No. 15-113267-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

Luke Gannon, *et al*.,
Plaintiffs-Appellees,

v.

State of Kansas, ***et al***.,
Defendants-Appellants.

Appeal from Appointed Panel
Presiding in the District Court of Shawnee County, Kansas

Honorable Franklin R. Theis
Honorable Robert J. Fleming
Honorable Jack L. Burr

District Court Case No. 2010-CV-1569

RESPONSE BRIEF OF APPELLANT STATE OF KANSAS

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Oral Argument: 30 minutes

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ARGUMENT

Contrary to the views of nearly every other stakeholder, Plaintiffs argue that the inflation calculation performed by Deputy Commissioner of Education Dale Dennis, approved by the State Board of Education, adopted by the Governor, and passed by the Legislature is insufficient to comply with *Gannon VI*. But the Legislature has substantial discretion in determining how to best account for inflation. It could have followed a number of different approaches, many of which would have provided less money than SB 16, but it reasonably decided to rely on the State Department of Education's calculations. Plaintiffs should not be allowed to second-guess that reasonable determination.

I. There is no particular, constitutionally required method of accounting for inflation.

As explained in the State's Opening Brief, the Legislature reasonably relied on the State Department of Education's inflation calculations, as approved by the State Board of Education and the Governor, in enacting SB 16 to comply with *Gannon VI*. The Governor and the State Board of Education stand by these calculations and attempted to file amicus briefs in this Court expressing their support.[1] *See* Governor Kelly's Motion for Leave to File Brief of *Amicus Curiae*, filed April 15, 2019 (stating that Governor Kelly supports the constitutionality of

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[1] The State Board of Education's vote to file an amicus brief supporting the financial provisions of SB 16 was unanimous, with members of both parties voting for the motion. Discussion occurs from 3:57:45 to 4:12:50, with the vote at 4:12:35, in the video of the State Board's April 16, 2019, meeting, available at https://www.ksde.org/Board/Kansas-State-Board-of-Education/Archived-Board-Media-Streaming.

SB 16 and discussing how she adopted the State Board of Education's funding plan); Kansas State Board of Education's Motion for Leave to File Brief of *Amicus Curiae*, filed April 18, 2019 ("The State Board supports the constitutionality of the school funding plan enacted during the 2019 legislative session . . . and believes that it is in the best interests of the students in the State of Kansas."). After initially *supporting* the State Board's calculations, as adopted by the Governor, Plaintiffs now propose an alternative method of calculating inflation that would—to no one's surprise—provide them with even more money.

Determining the proper method of accounting for inflation is a policy decision entrusted to the Legislature, which could have used a variety of calculations. Many of those calculations would have provided less money than the State Department of Education's calculations. In the end, after considering the options, strong bipartisan majorities in both chambers of the Legislature adopted the State Board's and the Governor's chosen method of calculating inflation. Because the Kansas Constitution does not mandate a particular method of accounting for inflation, Plaintiffs should not be allowed to second-guess this reasonable determination. *See Gannon v. State*, 298 Kan. 1107, 1151, 319 P.3d 1196 (2014) (*Gannon I*) ("[The] Kansas Constitution clearly leaves to the legislature the myriad of choices available to perform its constitutional duty."); *Gannon v. State*, 306 Kan. 1170, 1237, 402 P.3d 513 (2017) (*Gannon V*) ("[T]here is no 'specific level of funding' for adequacy . . . that is mandated."); *USD No. 229 v. State*, 256 Kan. 232, 237, 885 P.2d 232 (1994) ("[I]f a legislative enactment is constitutional, it is not for this court to set policy or to substitute its opinion for that of the legislature . . . .") (quoting *USD No. 380 v. McMillen*, 252 Kan. 451, 461-62, 845 P.2d 676 (1993)). If this Court had wanted to impose a particular method of accounting for inflation and corresponding funding amount, it could have done so in *Gannon VI*, but the Court properly left that decision to the Legislature.

