to be adopted:

2019-20	\$ 4,436
2020-21	\$ 4,697
2021-22	\$ 4,958
2022-23	\$ 5,219

Id., at SFFF001220.

The bases adopted in S.B. 16 do not raise the \$363 million in “new money” that is necessary to comport with this Court’s Order in *Gannon VI*.

II. REGARDLESS OF WHETHER KSBE MADE A MISTAKE OR INTENTIONALLY RECOMMENDED THE BASES CONTAINED IN S.B. 16, IT WAS CLEAR AT THE TIME THAT S.B. 16 WAS ADOPTED THAT THOSE BASES DID NOT COMPLY WITH GANNON VI

As Plaintiffs explained in their Opening Brief, it is not clear whether the decision to fund less than the required \$363 million was intentional or inadvertent. Originally, Plaintiffs assumed that a mathematical or drafting error occurred when the KSBE attempted to convert the \$363 million total increase into the base state aid per pupil needed to support that increase.

Plaintiffs had initially reviewed Mr. Dennis’ calculation of the needed \$3.742 billion in target aid and agreed with it. Plaintiffs still agree with that calculation and with the calculation of the total “new money” needed to reach that target aid amount (\$363 million). Initially, however, Plaintiffs mistakenly believed that the bases calculated by KSDE would actually raise \$363 million in “new money.” Plaintiffs did

not become aware that the bases failed to raise the total “new money” needed until Senator Denning questioned Mr. Dennis at the February 6, 2019 Hearing before the Senate Select Committee on Education Finance on S.B. 44 (an early version of S.B. 16) about the “total deviation from the Montoy Logic.” Appx. 3 to Pls’ Brief, at SFFF001222. Plaintiffs reviewed the bill in greater detail at that time, and confirmed Senator Denning’s conclusion: the bill was “clearly shorting schools \$271M from FY20 to FY23.” *Id.*

Plaintiffs then reviewed both the July 10, 2018 Memo and the Feb. 6, 2019 KSBE Testimony in more detail to determine how Mr. Dennis phased-up the bases over the five-year period to generate the “new money” needed to meet the *Montoy* Safe Harbor. To increase the base to add the inflation component necessary to comply with *Gannon VI*, Mr. Dennis needed to first include the S.B. 61 increase for EACH year, and THEN include the inflation increase for EACH year. Both components (the adequacy increase attributable to 2018’s S.B. 61 and the inflation increase this Court identified was necessary in *Gannon VI*) would need to be added to the base. S.B. 16 adds both of these components for FY20. For some unknown reason, KSBE’s recommendation only adds the S.B. 61 increases (and not the inflation increases) for FY21-23. Plaintiffs originally assumed that Mr. Dennis had made a mistake when he attempted to convert the \$363 million total increase into the base state aid per pupil needed to support that increase.

Plaintiffs believed that Mr. Dennis just inadvertently forgot to phase-in the additional increase for inflation into the FY21-23 bases.

When Plaintiffs pointed out the “mistake,” KSBE and Mr. Dennis took the position that no error was made in their recommendation and that the final computation was the intended computation. This is concerning, given the efforts that were taken to make it appear that the bases recommended in the July 10, 2018 Memo would raise the \$363 million in “new money” needed to comply with *Gannon VI*. There was no explanation provided as to why the “cost” column associated with S.B. 61’s bases refer to the new money that the funding will generate each year, but the “cost” column associated with S.B. 16 does not. The July 10, 2018 Memo certainly did not call attention to this point. Neither did Mr. Dennis’ written or oral testimony on February 6, 2019. Every presentation of the information suggested that KSBE’s base recommendations would result in \$363 million in “new money” by FY23.

Regardless of whether the KSBE made an error or an intended computation, the State was well aware of the fact that S.B. 16’s bases would not generate \$363 million in new money when it adopted and enacted the bill. *See generally* Appx. 3 and Appx. 5 to Pls’ Brief. Prior to enacting the bill, the State was fully aware that KSBE’s base recommendations missed the mark by approximately \$270 million. *Id.* Nevertheless, the State adopted S.B. 16, which incorporated KSBE’s base recommendations and did not generate the “new money” needed to comply with the *Montoy* Safe Harbor.

