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CASE NUMBER: 113267

No. 113,267

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. 2010C1569

REPLY BRIEF OF APPELLANT STATE OF KANSAS

Stephen R. McAllister, KS Sup. Ct. No. 15845
Solicitor General of Kansas
Memorial Bldg., 2nd Floor
120 SW 10th Avenue
Topeka, Kansas 66612-1597
Telephone: (785) 296-2215
Fax: (785) 291-3767
Email: steve.mcallister@trqlaw.com
Counsel for Appellant State of Kansas

Oral Argument Requested: One Hour

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INTRODUCTION

Based on extensive evidence, the Legislature reasonably concluded that the "public education financing system provided by the legislature for grades K-12—through structure and implementation—is reasonably calculated to have all Kansas public education students meet or exceed the standards set out in *Rose* [*v. Council for Better Education, Inc.*, 790 S.W.2d 186, 212 (Ky. 1989)]" and codified in K.S.A. 2015 Supp. 72-1127. *See Gannon v. State*, 298 Kan. 1107, 1170, 319 P.3d 1196 (2014) (establishing this standard).

Each and every Kansas public school is currently accredited. That means *all* public education students in Kansas have teachers who are properly licensed and *all* students attend schools whose curricula, attendance rates, and graduation requirements comply with the Kansas State Board of Education's rigorous requirements, which in turn comply with the *Rose* standards codified in K.S.A. 2015 Supp. 72-1127 and the academic requirements codified in K.S.A. 2015 Supp. 72-6479. Brief of Appellant State of Kansas ("Opening Brief"), pp. 23-26. Additionally, students receive books and educational materials necessary for instruction in each curricula area, students have adequate classrooms, and all schools have appropriate administrators and support staff. Plus, the Kansas public education system is receiving record-high amounts of funding. *Id.*, pp. 16-23.

This Court should defer to the Legislature's reasonable calculation that all Kansas schools provide all Kansas students the opportunity for:

> (i) sufficient oral and written communication skills to enable [the student] to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental

> processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

Gannon, 298 Kan. at 1164 ("*Rose* standards"). Particularly when measured against past performance of Kansas students and student performance in sister states, Kansas students as a whole are doing well, as are all major student subgroups. Opening Brief, pp. 26-39.

No finding by the Panel takes issue with these facts, and no evidence presented to the Panel contradicts these conclusions.

In *Gannon*, this Court held that the Panel did not apply the correct "*Rose*-based test" to determine whether the State provided suitable financing for the State's educational interests and remanded the case "*for the panel to make an adequacy determination, complete with findings, after applying the test to the facts.*" *Gannon*, 298 Kan. at 1171 (emphasis added). Yet, even after the remand, the Panel improperly substituted its policy judgments for those of the Legislature and held present K-12 funding unconstitutionally inadequate on the basis of flawed legal conclusions. *See* Memorandum Opinion and Order on Remand, R. Vol. 24 ("December Order"), pp. 3047-3185.

The State's Opening Brief thoroughly addressed many of the arguments in the Districts' Response Brief. The State does not repeat its arguments here. Other arguments made by the Districts are irrelevant to any defense of the Panel's reasoning. Indeed, the Districts' Response Brief does not defend the Panel's actual decision. Rather, the

Districts assert the existence of "facts" not found or relied upon by the Panel, exaggerating and misrepresenting stale testimony and outdated exhibits. The Districts also urge a variety of incorrect legal propositions. This Court should reject the Districts' efforts to bend both the facts and the law.

FACTS

I. The Districts' Alleged "Facts" Were Not Found or Relied Upon by the Panel and Are Nearly All Exaggerations of Stale Testimony and Outdated Exhibits.

In the stereotypical fisherman's story, the fish gets bigger and bigger over time. The Districts here are the stereotypical fishermen, exaggerating and reimagining the facts to serve their purpose.

First, the Districts misstate that the Panel "diverged only with Plaintiffs 'in the amount of dollars believed to represent a state of adequacy in meeting the *Rose* factors.'" Resp. Brief, p. 6 (citing the "December Order," R. Vol. 24, p. 3055). They actually misrepresent to this Court that "[t]he findings on which the Panel relied demonstrated [failure to provide suitable finance for the State's educational interest]. Those findings (Plaintiff's [sic] Proposed Findings of Fact and Conclusion of Law, ¶¶ 1-134, 145, and 147-164), summarized below, are entitled to deference on appeal." *Id.*

The claim that the Panel adopted the Districts' proposed findings of fact is flat wrong. In its January 23, 2015, Motion to Alter and Amend, R. Vol. 25, pp. 3186-3279, the State objected to the following statement from the Panel's December Opinion:

> We believe the Plaintiffs' Proposed Findings of Fact attached to their pleadings for Judgment on the Existing Record speak the truth, as we also believed their original Proposed Findings of Fact spoke the truth. As before in our original *Opinion*, all facts, by whomever [sic] presented, could not reasonably be discussed individually. Facts inconsistent with our original *Opinion* and our *Opinion* issued following are rejected implicit[]ly.