And the "myriad of choices" were not hypothetical. The Legislature could have followed other approaches that not only had textual support in the language of *Gannon VI* but would have resulted in less money to the schools. For example, one calculation considered by the Legislature determined that only $182.7 million in additional funding—roughly half of the amount provided by SB 16—was required to comply with *Gannon VI*. App. at 425-27.[2] That approach closely tracked the language of *Gannon VI*, which distinguished between (1) adjusting for inflation through the current school year to increase the $522 million principal and (2) adjusting the new principal for inflation through the remainder of the phase-in period. 308 Kan. at 374. As this Court explained: "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." *Id.* at 390.

[2] "App." citations are to the Appendix filed with the State's Opening Brief, while citations to "Supp. App." are to the Supplemental Appendix attached to this brief.

The $182.7-million calculation followed the two-step approach described in *Gannon VI*. Specifically, it carried forward the calculations from the April 23, 2018, memo through SY 2018-19, which resulted in an additional inflation amount of $99.6 million. App. at 425. Adding that amount to the $522.2 million principal from the April 23 memo resulted in a new rounded principal amount of $621.9 million. App. at 425. That new principal amount was then adjusted for inflation through SY 2022-23, using the 1.44% inflation rate mentioned in *Gannon VI*, to come up with a new total state aid obligation of $649 million. App. at 426. After subtracting previously adopted increases, the total remaining obligation under the calculation was $182.7 million. App. at 427.

The above calculation afforded support for proposals in the House of Representatives that would have provided less money than the State Board's and the Governor's recommendation. In fact, a number of legislators voted against SB 16 because they believed it increased funding more than was constitutionally necessary. Unlike with previous remedial legislation, not a single legislator voting against SB 16 provided an explanation of vote claiming that it did not provide enough money. And ultimately bipartisan majorities in the Legislature decided to pass the State Board's and the Governor's more generous proposal.

The rejected calculations described above were not the only other method of accounting for inflation. The State Department of Education's calculations themselves can be used to support a lower number than the $363.6 million figure the Department reached and the Legislature adopted. In calculating inflation at

1.44% from SY 2017-18 to SY 2022-23, the Department of Education's chart shows annual inflation amounts of approximately $50 million per year over six years. App. at 27, 78. Added together, inflation during these six years yields a cumulative total of $307.7 million, almost $60 million less than the State Department of Education's $363.6 million calculation. Yet the Legislature did not follow that approach but instead chose to adopt the greater amount calculated by Deputy Commissioner Dennis, approved by the Kansas Board of Education, and supported by the Governor.

In addition, the State Department of Education's calculation does not appear to consider all new funding provided by the remedial legislation passed in 2017 and 2018. According to last year's KLRD calculations, pre-SB 16 law was scheduled to provide $3.4521 billion in funding by SY 2022-23. *See* App. at 76 (reporting that SY 2017-18 state aid was $2.8171 billion); App. at 74 (showing an increase of $635 million, not counting SY 2017-18, attributable to 2017 SB 19, 2018 Sub. for SB 423, and 2018 H. Sub. for SB 61). Subtracting that from the $3.7426 billion figure in the Department's calculations yields a difference of $290.5 million, which is $73.1 million less than the amount of funding provided by SB 16. Still, the Legislature also opted to appropriate more than that amount.

All of this is to show that the Legislature could have chosen from a variety of calculations designed to reasonably account for inflation. Several provided less money than what became law. But ultimately, the Legislature decided to adopt the State Department of Education's calculations that were approved by the State

Board and Governor Kelly. This Court should not embrace Plaintiffs' effort to undermine that considered decision.