Admittedly, SFFF did initially state its approval of S.B. 44, an earlier version of S.B. 16, based upon Plaintiffs' assumption that the bases *actually funded* the total amount of "new money" that everyone agrees was needed. *See, e.g.*, State's Brief, at p.3 (indicating that State Board calculations of "new money" needed, Gov. Kelly's proposal, and Division of the Budget calculations all align). It was not until the hearing on S.B. 44 that Plaintiffs discovered that the bases do not actually increase funding as necessary to comply with *Gannon VI*. When the error was discovered, SFFF retracted its testimony and its support for S.B. 44.

The presentation of the KSBE's base recommendations did not only confuse Plaintiffs. The State has presented evidence regarding KNEA's confusion as well:

Chairperson Baumgardner asked Mr. Desetti [of KNEA] why his group was a proponent for SB 44, but neutral on SB 142. Mr. Desetti responded he misread the bill, and he was unaware of what the KSBE had recommended in July... [Vice-chairperson Denning] asked if he thought the SFFF inflation is the correct calculation. Mr. Desetti responded that their interpretation of the Court ruling is that it is in alignment with what SFFF has said.

See Vol. II of State's Appx., at App. 290.

The State has chosen to blame Plaintiffs for the Legislature's choices, criticizing Plaintiffs for "SFF's decision to reverse course during the legislative process on SB 16 and oppose in March the exact legislation it supported in February." *See, e.g.*, State's Brief, at p.13. Reviewing the "maze of bases" – however – makes clear that Plaintiffs, and perhaps others, were led to believe that the bases that were ultimately adopted in

S.B. 16 would appropriately increase the funding by the amount necessary to comply with *Gannon VI*. They do not.

Further, this historical context demonstrates the falsity of the State’s purported concern that this litigation will continue indefinitely because Plaintiffs will never be satisfied. Prior to *Gannon VI*, Plaintiffs disagreed (both in their briefing and at oral argument) that a return-to-*Montoy* was all that the Constitution demands. Nevertheless, Plaintiffs made clear that they would not challenge S.B. 16’s predecessor based on their belief that it complied with *Gannon VI*. The only reason that Plaintiffs withdrew that support was because Senator Denning alerted everyone to the fact that the bases did not raise the funds calculated as needed to comply with *Gannon VI*. In other words, this lawsuit is “long-running” because the State continues to fund less than what this Court and the Constitution say is necessary, not because of any actions by Plaintiffs.

III. BIPARTISAN SUPPORT FOR S.B. 16 DOES NOT DEMONSTRATE COMPLIANCE WITH *GANNON VI*

Seemingly, the State is asking this Court to declare that S.B. 16 complies with *Gannon VI* because Governor Kelly commended the Legislature’s “bipartisan effort” to comply with *Gannon VI*. State’s Brief, at p.5. That is simply not the test for compliance that this Court must apply. Further, Governor Kelly’s remarks demonstrate that the Legislature has once again based its funding decision on political compromise, stating, “It is a meaningful, reasonable plan that maintains the stability of the rest of the state’s budget.” *Id.* (citing Vol. 1 of State’s Appx., at 31-32).

This Court entered an Order in *Gannon VI* telling the State what needed to occur for the State to be in compliance with the *Montoy* Safe Harbor. The State did not do what *Gannon VI* required. This Court cannot accept a remedy that falls short of what the Constitution requires merely because it has legislative support. As this Court has already indicated, a law’s level of support does not shield it from review:

The political necessities of the legislature are similarly irrelevant to our review. **The constitution of the people of Kansas does not change its requirements based on legislators’ support, or nonsupport, of proposed legislation.** Rather, the Kansas Constitution “is the supreme and paramount law, receiving its force from the express will of the people.” Just as the legislature has the power and duty to create a school funding system that complies with Article 6, it is this court’s power and duty to determine whether an act of the legislature is invalid under that constitution, *i.e.*, if the legislature has met its duty. **A law’s political expediency or level of support will not shield it from such review.**

Gannon v. State, 304 Kan. 490, 513 (2016) (“*Gannon III*”) (internal citations omitted) (emphasis added).