R. Vol. 24, p. 3052. The State argued this statement was ambiguous and largely unhelpful. The State noted that it did not appear the Panel had, or would, adopt either side's proposed findings wholesale, particularly when the Panel rejected or appeared to reject many of the findings the Plaintiffs proposed after trial when the Panel issued its original Memorandum Opinion and Entry of Judgment on January 11, 2013 ("Initial Opinion," R. Vol. 14). *See* R. Vol. 25, p. 3187.

On March 11, 2015, responding to the State's motion, the Panel struck the challenged statement from its Order. R. Vol. 128, p. 11. The Panel stated:

> *Throughout both Opinions* [the December Order and Initial Opinion] *we identified the certain facts or exhibits* we deemed controlling and that would exemplify our acceptance or rejection of the premise or an issue raised and discussed the efficacy of any conflict or premise toward which they were asserted. *We feel no need to go further* than this either in the identification of supporting facts and exhibits or their discussion.

Id. (emphasis added); *see also id.*, p. 7 (stating that the opinions are "intended" to "convey both the findings and conclusions of the Court").

Perhaps the passage of time between entry of the Panel's orders and the preparation of the Districts' Response Brief explains the misrepresentation. But the Districts' proposed findings of fact, which they extensively cited and quoted in their Response Brief as the support for their statement of facts,[1] are entitled to no deference and are no support for the Panel's orders.

Second, the "facts" the Districts recite, with few exceptions, summarize stale testimony and exhibits. The Districts' summaries read as if reductions in state general aid in 2009 and 2010 continued into the present. Resp. Brief, pp. 10, 15, 16. The Districts

[1] Resp. Brief, pp. 5, 6, 10-23, 26, 27, 32, 49, 53-57, 63-65, 80.

cite their proposed findings of facts and excerpts from the June 2012 trial transcripts and exhibits. But that dated trial record is no proof of *present* circumstances, and citing to the Districts' own never-adopted findings of fact does not offer proof of anything except the Districts' point of view.

Third, the Districts' summaries of alleged facts are not even supported by the stale evidence they cite. The summaries are based either on exaggeration of the meaning of the dated testimony or exhibits, or on the Districts' creative definitions of terms and phrases, like "cuts" and "less funding." The Districts repeatedly assert that students are currently not afforded the opportunity for an education meeting the *Rose* standards. The record cited as support for the proposed findings, however, does not fully support the findings, if at all. As a result, the Court cannot trust that any of the claimed facts the Districts have presented accurately recite the record or have any evidentiary support.

As the Panel did not adopt the Districts' proposed findings, the State cannot be reasonably required to address each and every misstatement of the facts. But a few examples establish the State's point. The Districts assert that "the elimination of programs, services, and staff negatively impacted achievement as measured by various outcomes, including ACT results, graduation rates, and remediation rates." *See* Resp. Brief, p. 20; *see also id.*, p. 8. Proposed finding of facts ¶¶ 87-99 are cited in support of this statement. *Id.* But none of these proposed findings address the *cause* of alleged deficiencies pertaining to ACT results, graduation, or remediation.

Another example is the Districts' repeated claim that "cuts were made for purely political reasons." Resp. Brief, p. 10; *see also id.*, p. 8. The Districts cite their proposed findings of fact ¶¶ 139-140 for this assertion, but none of the statements in these

proposed findings support the assertion. Any claim that determination of the amount of funding is "solely political" has been debunked as recently as January 19, 2016, when the Legislature's Special Committee on K-12 Student Success adopted and issued a report, compiled after extensive hearings, with ideas and information regarding allocation of the billions of state dollars directed to public education. *See* Kansas Legislative Research Department, Report of the Special Committee on K-12 Student Success to the 2016 Kansas Legislature, http://www.kslegresearch.org/KLRD-web/Publications/CommitteeReports/2015CommitteeReports/spc_k-12_student_success-cr.pdf. The only way the Districts' claim could plausibly be substantiated by the record is if they redefine as "political" any decision with which they disagree on the merits.

One final example is the Districts' claim that teachers and administrators who testified at trial "equated the term 'suitable education' with the *Rose* Standards." Resp. Brief, p. 79. The Districts cite to R. Vol. 52, p. 707, which is a copy of K.S.A. 2005 Supp. 72-1127 that sets forth accreditation requirements; testimony from Dr. Cynthia Lane stating that Kansas accreditation requirements describe the education her district hopes to impart to its students, R. Vol. 29, pp. 108-10; and Mr. Alan Cunningham's testimony stating all-day kindergarten and after school classes are required for his students to be successful and to receive a "suitable education." R. Vol. 36, pp. 1909-10. Dr. Lane maintains that the education provided by her district is not a constitutional education if a single student scores less than proficient on any annual state reading or math assessment, and she asserts the Kansas Constitution's demand for funding is "whatever it takes" for 100% proficiency. *Id.* Mr. Cunningham testified that unless all students are both successful while in school and successful in their post-secondary

education endeavors, a "suitable education" is not being provided. Vol. 29, pp. 1857-58. He testified that, in his opinion, this guarantee is what the State's statutes require. *Id.*, pp. 1836-37. He concluded his district, Dodge City, had *never* in the last 39 years provided a "suitable education" under his definition of the phrase. *Id.*, pp. 1909-10.