II. The Kansas Constitution does not mandate strict inflationary increases based on the Consumer Price Index.

More fundamentally, while the Legislature chose to use the Consumer Price Index (CPI) as a rough proxy for calculating inflation, strict adherence to CPI is not constitutionally required. After all, the CPI is "a measure of the average change over time in the prices paid by urban consumers for a market basket of consumer goods and services." *See* Bureau of Labor Statistics, Consumer Price Index, at https://www.bls.gov/cpi/. It is not a precise measure of *school district* costs.[3]

The spending patterns of individual consumers are materially different than the spending patterns of school districts. By far the largest cost for school districts is the cost of teachers and other staff, *see* Supp. App. at 1-2 (noting that in Kansas, "81 percent of current operating expenditures in core academic functions are going to be labor costs"), but local school districts have substantial control over this cost in that they decide what to pay their staff. Of course, local school districts must offer sufficient wages and benefits to attract and retain quality teachers and other educational professionals, but this does not require strict annual increases in line

[3] For instance, the CPI reflects the price of tobacco products and alcoholic beverages, which school districts presumably do not purchase. *See* Appendix 5 to Bureau of Labor Statistics Handbook of Methods, Chapter 17, Consumer Price Indexes, available at https://www.bls.gov/opub/hom/pdf/cpi-20180214.pdf; *see also* https://www.bls.gov/regions/midwest/cpi-summary/ConsumerPriceIndex_Summary_Midwest.pdf. Numerous other items in the basket of goods and services measured by CPI are items that school districts either do not purchase or purchase to a materially different extent than individual consumers.

with CPI. As Plaintiffs' own expert explained last year: "The cost of providing comparable education services over time depends on the wages necessary to continue recruiting and retaining a similarly qualified teaching workforce, and not on changes to the price of a loaf of bread or gallon of gasoline (as per a CPI)." Supp. App. at 3.[4]

And Kansas teacher salaries have increased significantly in recent years, especially when compared to national trends. Testimony before the Legislature demonstrates that the vast majority of funding increases in the last two years went to employee salaries and benefits. App. at 87-88 (reporting that for Topeka Public Schools, 85.2% of the new funding for SY 2018-19 went to teacher salaries, which provided an average salary increase of 6.8%), 99 (stating that USD 393 used additional funding to give a 5.6% raise to employees), 169 (Kansas Association of School Boards' analysis of how districts used increased funding in 2017-18). In fact, a Kansas Association of School Boards' analysis presented to the Legislature shows that average teacher salaries have increased significantly in the last two years and are no longer falling behind inflation, even using a higher inflation amount of 2.2%. App. at 165. In comparison, teacher salaries nationwide have decreased by 4% when adjusted for inflation. App. at 262. The average starting teacher salary in Kansas now is higher than in every surrounding State. *See* http://www.nea.org/

[4] This is not to say the State agrees with everything Plaintiffs' expert has to say. But it does demonstrate that accounting for inflation is not a matter of mathematical precision.

home/2017-2018-average-starting-teacher-salary.html. And there is every reason to expect that this trend of increased teacher salaries will continue given that the BASE is set to increase by 6.5% next year and by 3% the next three years after that:

School Year	SB 16 BASE	Increase % from prior year
2018-19	$4,165	
2019-20	$4,436	6.5%
2020-21	$4,569	3.0%
2021-22	$4,706	3.0%
2022-23	$4,846	3.0%

SB 16, § 10(e). Thus, even if the increases in SB 16 and the last two years' remedial legislation do not strictly match some measure of CPI, the Legislature could have reasonably determined that it has adequately accounted for inflation, considering districts' actual costs as opposed to a hypothetical basket of goods and services for an individual consumer.

III. In light of massive increases in funding, this Court should hold that the remedial legislation passed in the last few years is reasonably calculated to comply with Article 6.

Even apart from the Legislature's reasonable calculation of inflation, the sheer amount of additional funding provided in the last few years justifies a finding that the remedial legislation is reasonably calculated to achieve compliance with Article 6. As noted in the State's Opening Brief, after the enactment of SB 16, the State will be *annually* providing local school districts roughly $1 billion in additional funds by SY 2022-23 than provided in SY 2015-16. And that does not even count increases in local districts' LOB funding and additional State contributions to KPERS, which push the total much higher.[5]

Given that "money makes a difference," *see Gannon v. State*, 305 Kan. 850, 899-900, 390 P.3d 461 (2017) (*Gannon IV*), $1 *billion* in additional funding should make a huge difference. Along with its efforts to account for inflation, the Legislature could have reasonably determined that this massive increase in funding was reasonably calculated to comply with Article 6. In an environment where there are many worthy requests for state funding from a finite amount of available taxpayer funds, this additional funding for Kansas schools represents a good faith and constitutionally significant effort to address the concerns of the Court.