The compass for determining whether a particular school funding system complies with Article 6 must always be the language of the Kansas Constitution. While all parties acknowledge that the State has great latitude in crafting its school funding scheme, the State cannot ignore the mandates of the Constitution merely because a bill has bipartisan support.

IV. THE STATE HAS – AT ALL TIMES THROUGHOUT THIS LAWSUIT – RETAINED ITS DISCRETION WITH REGARD TO HOW TO MEET ITS CONSTITUTIONAL OBLIGATION

The State points out that it has a “myriad of choices” that remain available to it for purposes of complying with Article 6 of the Kansas Constitution. That has been respected by this Court at all times during this litigation. Importantly, at no time did the Court or Plaintiffs impose any requirement on the State that it must fund K-12 public education via the *Montoy* Safe Harbor. Rather, the State chose to “implement its self-styled ‘*Montoy* safe harbor’ plan of compliance.” *Gannon VI*, 308 Kan. at 374. But, if the State’s chosen method of compliance remains the *Montoy* Safe Harbor, it has to actually fund the *Montoy* Safe Harbor. It did not. No level of bipartisan support can change this. The State cannot claim the protection of the safe harbor and simultaneously refuse to make the necessary “financial adjustments” to meet it.

Further, this Court has made absolute clear that while “[t]he Kansas Constitution leaves to the legislature a myriad of choices available to perform this constitutional duty,” that is not the final step. *See Gannon v. State*, 306 Kan. 1170, 1236-37 (2017) (“*Gannon V*”). Once the legislature acts, the Court is required to perform its own duty “and review whether any new legislation is compliant with the people’s constitution.” *Id.* This Court is in no way required to merely accept what the Legislature has adopted and take its word that the legislation is constitutional. The Legislature has great latitude, only inasmuch as it adopts legislation that complies with the Constitution. Here, the

Court told the State that it was well on its way to meeting constitutional compliance by funding the *Montoy* Safe Harbor, if it made certain adjustments for inflation. The State started the process, but did not “complete the plan.” As such, this Court has the power to declare that S.B. 16 does not comply with this Court’s guidance in *Gannon VI*.

V. FUNDING ONLY INCREASED BY \$92 MILLION, WHICH FAILS TO REASONABLY FUND INFLATION

Under S.B. 16, funding does not increase by \$363 million; it only increases funding by approximately \$92 million. Plaintiffs expect that – at oral argument or in responsive briefing – the State may argue that this amount comports with *Gannon VI* because this Court only ordered it to adjust for inflation on the “new money” being added. This is not what the Court ordered; however, even if it were, the State still misses the mark.

As a reminder, in *Gannon VI*, the Court identified two “obvious problems” that needed to be addressed to meet the *Montoy* Safe Harbor. *Gannon VI*, 308 Kan. at 374 (describing “The failure to adjust two years of funding for inflation through the approaching 2018-19 school year” as the first obvious problem). The Court first suggested that, if the State’s intent was to fully fund the *Montoy* Safe Harbor, it needed to finish the work it started in the April 23 memo: if the apparent purpose of the memo was to calculate how much the legislative funding was short for SY2018-19, it needed to make those calculations. *Id.* at 390.

On March 27, 2019, KLRD’s Principal Research Analyst Mr. Edward Penner drafted a memorandum to Representative Blaine Finch regarding the *Gannon VI School Finance Calculations*. See Vol. II of State’s Appx., at 425-427 (the “March 27, 2019 Penner Memo”). Within that document, Mr. Penner calculates what inflationary adjustments would be necessary to address this first “obvious” problem.