Obviously, such testimony reflects the witnesses' personal views of a "suitable education." But those views cannot be squared with the *Rose* standards' minimum requirements for constitutional adequacy.

The Districts also play word games in their "statement of the facts." For example, the Districts give the term "cuts" multiple meanings throughout their brief. They assert the State made "significant cuts to educational funding" between 2009 and 2012. Resp. Brief, p. 9. The Districts cite Exhibit 241 and the Panel's acceptance of the Exhibit in support of this claim. R. Vol. 90, p. 5486; R. Vol. 14, pp. 1794-95. In this context, the term "cuts" refers to reduction in state general aid revenue if hypothetically the BSAPP remained at $4,492 after 2010, if special education funding were not reduced 2% during 2009, and if capital outlay and LOB aid were fully funded. R. Vol. Ex. 241. These "cuts" were to revenue districts hoped to receive from the State alone, not reductions from previous *total* funding levels. So employed, the term "cuts" does not address whether revenue to districts—particularly when revenue from *all* sources is considered—was lower than in previous years or whether districts' expenditures were lower. In fact, total expenditures have increased each year since 2011-12. *Compare* R. Vol. 14, p. 1788 *with* Opening Brief, Appx. 1.

The Districts also use the term "cuts" when describing testimony that local districts reduced some staff and services in 2009-2011 because of allotments produced by

the Great Recession. *See* Resp. Brief, pp. 10-15. Then, mixing these different meanings of cuts, the Districts imply that the reductions in revenue and spending they allege, as compared to in previous years, negatively affected student achievement. Resp. Brief, pp. 16-24. However, the evidence does not support this, and the Districts' creative redefining of "cuts" does not change the facts.

The Districts use the phrase "less funding" in much the same manner. Most of the time, they do not use the phrase to address *all* sources of revenue available to local districts. *E.g.*, Resp. Brief, pp. 45 (quoting the Panel at R. Vol. 24, p. 3065). Additionally, they usually use the phrase "less funding" to mean less than what local districts *expected or hoped for* from the State, not less than the funding the State previously provided. *E.g.*, *id.*, pp. 26, 46, 61.

Fourth, even when referring to the Panel's opinions, the Districts assert the Panel reached conclusions it did not make. The Districts cite to the Panel's June 26, 2015, Order ("Memorandum Opinion and Entry of Judgment on Plaintiffs' Motion to Alter Judgment Regarding Panel's Previous Judgment Regarding Equity and Plaintiffs' Motion for Declaratory Judgment and Injunctive Relief," R. Vol. 136), asserting Dale Dennis (KSDE's Deputy Commissioner of Education) testified that funds to school districts "will be less." Resp. Brief, p. 27. The Panel, however, was stating that the KPERS contribution would be less in FY17, under 2015 House Substitute for SB112, §§ 114-15, if some of KPERS' unfunded liability was bonded. R. Vol. 136, p. 1430; *see also* R. Vol. 139, pp. 246-47 (Dennis' testimony about the potential bond changes). By contrast, Exhibit 3020 (Vol. 143, pp. 2164-78) shows state aid will increase from FY14 through FY17 even with KPERS contributions excluded. *See* Opening Brief, p. 18.

The Districts also quote the Panel's discussion in the December 30, 2014, Order where the Panel concluded the increase in the BSAPP, from $4433 to $4490, used to calculate the LOB cap found in K.S.A. 72-6433(b), did not keep pace with inflation from 2012. Resp. Brief, p. 87. However, the Districts misrepresent that this discussion proves "no school district has received increased funding under S.B. 7." *Id.* Obviously it does not.

Then, at page 27 of their Brief, the Districts argue, "no school district has received increased funding under S.B. 7" and "S.B. 7 certainly did not restore the cuts to funding that started in 2009." Resp. Brief, pp. 26-27. The Districts want this Court to believe that the Panel held that local districts have less revenue and less to spend, all sources of revenue considered. However, where the Panel stated "current funding levels have devolved to pre-*Montoy* levels," it was focused *only* on the BSAPP and therefore only on general state aid. Vol. 24, pp. 3060, 3065. Likewise, the Panel's discussion of inflation, cited by the Districts, concerns the BSAPP only. *Id.*, pp. 3125-26.

II. The Facts Recited in the State's Opening Brief Are Accurate.

The Panel noted much of the evidence was undisputed "matters of public record," like "school funding sources and amounts." R. Vol. 128, p. 8. These records establish the following:

- The Legislature made an informed judgment on what is required to make suitable provision for financing of the public schools;
- School spending in Kansas is at record-high levels;
- Direct State funding has increased since 2009;
- Local districts have received and will receive substantial local option budget ("LOB") funding;

- Local districts also receive substantial federal funds;
- Spending on instruction and operations has increased, both in the aggregate and per pupil;
- Each and every Kansas school is accredited (and the Panel expressly found that the Districts failed to prove that the educational standards, which are the bedrock of Kansas' accreditation requirements, are too low, R. Vol. 14, p. 1870);
- Kansas standardized testing results have improved;
- Kansas is closing achievement gaps in recent years;
- The education provided to Kansas students compares favorably to the education offered in other states;
- Kansas graduation rates have improved, both for all students and in the major student subgroups;
- More Kansas students are prepared for college than in the past;
- Changes in funding from the Great Recession did not affect the classroom; and
- Many local districts have unspent reserves.