IV. Plaintiffs' new, last-minute challenges should be rejected.

In addition to the issue of virtual school state aid, which the State addressed in its Opening Brief, Plaintiffs argue that "other components of the calculation, such as the inputs for the now non-existent Non-Proficient Weighting and what other components were included or excluded remain unexplained." Plaintiffs' Br. at

[5] While local districts have some discretion in determining how much LOB funding to raise, last year's remedial legislation imposed a 15% mandatory minimum, 2018 SB 61, § 5, so the State should at minimum receive credit for that funding. And in reality, the State should receive full credit for the recent increases in LOB authority. After all, districts should not be allowed to turn down money from a constitutionally equalized source that is on the table and then complain that they are not being adequately funded. As to KPERS funding, this Court held in *Gannon I* that "state monies invested in the Kansas Public Employees Retirement System (KPERS) may also be a valid consideration because a stable retirement system is a factor in attracting and retaining quality educators—a key to providing an adequate education." 298 Kan. at 1171.

27. But in *Gannon VI*, this Court accepted the Legislature's chosen remedial approach, subject to two—and only two—caveats: (1) the need to account for certain inflationary increases, and (2) the need to explain the April 23 memo's treatment of virtual school aid. 308 Kan. at 387 ("[W]ith some financial adjustments to the State's remediation plan, we basically agree that through structure—and particularly implementation—it can bring the K-12 system into compliance with the adequacy requirement in Article 6 of the Kansas Constitution."). This Court's general acceptance of the State's remediation plan is now law of the case, so Plaintiffs cannot now raise new challenges to those calculations. *See Gannon IV*, 305 Kan. at 864.

Even if the law of the case doctrine did not apply, Plaintiffs' newfound criticisms should be deemed waived. The validity of the April 23 memo's calculations was litigated the last time this matter was before this Court, but Plaintiffs did not raise these particular challenges to the calculations then. Nor, for that matter, did Plaintiffs raise their concerns before the Legislature this year. Even after they changed their position on the State Board's and Governor's proposal, they continued to assert that the State Department of Education's inflation calculation of $363 million—which was based on the April 23 memo—was correct. *See* App. at 104-09, 329-47. Instead, Plaintiffs waited until the eleventh hour, after the Legislature had passed SB 16 and adjourned until May 1, to first bring up their questions regarding the April 23 memo. This Court should reject

Plaintiffs' last-minute attempt to raise new issues that will continue entangling this Court in the business of enacting school finance legislation.

Plaintiffs also cite assessment test results in an attempt to re-litigate this Court's conclusion in *Gannon VI* that the Legislature's chosen remedial plan, with adjustments for inflation, is reasonably calculated to "bring the K-12 system into compliance with the adequacy requirement in Article 6 of the Kansas Constitution." 308 Kan. at 387. Although Plaintiffs argued in *Gannon VI* that the "Montoy safe harbor" was insufficient to achieve constitutional compliance, this Court rejected that argument. *Id.* at 387-93. Plaintiffs' argument about student achievement, Plaintiffs' Br. at 28-29, fails to recognize this. More fundamentally, much of the funding under the State's remediation plan will be phased in throughout the next few years, so achievement data from prior school years is simply irrelevant to determining whether these scheduled increases in funding will achieve constitutional compliance.