<u>Year</u>	<u>Prior Year Amount</u>	<u>Inflation Percent</u>	<u>Inflation Adjustment Amount</u>	<u>New Amount</u>
2018	\$ 3,434,941,542	1.44 %	\$ 49,463,158	\$ 3,484,404,700
2019	3,484,404,700	1.44	<u>50,175,428</u>	3,534,580,128
TOTAL			\$ 99,638,586	

The sum of the two additional years of inflation is \$99.6 million. When added to the \$522.2 million identified by the State in 2018, this generates a new enlarged principal amount of \$621.9 million.

See Vol. II of State’s Appx., at 425.

Mr. Penner’s calculations show that the “enlarged principal amount” at the end of FY19 would be \$621.9 million as opposed to the \$522.2 million identified by the State in 2018. At this stage, Mr. Penner’s calculations are identical to those of Mr. Dennis in the Feb. 6, 2019 KSBE Testimony. Both memos calculate an identical inflation adjustment amount and calculate the same total target aid for FY19 (\$3,534,580,128).

Compare Vol. II of State’s Appx., at 425 with Appx. 2 to Pls’ Brief, at KSDE158347.

Mr. Penner then attempts to address the second “obvious problem” – but does so incorrectly. The Court identified the second obvious problem as follows:

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 school year 2018-19 – need not be adjusted because that inflation has already been accounted for in paragraph 1 above.

Gannon VI, 308 Kan. at 374.

In *Gannon VI*, the Court faulted the State for failing to make “adjustments [that] need to be made to account for inflation during [the phase-in period].” *Id.* at 390. In other words, the Court told the State to continue the inflationary adjustments that had been started in the April 23 memo for each year of the phase-in. This is exactly what Mr. Dennis did to calculate the total target aid of \$3.742 billion in the July 10, 2018 Memo and the Feb. 6, 2019 KSBE Testimony.

INFLATION ADJUSTMENT

Year	Prior Year Amount	Inflation Percent	Inflation Adjustment Amount	Net Amount
2010-11	\$3,108,690,821	3.22	\$100,099,844	\$3,208,790,665
2011-12	\$3,208,790,665	2.03	\$ 65,138,451	\$3,273,929,116
2012-13	\$3,273,929,116	1.40	\$ 45,835,008	\$3,319,764,124
2013-14	\$3,319,764,124	1.47	\$ 48,800,533	\$3,368,564,656
2014-15	\$3,368,564,656	(0.54)	(\$18,190,249)	\$3,350,374,407
2015-16	\$3,350,374,407	0.85	\$ 28,478,182	\$3,378,852,590
2016-17	\$3,378,852,590	1.66	\$ 56,088,953	\$3,434,941,542
2017-18	\$3,434,941,542	1.44	\$ 49,463,158	\$3,484,404,700
2018-19	\$3,484,404,700	1.44	\$ 50,175,428	\$3,534,580,128
2019-20	\$3,534,580,128	1.44	\$ 50,897,954	\$3,585,478,076
2020-21	\$3,585,478,076	1.44	\$ 51,630,884	\$3,637,108,960
2021-22	\$3,637,108,960	1.44	\$ 52,374,369	\$3,689,483,329
2022-23	\$3,689,483,329	1.44	\$ 53,128,559	\$3,742,611,889

See Appx. 2 to Pls’ Brief, at KSDE158347; Appx. 9, at App. 27.

Mr. Penner, however, took a wholly different approach – one that has never been used to adjust for inflation (likely because it ignores how inflation works). He calculated inflation based only on the “enlarged principal amount” of \$621.9 million. See Vol. II of State’s Appx., at App. 426. In FY19, he calculated that the State owed an additional \$8,995,120 for inflation (the total enlarged principal amount of \$621.9 million *1.44% inflation). In FY20, he calculated the State owed inflation only on the remaining portion of the principal amount (\$621.9 million minus the \$120 million to be paid in FY19 = \$501.1 million), which would result in a lower inflation increase (\$501.1 million * 1.44% inflation = \$7,214,940 owed in inflation). *Id.*

<u>Year</u>	<u>Principal</u>	<u>Interest</u>	<u>Total of Principal and Interest</u>
2019	\$ 120,845,823	\$ 8,955,120	\$ 129,800,942
2020	122,586,002	7,214,940	129,800,942
2021	124,351,241	5,449,701	129,800,942
2022	126,141,899	3,659,043	129,800,942
2023	127,958,342	1,842,600	129,800,942
TOTAL	\$ 621,883,307	\$ 27,121,404	\$ 649,004,711

The total amount of interest to be paid in this amortization schedule is \$27.1 million. Adding that amount to the newly enlarged principal identified above creates a total state aid obligation of \$649.0 million.