See Opening Brief, pp. 6-41. The Districts have not rebutted *any* of these facts.

ARGUMENT

I. The Legislature's Decisions on "Suitable" Funding Are Entitled to Substantial Deference.

The Districts assert, in a new argument presented for the first time in their Response Brief, that the burden of proof rested upon the State to show current funding is adequate under Article 6 of the Kansas Constitution because this Court affirmed the Panel's judgment regarding inequities in LOB and outlay aid and remanded for consideration of a legislative cure. Resp. Brief, pp. 16, 40, 70. The Districts also claim the Panel could, *de novo*, substitute its judgment for the Legislature's on policy matters. *Id.*, pp. 43-44, 69-73. The Districts unabashedly asked the Panel, and now this Court, to

become a super-legislature on school finance matters. These positions are outlandish and beyond the constitutional pale.

First, the burden of proof to show a violation of Article 6, § 6 rests squarely on the Districts. It is true that *in the remedy phase*, the State bears the burden of persuading the court that new legislation cures constitutional infirmities. *See Montoy v. State*, 279 Kan. 817, 826, 112 P.3d 923 (2005) ("*Montoy III*"); *Gannon*, 298 Kan. at 1162. But this appeal is not about the State's efforts to remedy adequacy issues previously adjudicated by this Court. Rather, in its Order of March 5, 2015, this Court recognized that the adequacy and equity issues were in "different stages of their resolution," with equity issues in the remedial phase but with adequacy issues not yet resolved on the merits:

> More specifically, this court affirmed the panel's equity rulings and remanded for the panel to enforce them after giving the legislature an opportunity to cure the constitutional infirmities. But instead of affirming the panel's adequacy rulings, we remanded for the panel to apply the test we articulated to determine whether the State met its constitutional duty to provide adequacy in public education.

R. Vol. 128, p. 3-4 (citations omitted). Because the adequacy aspect of this case is not in the remedial phase, the burden remains on the Districts to prove a violation of Article 6 before remedial issues are considered.

Second, in determining whether the Legislature has satisfied Article 6, the Districts must overcome the presumption of constitutionality under which the Court "resolves all doubts in favor of a statute's validity." *Gannon*, 298 Kan. at 1148 (internal quotation marks omitted). In *Unified School Dist. No. 229 v. State*, 256 Kan. 232, 236-38, 257, 885 P.2d 1170 (1994), this Court emphasized that given the separation of powers between the legislative and judicial branches, courts have a "limited role" in reviewing legislative school finance decisions, agreeing that "[i]t is well settled that courts should

not substitute judicial judgment for educational decisions and standards." While *Montoy III* held that the presumption of constitutionality did not apply in the *remedial* phase of litigation, *see* 279 Kan. at 825-26, the presumption applies to the Court's determination of constitutional adequacy here, *see Gannon*, 298 Kan. at 1148.

Third, the Legislature's policy judgments regarding the adequacy of school funding are entitled to substantial (if not conclusive) deference, even beyond the standard presumption of constitutionality. The State continues to believe that the adequacy component of this case is nonjusticiable under the political question doctrine. *See* Opening Brief at 43-46. But even if this Court determines that Article 6 and *Rose* provide judicially manageable standards, those standards are so amorphous and so policy-based—so quintessentially legislative in nature—that the separation of powers requires this Court to grant substantial deference to the Legislature's judgments in making suitable provision for finance of the educational interests of the State. *See Solomon v. State*, No. 114,573, 2015 WL 9311523, at *11 (Kan. Dec. 23, 2015) (listing the four factors this Court considers in determining whether one branch of government has violated the constitutional separation of powers by significantly interfering with the operations of another, including notably "the essential nature of the power being exercised").

In *Gannon*, this Court acknowledged the substantial deference the Legislature is due, holding that the Legislature satisfies the adequacy component of Article 6 if the school finance system it enacts "is reasonably calculated to have all Kansas public education students meet or exceed the standards set out in *Rose* and presently codified in K.S.A. 2013 Supp. 72-1127." 298 Kan. at 1170. This Court's *Gannon* decision rejected the use of litmus tests, recognizing that "the test does not require the legislature to

provide the optimal system." 298 Kan. at 1172. Yet the Districts pretend that the *Rose* standards provide concrete, "objective" standards that afford the Legislature no real deference in making the policy judgments that inhere in its duty to make suitable provision for financing the State's educational interests. Resp. Brief at 72.

As it did in *Gannon*, this Court should reject the Districts' attempt to handcuff the Legislature with litmus tests that would eliminate the discretion Article 6 reserved for the Legislature. Determining the precise content of the *Rose* standards, as well as the amount of money required to meet them, is a task replete with policy judgments. Take the first *Rose* standard, for example: "sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization." That could mean many different things to many different people, as could any of the standards. As long as the Legislature reasonably could conclude that the amount of funding provided to schools is reasonably calculated to meet the *Rose* standards, this Court should not second-guess the Legislature's determination and impose its own policy preferences.