CONCLUSION

This Court should find that SB 16 complies with this Court's decision in *Gannon VI* and dismiss this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 25th day of April 2019, the above brief was electronically filed with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to registered participants, and a copy was electronically mailed to:

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State’s Supplemental Appendix

Pages 415-16 from State's Appendix in

Gannon VI

literature is that a diagnosis of disability can be very large and varied across physical, emotional and behavioral bounds. Consider for a moment a student that might have or need speech therapy is very different from a student that has severe autism and requires multiple types of emotional and behavioral support, not to mention the cost that is associated with procuring the services for those students. And so when we think about different combinations of these necessary resources to support students, in the context of Kansas, the types of students that you're serving can vary. So I'll let Dr. Taylor dive into the next bucket of input prices.

DR. TAYLOR: So one of the other reasons, in addition to student need, why the cost of operating a school district can be higher in one location than in another has to do with variations in the cost of labor. Labor is by far the largest single component in each school district's budget. It's going to be comprising all of the dimensions of compensation, payroll, and benefits and the like. In Kansas 81 percent of current operating expenditures in core academic functions are going to be labor costs. So it's a huge part of why districts spend what they do. It's also recognized that there are substantial differences in the cost of labor and the price one has to pay to hire the same caliber of teacher in various locations.

There are a couple of reasons why labor costs differ from one place to another. One of them is cost of living, that the housing costs can be substantially higher in one geographic area than they are in another. A second reason is the presence or absence of the amenities of modern life and whether you have -- are in a situation where there are a lot of urban amenities, then that will offset, to a certain extent, the higher cost of living in an urban area. Very remote locations are likely to have higher labor costs by virtue of the remoteness and the cost that the loss of those amenities imposes on those districts. So it's important to recognize that labor costs can vary within a state. And this is the comparable wage index that I developed for the National Center For Education Statistics looking at the most recent

Bruce D. Baker, Review of Kansas Cost Studies, from Plaintiffs’ Appendix 14 in *Gannon VI*

- This problem cannot be fixed by simply bottoming out the economies of scale weight at the current minimum or raising it to the large district plateau. Changing the structure of the scale term would affect other factors in the model. The appropriate solution would be to re-estimate the model with district size categories, as done by Duncombe and Yinger, wherein large districts serve as the baseline group.
    - Applying this change, Dr. Taylor might find that there is indeed a relationship between poverty and population density (as in the DY model) which may not appear in the current model due to the large district weight created by the U-shaped size curve.

Adoption & Moving Forward

As noted in the WestEd/Taylor report, it is reasonable for the legislature to consider phasing in the additional funding required to meet cost targets established in accordance with the accountability goals. Phase in requires consideration of two important factors:

- Continued changes in the competitive wages for school employees, most notably teachers. That is, the *inflation factor* which should be used in adjusting cost targets for out years is a comparable wage inflation factor,[2] not a consumer price index. The cost of providing comparable education services over time depends on the wages necessary to continue recruiting and retaining a similarly qualified teaching workforce, and not on changes to the price of a loaf of bread or gallon of gasoline (as per a CPI).
- The legislature should be aware that if they and/or the Kansas Board of Education decide to raise outcome standards further, the costs of achieving those standards will be higher, and the funding targets must be accordingly adjusted.

Finally, cost studies are rarely if ever translated directly into state school finance policy – adopted "as is" so-to-speak (Appendix B). The 2006 Post Audit study included a cost model estimated by Duncombe and Yinger, but then Post Audit staff translated that study into a structure and series of estimates for adoption in policy, making many reasonable changes, and some objectionable (noted in following report) ones.

The most reasonable path forward might be to seek ways to introduce new funding into the formula structure adopted in 2007 and make adjustments to weights to better align with Taylor's cost estimates, rather than attempting to adopt an entirely new formula.

The present WestEd Taylor study applies rigorous methods to high quality (higher than previously) data to arrive at reasonable estimates of the cost of achieving the legislature's constitutional mandate. The findings of the study are highly correlated with those of the two previous studies. Taken as a whole, the present study, and two which came before it, provide reasonable, empirically based evidence for reforming and funding the state school finance system to meet constitutional demands.

[2] http://bush.tamu.edu/research/faculty/Taylor_CWI/