Mr. Penner carried those calculations through to calculate a “total state aid obligation of \$649.0 million” – the enlarged principal amount of \$621.9 million, plus \$27.1 million in inflation increases for FY19-FY23. Mr. Penner’s calculations only accounted for

inflation on the increase, as opposed to on the total amount of funding (as it was done in the original April 23 Memo that the Court relied on in *Gannon VI*).

Mr. Penner next subtracted \$466.3 million, which represented the “total amount of new aid to schools [already] provided by the State” to conclude that the “total amount of aid owed by the State” is \$182.7 million. *Id.*

Newly Enlarged Principal	\$	621,883,307
Interest		<u>27,121,404</u>
<i>Total Obligation</i>	\$	<i>649,004,711</i>
State Board Identified FY 2019 Increase	\$	146,105,000
Less Increase Already Counted by State		(95,606,000)
State Board Identified FY 2020-2023 Increases		<u>415,780,000</u>
<i>Total Increases Provided</i>	\$	<u><u>466,279,000</u></u>
Total Remaining Obligation	\$	182,725,711

Gannon VI does not provide support for this concept of only calculating inflation on the increase, as opposed to calculating inflation on the total amount of funding. Clearly, Mr. Penner’s memo is keying off of the following language included in the Court’s opinion in *Gannon VI*:

Toward that end, we observe that the average of all the years of inflation shown in the State’s chart from its April 23 memo (SY 2010-11 through SY 2016-17) is 1.44%. Inflation adjustments for SY 2017-18 and SY 2018-19 obviously enlarge the State’s principal figure of \$522 million. That enlarged principal amount then needs to be adjusted again (for inflation) until the new principal is paid in full over time—as the State’s chosen remediation plan provides.

Gannon VI, 308 Kan. at 390 (emphasis added).

By focusing only on this emphasized sentence, Mr. Penner’s methodology wholly ignores almost all of the other sentences contained within *Gannon VI*. The Court’s stated purpose in ordering that “financial allowance should be made for that phase-in period” was to preserve “the legislatively devised finance system – and the future funding the legislature represented would flow from it – that led to the dismissal of *Montoy IV*.” *Id.* at 389-391. To do that, the Court stated that “adjustments need to be made to account for inflation during that time.” *Id.*, at 390. And, logically, this makes sense. If we want to get students the amount of money that they were receiving at the end of *Montoy*, when the case was dismissed, we take that amount, and adjust – consistently – for inflation. If we want students to get that amount of money in FY19, we adjust for inflation until FY19. If we want students to get that amount of money in FY23, we adjust for inflation until FY23.

The Court’s direction in *Gannon VI* made clear what it intended: carry the inflation calculations started in the April 23 Memo forward until the end of the five-year plan – or, as the Court stated it in identifying obvious problem number two “until the memo’s calculated principal sum . . . is paid in full.” *Id.* at 374. The Court did not say “adjust only the increase in funding for inflation” or “adjust the principal sum for inflation.” It said, adjust for inflation until the phase-in period is over. *Id.* Mr. Penner (who also drafted the April 23, 2018 Memo discussed extensively in *Gannon VI*) offers

no explanation for this change in methodology in his March 27, 2019 Memo, which defies logic, historical methods of calculating inflation, and the Court’s intended result.

In any event, even if the March 27, 2019 Penner Memo were an accurate reflection of what this Court told the State to do in *Gannon VI*, the State did not increase funding by the amount of “new money” that Mr. Penner concludes was needed (\$182.7 million). Instead, S.B. 16 made a one-time increase of approximately \$92 million, which falls far short even of the unsound methodology employed in Mr. Penner’s memo.