Contrary to the Districts' claims, the *Rose* standards do not preclude this Court from granting substantial deference to the Legislature. In fact, the Kentucky Supreme Court's decision in *Rose* recognized that the "presumption of constitutionality is substantial" and that "great weight should be given to the decision of the General Assembly." *Rose*, 790 S.W.2d at 209.

Courts in other states have also granted substantial deference to their legislatures in the school finance context. For example, the Colorado Supreme Court has explained:

> [T]he judiciary must . . . evaluate whether the current state's public school financing system is funded and allocated in a manner rationally related to the constitutional mandate that the General Assembly provide a "thorough and uniform" public school system. This rational basis review satisfies the

> judiciary's obligation to evaluate the constitutionality of the public school system without unduly infringing on the legislature's policymaking authority. The court's task is not to determine "whether a better financing system could be devised," *Lujan* [*v. Colorado State Board of Education*, 649 P.2d 1005, 1025 (Colo. 1982)], but rather to determine whether the system passes constitutional muster.

Lobato v. State, 218 P.3d 358, 374 (Colo. 2009). Likewise, in *Neeley v. West Orange-Cove Consolidated Independent School District*, 176 S.W.3d 746 (Tex. 2005), the Texas Supreme Court held that the Legislature's school finance decisions must be reviewed under a "very deferential" standard. *Id.* at 790.

When this case was previously before this Court, the Districts relied on *Neeley* to support their arguments, *see* Response Brief of Appellees/Cross-Appellant, Case No. 13-109,335, filed July 16, 2013, p. 39, but now they assert that *Neeley* and cases from other jurisdictions are not persuasive because the language of their constitutions is different than Article 6 in the Kansas Constitution. Resp. Brief, p. 71. The Districts' newfound distinction is illusory. Nothing in the textual differences between the Kansas Constitution and those of other states indicates that Kansas courts should give less deference to the Legislature's education funding decisions than do the courts of other states. Instead, the text of Article 6—which offers only a policy-based standard of "suitable" provision for school finance—supports granting substantial deference to the Legislature.

The practical effects of allowing the Panel or this Court to act as a super-legislature will be momentous. *First*, there will be no end to school finance litigation. Each year some district, teacher, or student will ask for *de novo* review of the amount of funding, hoping a new panel, with new evidence, will be receptive to their position. *Second*, all branches of government will be victimized. When one branch intrudes on core functions of another branch, the separation of powers is violated, *see Solomon*, 2015

WL 9311523, and the public's confidence in the integrity of each branch is undermined. This Court has the "authority and duty to preserve the constitutional division of powers against disruptive intrusion by one branch of government [including the judiciary] into the sphere of a coordinate branch of government." *Id.* at *11; *see also id.* at *24 (Stegall, J., concurring) ("[W]hen 'the Government is called upon to perform a function that requires an exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform it.'" (citing *Dept. of Transp. v. Ass'n of Am. Rr.*, 135 S. Ct. 1225, 1241 (2015) (Thomas, J., concurring))).

In this case, one of the main examples of where the Panel failed to give the required deference to the Legislature's actual and presumed findings is the Panel's conclusion that "money makes a difference." R. Vol. 24, p. 30. Evidence at the hearing and information provided to the Legislature established that providing more undirected state funds to local districts was (1) unlikely to improve student achievement and (2) was not necessary to provide a reasonable opportunity for each student to obtain the minimum education described by *Rose* and K.S.A. 72-1127. *See* Opening Brief, pp. 56-57.

Similarly, the Districts continue to push a claim that the Legislature failed to consider "actual costs." Resp. Brief, pp. 46, 48. They reason an actual cost analysis is "still imperative," but equate such analysis with formal cost studies. *Id.* It is their view that the Legislature cannot be deemed to have considered actual costs without an expert study.

Gannon rejected this position for a variety of reasons. *See* Opening Brief, pp. 58-60. However, the salient point here is that the Legislature's actual and presumed findings pertaining to actual costs must be controlling to the extent that the findings have a

rational basis or are not arbitrary. Common sense and the evidence demonstrate that there is no scientific actual cost test for determining adequacy of funding. *Id.*, pp. 55-58. The Legislature had testimony and exhaustive budgetary data from which it could evaluate and reach its legislative conclusions about K-12's financial needs. *Id.*, pp. 6-16. Moreover, the Legislature provided directly and indirectly for revenue to the local districts that exceeded the LPA's study estimate of necessary foundation education funding by hundreds of millions of dollars. *Id.*, pp. 64, 84-85.

Furthermore, the Panel found what it described as "funding shortfalls" between the averages the Panel calculated from the A&M and LPA consultant cost studies and state aid funding provided under SB 7. This analysis suffers from multiple flaws, including (1) the Panel's explicit refusal to consider *all* sources of revenue, (2) the fact that the studies' weightings were different than those embodied in Kansas statutes, which the Panel had reviewed and approved, and (3) the many reasons, in the record, for the Legislature to question the validity of the studies. Opening Brief, pp. 58-63.

There is yet another reason that the average identified by the studies is immaterial. The No Child Left Behind Act's ("NCLB") concept of annual yearly progress ("AYP") was employed by both studies as the outputs measure for the target education that the studies hoped to cost out. *See* Vol. 81, pp. 3950, 4069; Vol. 82, pp. 4122, 4129-30, 4170-71. The Panel's average of the studies is the alleged average cost to meet, as outputs, AYP. Kansas had obtained waivers from compliance with AYP in 2012. However, the wholly aspirational but unattainable goal embedded in AYP of 100% student proficiency is now gone. The NCLB was repealed by the "Every Student Succeeds Act" in December

2015. Pub. L. No. 114-95, 129 Stat. 1802 (2015). And, more importantly, there is no evidence that the goals reflected in AYP were identical to the *Rose* standards.

II. The Districts Mistakenly Equate Lofty Educational Goals with the Requirements for a Constitutionally Adequate Education under the *Rose* Standards.

The Districts argue that the Legislature's decision not to provide the amount of funding the Districts prefer precludes the opportunities and outcomes that would exist in the Districts' ideal world. Resp. Brief, p. 10-24. From this premise, the Districts (like the Panel) assert that the existing level of funding "*negatively impact[s]* the ability of Kansas school districts to provide their students with an education that meet[s] or exceed[s] the *Rose* standards." Resp. Brief, p. 24. This reasoning mistakenly equates the Districts' own preferred and aspirational goals with the *Rose* standards' minimum requirements for a constitutionally adequate education.

Admittedly, the *Rose* standards are imprecise to say the least (so imprecise that they are not judicially manageable in the State's view). But this is not a justification for concluding that the Districts' preferences determine the meaning of the *Rose* standards. Instead, given the vagueness of the *Rose* standards and that their meaning is first and foremost a matter of policy, the Legislature should be granted substantial, if not conclusive, deference in determining whether the *Rose* standards are being met. Here, the Legislature reasonably concluded that they are.

This Court has required—for adequacy purposes—that funding must be "reasonably calculated" to allow "all" students to "*meet or exceed*" the *Rose* standards. *Gannon*, 298 Kan. at 1108, Syl. ¶ 10. Present Kansas accreditation, with all that it encompasses, exceeds the standards in *Rose*. Even assuming (but not agreeing) that more

funding would facilitate some marginal, additional number of students surpassing the standards, such evidence does not address whether the standards are being met.

Should the State, its districts, and its schools strive to continue reducing the number of students who are not taking full advantage of the educational opportunities the State provides? Should educational standards and curricula continue to be reviewed and modified so that the educational opportunity provided exceeds, by the widest possible margin, the *Rose* standards? Surely most Kansans think the answer to these questions is "yes."

In fact, legislation enacted in recent years (aimed at improving teacher accountability and expanding student access to uniquely qualified instructors) confirms the Legislature has answered "yes." However, the Legislature—and apparently a significant majority of Kansas voters—do not agree that large, undirected increases in districts' general funds are necessary to meet the *Rose* standards' minimum requirements for a constitutionally adequate education.

The State must not be discouraged from setting goals—through assessments, accreditation, and graduation requirements—that support the best educational opportunity that schools can provide, goals that provide opportunity for an education that exceeds the *Rose* standards. The danger in equating assessment goals with the *Rose* standards is to punish the State and its taxpayers if the State strives for an optimal education opportunity, but falls short. Cases in other jurisdictions finding funding inadequate all have involved a denial of the basic necessities for an educational opportunity. Nothing in this case *approaches* the circumstances presented in those cases. *See* Opening Brief, pp. 87-89.

Attempting to set up a straw man, the Districts recast the distinction between opportunity and guarantee by accusing the State of arguing that the *Rose* standards are merely aspirational goals and that Article 6 is hortatory. Resp. Brief, p. 75. That is not the State's position. The State's position is that Article 6 requires the State to provide funding sufficient to offer all students the opportunity for the minimum constitutionally required education. Opening Brief, p. 45, 53-55. But Article 6 does not mandate that the State compel or guarantee *all* of its students will take *full* advantage of *all* of the opportunities provided. *Id.* at 53-55. That would be an impossible standard—as congressional repeal of the similar standard in No Child Left Behind has demonstrated—and if that were the test for whether funding is adequate, then "adequacy" *never* could be achieved.

There is no evidence that any state, or even any district in any jurisdiction, has been able graduate *all* of its students, or has found a way for *all* of its students to always test proficient on standardized achievement tests. No state has been able to eliminate completely gaps between the test scores of subgroups of students. If such numbers are a constitutional measure of schools' performance and the educational opportunity the State provides to its students, test scores of the K-12 students in Kansas show that Kansas students are doing very well compared to students across the Nation. Opening Brief, pp. 32-36.

III. The State's Motion for Judgment Should Have Been Granted.

On remand, the Districts deliberately elected not to present *any* additional evidence on whether the current public education financing system "is reasonably calculated to have all Kansas public education students meet or exceed the standards set

out in *Rose*." The Districts argued no new evidence was proper and "elected to proceed on the existing record." R. Vol. 128, p. 12. The State opposed this course, arguing that the Panel needed to consider the most recent information, but the Panel sided with the Districts and refused to receive new evidence.