VI. THIS COURT CAN TAKE JUDICIAL NOTICE OF THE FACT THAT \$92 MILLION IS NOT \$363 MILLION

In what sounds like a plea for this Court not to check the State’s faulty math, it argues that “[t]his Court is not a fact-finding body.” *See* State’s Brief, at p.8. While this is true, generally, it is appropriate for this Court to take judicial notice of certain facts, and this Court has repeatedly taken judicial notice of certain facts in resolving issues arising in this case. *See e.g., Gannon VI*, 308 Kan. at 383 (citing *Gannon v. State*, 305 Kan. 850, 881 (2017) (“Gannon IV”). And, interest and other mathematical calculations are appropriately established through judicial notice. *See, e.g. George v. Capital South Mortg. Inv.*, 265 Kan. 431, 447-48 (1998) (finding that information regarding interest rates and mathematical calculations using assumed interest rates were figures “the trial judge could have taken judicial knowledge of”); *see also Sheppard v. Wichita Ice & Cold Storage Co.*, 82 Kan. 509, 511-12 (1910) (“appellate courts will take judicial notice of the unquestioned laws of nature, of the laws of mathematics and of

physics”). Therefore, Plaintiffs specifically request that this Court take judicial notice of the fact that S.B. 16 does not increase funding by the \$363 million in “new money” that Mr. Dennis and the KSBE calculated was necessary to comply with *Gannon VI*.

VII. THIS COURT SHOULD MAINTAIN JURISDICTION OF THIS MATTER UNTIL THE SCHOOL FINANCE SYSTEM REACHES A CONSTITUTIONAL STATE

Consistent with its past practice, this Court should retain jurisdiction of this matter until the Court determines that the remaining adequacy issues have been cured, and that the legislative cure did not disturb equity. *See, e.g., Gannon VI*, 308 Kan. at 400-01 (“Because of the problems with adequacy we retain jurisdiction and stay the issuance of today’s mandate until June 30, 2019, or until further order of the court.”).

In arguing that this Court should release its jurisdiction now, the State concludes:

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.

State’s Brief, at p.16. Apparently, the State has forgotten that this is exactly how we got to where we currently are. These Plaintiffs have already bore the burden of filing a lawsuit, establishing their proof at trial that the system was unconstitutional, and having that decision affirmed by this Court.

Plaintiffs filed suit in 2010. *See, e.g., Gannon IV*, 305 Kan. at 853. “After a 16-day bench trial that produced a 21,000-page record, the panel issued a 250-page memorandum opinion and entry of judgment.” *Id.* In that decision, the Panel

determined that “the State had inequitable and inadequately funded education in violation of Article 6.” *Id.* at 855-57. In March of 2017, this Court affirmed the Panel’s finding, concluding that “the state’s public education financing system, through its structure and implementation, is not reasonably calculated to have all Kansas public education students meet or exceed the minimum constitutional standards of adequacy.” *Id.*

Now, six years after the Panel first confirmed inadequacy and two years after this Court affirmed it, a constitutional funding scheme still does not exist. The State does not need new plaintiffs or new stakeholders challenging the system. It just needs to comply with the Court’s orders and meet its constitutional duty. Once the system is deemed to be constitutional, and once any phase-in period is successfully completed, then the State’s arguments that this Court should not retain jurisdiction would gain credence. But, that is not the case. It is premature to dismiss this case at this time, under these facts.