The Districts do not contest that they seek only *prospective* relief and not an adjudication of whether past funding levels were inadequate. Nor do they dispute that Kansas law directs that this appeal is to be resolved based on *current* adequacy. *See* Opening Brief, pp. 73-79. Nor do the Districts attempt to defend the Panel's *sua sponte* review and consideration of judicially noticed information after the Districts had effectively rested, while the State's motion for judgment was pending. The Districts offer no defense that the Panel could cherry-pick the "new" information that it wanted to consider without offering the State the opportunity to present new evidence once the Panel decided to consider new evidence (the Panel instead denied the State the ability to conduct reasonable discovery).

As the case stands, this Court should hold that the Districts' deliberate decision to rest on their 2012 trial evidence foreclosed consideration of the records the Panel requested and considered *sua sponte*. With absolutely no evidence of the current status of school finance, judgment should have been entered in favor of the State on the Districts' claims for an alleged violation of Article 6.

IV. The Panel Should Not Have Adjudicated the Constitutionality of SB 7.

The Panel held that SB 7 does not provide the constitutionally required level of funding. However, SB 7 did more than just make appropriations for K-12 public school funding in FY16 and FY17. And the Panel held SB 7's block grants unconstitutional not

only because the funding levels were allegedly insufficient, R. Vol. 136, p. 1473, but also because, according to the Panel, the Extraordinary Need Fund is not the "failsafe" mechanism that the Panel had concluded was necessary if LOB was relied upon to fund the *Rose* standard's minimum education, *id.*, p. 1432, 1475, and because the calculation of the block grants does not make adjustments for changes in enrollment and demographics, *id.*, p. 1475.

The Districts restate the arguments they previously advanced in the equity context as a purported response to the State's contention that the Panel erred in adjudicating the suitability of funding under SB 7. These issues have been fully briefed and presented to the Court, *see* Brief of Appellant, filed Sept. 2, 2015, pp. 11-14; Brief of Appellee, filed Sept. 2, 2015, pp. 25-26; Response Brief of State of Kansas, filed Oct. 2, 2015, pp. 17-25. Although the equity issues are not before the Court in this appeal, the State incorporates by reference its previous briefing in response to the Districts' assertions regarding SB 7. *See* Brief of Appellant, filed Sept. 2, 2015, pp. 11-14, 32-38; Response Brief of State of Kansas, filed Oct. 2, 2015, pp. 17-25.

Specifically, the Districts argue that this Court in its Order of April 30, 2015, authorized the Panel to rule on the constitutionality of SB 7. Resp. Brief, pp. 40-41. The Court's Order, however, did nothing more than grant the Panel jurisdiction to either refuse to grant declaratory and injunctive relief concerning SB 7 or to allow amendment of the pleadings to initiate litigation of SB 7's constitutionality. *See* Opening Brief, p. 80.

As a fall back, the Districts raise a new argument—that they were properly allowed to shift their theory of the case, Resp. Brief, p. 41, a proposition for which they cite *Montoy v. State* ("*Montoy I*"), 275 Kan. 145, 149-50, 62 P.3d 228 (2003) (holding

that when the final pretrial order has not been entered, the trial court should have considered claims that were raised in pretrial questionnaires and addressed in the parties' briefing). *Montoy I* could be read as authority for allowing the Districts to amend their pleadings, as in *Knowles v. State Board of Education*, 219 Kan. 271, 547 P.2d 699 (1976). But *Montoy I* does not support the Districts' argument that the Panel could adjudicate SB 7 without amendment of pleadings, discovery, pretrial procedures, and all other aspects of due process. As matters currently stand, the Court is being asked to evaluate the Panel's judgment concerning SB 7 without findings pertaining to current circumstances, and with the State deprived of any opportunity to develop and present relevant evidence regarding SB 7.

V. The Districts' Request for an Expanded Remedy Must Be Rejected.

The Districts ask this Court to enter a "supplemental order requiring the State to fund a constitutionally adequate education at a level consistent with the average of the cost studies . . . ." Resp. Brief, p. 52. This "average" is of the BSAPP estimates in the "updated" A&M and LPA Studies. *Id.*, p. 53 (citing R. Vol. 83, p. 4261-64; R. Vol. 89, p. 5386, 5364-88), which the Districts claim result in a "floor [that] should be no lower than a [BSAPP] of $5,944." *Id.*, p. 54. But the Panel only found that a $4,654 BSAPP was required, if the weightings included in the State Financial Aid formula were changed and increased to align with the weighting which had been suggested by the LPA Study's consultant, R. Vol. 124, p. 3149, and at least a $4,980 BSAPP was required if LOB continued to be used, in part, to satisfy Article 6, *id.*, p. 3151.

The Districts' expanded remedy request must be rejected for at least two reasons. *First*, the Districts did not cross-appeal any orders entered after the remand in this case.

Thus, this Court lacks jurisdiction to enter the supplemental order that the Districts demand. *See Lleras v. Via Christi Reg'l Med. Ctr.*, 37 Kan. App. 2d 580, 585, 154 P.3d 1130 (2007) (K.S.A. 60-2103(h) requires an appellee to file a notice of cross-appeal from adverse rulings in order to obtain appellate review of those issues).