Finally, this Court cannot rely on legislative promises to fund education in a constitutional manner, when that has not occurred once during the pendency of this appeal. This is especially true when the current Legislature attempted to claw back the increases adopted just last year in S.B. 61, before the phase-in was even complete, and despite the fact that the State represented it was the Legislature’s intent to return funding back to *Montoy* levels. *See* 2019 House Bill 2395, as introduced and heard in House

committee.¹ Even though this proposed legislation did not pass the House, the Conference Committee dedicated a significant amount of time and effort to debating whether to adopt such a claw back or to instead adopt S.B. 16. The Court should be mindful of this type of legislative activity. After all, the *Montoy* case was dismissed based upon a legislative promise to phase-in a remedy. After the case was dismissed and the Court no longer retained jurisdiction, the State clawed the promised remedy back before it was even fully phased-in, resulting in the current *Gannon* case. The devastating effects of the State's revocation of the *Montoy* funding are reflected in the continued failure for *all* Kansas students to meet the *Rose* standards. This Court should maintain jurisdiction until constitutional status is actually regained, not simply promised.

CONCLUSION

For the reasons stated herein, Plaintiffs request that this Court:

- (1) Declare that S.B. 16 has not passed the bar of constitutional compliance identified by this Court in *Gannon VI*.
- (2) Further stay the Court's mandate in *Gannon VI*, until June 30, 2020.
- (3) Continue its order that the KSEEA – enacted by S.B. 19 and amended by S.B. 423 and S.B. 61 – will remain in temporary effect.

¹ See http://kslegislature.org/li/b2019_20/measures/hb2395/. The actual language of the bill, as introduced, is available at: http://kslegislature.org/li/b2019_20/measures/documents/hb2395_00_0000.pdf.

(4) Enter a finding that S.B. 16 should go into temporary effect for FY20, since S.B. 16 appropriately funds one-quarter of the needed inflation in compliance with *Gannon VI*, by providing a sufficient inflationary increase in FY20 only.

(5) Allow the Legislature an additional legislative session to make the necessary financial adjustments to appropriately account for inflation, as set forth in *Gannon VI*.

Plaintiffs request that the Court retain jurisdiction of this matter until it enters a finding that the State is in compliance with both the adequacy and equity requirements of the Kansas Constitution.

Dated this 25th day of April, 2019.

/s/ Alan L. Rupe

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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2019, I electronically filed the foregoing Response to Brief of Appellant State of Kansas through the Court's electronic filing system, which will send a "Notice of Electronic Filing" to each party's registered attorney.

/s/ Alan L. Rupe _____
Alan L. Rupe

APPENDICES

9. **Appendix 9:** Plaintiffs' Annotated Version of July 10, 2018 Memo from Mr. Dennis to Cmmr. Watson (Vol. 1 of State's Appendix, at App. 25-27)

Appendix 9:
Plaintiffs' Annotated Version of July
10, 2018 Memo from Mr. Dennis to
Cmmr. Watson (Vol. 1 of State's
Appendix, at App. 25-27)

Appendix 9 is a demonstrative exhibit of the Memorandum. The Memorandum was previously submitted to this Court by the State as Volume 1 of the State's Appendix to the State's April 15, 2019 Brief.



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To: Commissioner Randy Watson
From: Dale Dennis
Subject: Legislative Matters

DISCUSS FY 2020 AND FY 2021 BUDGET OPTIONS

Attached are budget options for FY 2020 and FY 2021 to be discussed at the July meeting. Due to the large size of the KSDE budget, we would like the State Board to make decisions in July for these fiscal years. This will allow KSDE staff to proceed with the preparation of the budget and comply with the Sept. 15, 2018 due date.

SUPREME COURT DECISION ON SCHOOL FINANCE

The Kansas Supreme Court issued its opinion on school finance, Gannon VI, on June 25, 2018. Attached is a summary of the opinion which will be discussed at the July meeting.

DISCUSS FY 2020 AND FY 2021 KSDE BUDGETS

Listed below are options to begin the discussion on recommendations for the FY 2020 and FY 2021 KSDE budgets.

BASE STATE AID PER PUPIL (BSAPP)

History:	2005-06	\$ 4,257	
	2006-07	\$ 4,316	
	2007-08	\$ 4,374	
	2008-09	\$ 4,400	Reduced from \$4,433
	2009-10	\$ 4,012	
	2010-11	\$ 3,937	
	2011-12	\$ 3,780	
	2012-13	\$ 3,838	
	2013-14	\$ 3,838	
	2014-15	\$ 3,852	
	2015-16	\$ 3,852	
	2016-17	\$ 3,852	
	2017-18	\$ 4,006	
	2018-19	\$ 4,165*	

These are the yearly calculated increases to the base.

SB 16 replaces this with this

2019-20	+137	\$ 4,302*
2020-21	+137	\$ 4,439*
2021-22	+137	\$ 4,576*
2022-23	+137	\$ 4,713*

<u>Cost</u>
\$ 95,695,000
\$ 95,695,000
\$ 95,695,000
\$ 95,695,000
\$ 95,695,000

Options to Comply With Kansas Supreme Court Decision: (add funding for inflation)

2019-20	+271	\$ 4,436
2020-21	+133	\$ 4,569
2021-22	+137	\$ 4,706
2022-23	+140	\$ 4,846

<u>Cost</u>
\$ 92,659,017
\$ 89,659,017
\$ 89,659,017
\$ 91,659,017

Options to Increase BSAPP:

			<u>Cost</u>
2019-20	\$100		\$ 69,800,000
2019-20	\$200		\$139,600,000
2019-20	\$300		\$209,400,000
2019-20	\$400		\$279,200,000
2019-20	\$500		\$349,000,000
2020-21	\$100		\$ 69,800,000
2020-21	\$200		\$139,600,000
2020-21	\$300		\$209,400,000
2020-21	\$400		\$279,200,000
2020-21	\$500		\$349,000,000

* BSAPP amounts established in 2018 Senate Bill 61.

BASE STATE AID PER PUPIL (BSAPP) - Continued

INFLATION ADJUSTMENT

Year	Prior Year Amount	Inflation Percent	Inflation Adjustment Amount	Net Amount
2010-11	\$3,108,690,821	3.22	\$100,099,844	\$3,208,790,665
2011-12	\$3,208,790,665	2.03	\$ 65,138,451	\$3,273,929,116
2012-13	\$3,273,929,116	1.40	\$ 45,835,008	\$3,319,764,124
2013-14	\$3,319,764,124	1.47	\$ 48,800,533	\$3,368,564,656
2014-15	\$3,368,564,656	(0.54)	(\$18,190,249)	\$3,350,374,407
2015-16	\$3,350,374,407	0.85	\$ 28,478,182	\$3,378,852,590
2016-17	\$3,378,852,590	1.66	\$ 56,088,953	\$3,434,941,542
2017-18	\$3,434,941,542	1.44	\$ 49,463,158	\$3,484,404,700
2018-19	\$3,484,404,700	1.44	\$ 50,175,428	\$3,534,580,128
2019-20	\$3,534,580,128	1.44	\$ 50,897,954	\$3,585,478,076
2020-21	\$3,585,478,076	1.44	\$ 51,630,884	\$3,637,108,960
2021-22	\$3,637,108,960	1.44	\$ 52,374,369	\$3,689,483,329
2022-23	\$3,689,483,329	1.44	\$ 53,128,559	\$3,742,611,889

This is the State calculated *Montoy* safe harbor.



SUMMARY

Target Aid To Schools -- FY 2023	\$ 3,742,611,889
Less: Current Aid	(\$2,817,090,821)
Less: Scheduled Increase in Aid -- FY 2019	<u>(\$ 146,105,000)</u>
Total Target Additional Aid	\$ 779,416,068

ANNUAL SUMMARY

	<u>2019-20</u>	<u>2020-21</u>	<u>2021-22</u>	<u>2022-23</u>	<u>TOTAL</u>
Four-Year Average	\$194,854,017	\$194,854,017	\$194,854,017	\$194,854,017	\$779,416,068
Five-Year Plan Amt.	<u>(\$102,195,000)</u>	<u>(\$105,195,000)</u>	<u>(\$105,195,000)</u>	<u>(\$103,195,000)</u>	<u>(\$415,780,000)</u>
Additional Required	\$92,659,017	\$89,659,017	\$89,659,017	\$91,659,017	\$363,636,068

This is the State calculated new money needed to reach the State calculated *Montoy* safe harbor.