Second, even if this Court had jurisdiction over the Districts' request, the Districts' demand must be rejected. Had the Districts cross appealed, the standard of review would be whether the Panel arbitrarily disregarded undisputed evidence, or was influenced by some extrinsic consideration such as bias, passion, or prejudice. *Mynatt v. Collis*, 274 Kan. 850, 872, 57 P.3d 513 (2002); *see also Brown v. Lang*, 234 Kan. 610, 616-17, 675 P.2d 842 (1984) (applying the standard to plaintiff's claim that the trial court erred in the amount of damages awarded).

The Panel did not make the factual findings that would be required to consider the Districts' request for a massive additional appropriation above and beyond what the Panel declared was necessary. For instance, the Panel did not adopt the "updates" of the A&M and LPA Studies on which the Districts rely. No one, including the Panel, is obligated to rely on the "updates" of the A&M and LPA Studies because, among other reasons, those "updates" were unsound in that they relied on contested methodologies and assumptions, and were tied to admittedly outdated studies that address educational AYP targets and other tests that either are no longer in use or which have been substantially revised. Thus, the Panel did not act arbitrarily by refusing to magnify its errors at the Districts' invitation.

VI. The Districts Are Not Entitled to Attorneys' Fees.

To the best of the State's recollection, the Districts have requested attorneys' fees in every school finance brief filed in this Court in this case. Once again, the Districts ask this Court to exercise its "equitable" powers to award attorneys' fees in order to sanction the State for acting in bad faith. In *Gannon*, unlike this appeal, the Panel had reviewed and rejected the Districts' attorneys' fee claim, so at least the demand was part of the Districts' cross-appeal. This time, however, the Panel has not even ruled on the request and the Districts have not filed a cross-appeal. In any event, the Districts' request is without merit and should be denied for the same reasons the Court has rejected every other such request by the Districts in this and previous school finance litigation. *See Gannon*, 298 Kan. at 1195-96. Perhaps the Court can (and it should) put to bed the Districts' repeated, legally baseless claims for attorneys' fees.

CONCLUSION

For the reasons above, as well as those set forth in the State's Opening Brief, the State urges the Court to reverse the Panel's decision and instruct the Panel to grant judgment in the State's favor. This Court should give substantial deference to the reasonable and well-informed determinations by the Legislature that the Kansas school funding system satisfies Article 6 of the Kansas Constitution by making suitable provision to finance the State's educational interests.

Respectfully submitted,

OFFICE OF ATTORNEY GENERAL
DEREK SCHMIDT

By: /s/ Derek Schmidt

Derek Schmidt, KS Sup. Ct. No. 17781
Attorney General of Kansas
Jeffrey A. Chanay, KS Sup. Ct. No. 12056
Chief Deputy Attorney General
Stephen R. McAllister, KS Sup. Ct. No. 15845
Solicitor General of Kansas
M. J. Willoughby, KS Sup. Ct. No. 14059
Assistant Attorney General
Dwight R. Carswell, KS Sup. Ct. No. 25111
Assistant Solicitor General
Bryan C. Clark, KS Sup. Ct. No. 24717
Assistant Solicitor General

Memorial Bldg., 2nd Floor
120 SW 10th Avenue
Topeka, Kansas 66612-1597
Tel: (785) 296-2215
Fax: (785) 291-3767
Email: jeff.chanay@ag.ks.gov
steve.mcallister@trqlaw.com
mj.willoughby@ag.ks.gov
dwight.carswell@ag.ks.gov
bryan.clark@ag.ks.gov

Arthur S. Chalmers, KS Sup. Ct. No. 11088
Gaye B. Tibbets, KS Sup. Ct. No. 13240
Jerry D. Hawkins, KS Sup. Ct. No. 18222
Rachel E. Lomas, KS Sup. Ct. No. 23767
HITE, FANNING & HONEYMAN, LLP
100 North Broadway, Suite 950
Wichita, Kansas 67202
Tel: (316) 265-7741
Fax: (316) 267-7803
E-mail: chalmers@hitefanning.com
tibbets@hitefanning.com
hawkins@hitefanning.com
lomas@hitefanning.com

Attorneys for the State of Kansas

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 27th day of January 2016, the above reply 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:

Mr. Alan L. Rupe
Alan L. Rupe
Jessica L. Skladzien
Mark A. Kanaga
LEWIS BRISBOIS BISGAARD & SMITH
1605 North Waterfront Parkway, Suite 150
Wichita, KS 67206-6634
Alan.Rupe@lewisbrisbois.com
Jessica.Skladzien@lewisbrisbois.com
Mark.Kanaga@lewisbrisbois.com

John S. Robb
Somers, Robb & Robb
110 East Broadway
Newton, KS 67114-0544
johnrobb@robblaw.com
Attorneys for Plaintiffs

Steve Phillips
Assistant Attorney General
OFFICE OF ATTORNEY GENERAL DEREK SCHMIDT
120 S.W. 10th, 2nd Floor
Topeka, KS 66612
steve.phillips@ag.ks.gov
Attorney for State Treasurer Ron Estes

Philip R. Michael
Daniel J. Carroll
Kansas Department of Administration
1000 SW Jackson, Suite 500
Topeka, KS 66612
philip.michael@da.ks.gov
dan.carroll@da.ks.gov
Attorneys for Secretary of Administration Jim Clark

/s/ Dwight R. Carswell
Dwight R. Carswell