

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.

**OPENING BRIEF OF PLAINTIFFS/APPELLEES
REGARDING UNCONSTITUTIONALITY OF
SUBSTITUTE FOR SENATE BILL NO. 423, AS AMENDED**

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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TABLE OF CONTENTS

INTRODUCTION 1

PROCEDURAL HISTORY 3

STATEMENT OF THE FACTS 4

 ARGUMENTS AND AUTHORITIES 21

 I. The State Bears The Burden to Demonstrate Constitutional
 Compliance..... 22

Gannon v. State, 306 Kan. 1170, 402 P.3d 513 (2017)
 (“Gannon V”) 22, 23

Gannon v. State, 305 Kan. 850, 390 P.3d 461 (2017)
 (“Gannon IV”)..... 22

 II. The State Cannot Meet Its Burden 23

 A. S.B. 423 is an outlier that is immediately subject to criticism. 24

Gannon v. State, 306 Kan. 1170, 402 P.3d 513 (2017)
 (“Gannon V”) 24, 28

 B. S.B. 423 is politically motivated and does not reflect cost-
 based decisions that are reasonably calculated to have all
 students meet or exceed the standards set out in *Rose*. 28

Gannon v. State, 304 Kan. 490, 372 P.3d 1181 (2016)
 (“Gannon III”)..... 29

 C. S.B. 423 does not appropriately account for inflation. 30

 Substitute for Senate Bill 423 30, 33

 House Substitute for Senate Bill 61 30, 33

Gannon v. State, 306 Kan. 1170, 402 P.3d 513 (2017)
 (“Gannon V”) 30-31, 32-33

Gannon v. State, 298 Kan. 1107, 319 P.3d 1196 (2014)
 (“Gannon I”)..... 31

Gannon v. State, 305 Kan. 850, 390 P.3d 461 (2017)
 (“Gannon IV”)..... 31

D.	The newly-commissioned studies are valid studies on which this Court should rely to conclude that S.B. 423 is unconstitutional.	33
	<i>Montoy v. State</i> , 279 Kan. 817, 818-19, 112 P.3d 923 (2005) (“Montoy IV”).....	33
E.	The WestEd Report, based largely on the KSBE’s Consolidated State Plan, is not too ambitious.	34
	<i>Gannon v. State</i> , 306 Kan. 1170, 402 P.3d 513 (2017) (“Gannon V”)	35
	<i>Gannon v. State</i> , 305 Kan. 850, 390 P.3d 461 (2017) (“Gannon IV”).....	37
F.	Additional Funding is Necessary to Ensure Compliance with the <i>Rose</i> Standards Related to College-and-Career Readiness	39
	<i>Gannon v. State</i> , 306 Kan. 1170, 402 P.3d 513 (2017) (“Gannon V”)	39
	<i>Gannon v. State</i> , 305 Kan. 850, 390 P.3d 461 (2017) (“Gannon IV”).....	39-40
G.	S.B. 423 continues to knowingly underfund special education.	40
	<i>Gannon v. State</i> , 306 Kan. 1170, 402 P.3d 513 (2017) (“Gannon V”)	40
H.	“Returning to <i>Montoy</i> ” should not be the State’s goal and does not ensure compliance with adequacy test.....	41
	<i>Gannon v. State</i> , 306 Kan. 1170, 402 P.3d 513 (2017) (“Gannon V”)	41
I.	S.B. 423 violates Article 6’s equity requirement because it retains a protest petition and election process regarding LOB.	42
	<i>Gannon v. State</i> , 306 Kan. 1170, 402 P.3d 513 (2017) (“Gannon V”)	42-43, 44
	Substitute for Senate Bill 423	43
J.	S.B. 423 further violates Article 6’s equity requirement by mandating that all districts adopt a 15% Local Option Budget	44

	<i>Gannon v. State</i> , 306 Kan. 1170, 402 P.3d 513 (2017) ("Gannon V")	44, 45, 46
	<i>Gannon v. State</i> , 304 Kan. 490, 372 P.3d 1181 (2016) ("Gannon III")	44-45, 46
	<i>Gannon v. State</i> , 298 Kan. 1107, 319 P.3d 1196 (2014) ("Gannon I").....	45
K.	S.B. 423 further violates Article 6’s equity requirement by requiring a transfer from the LOB to the at-risk and bilingual funds.	47
	<i>Gannon v. State</i> , 306 Kan. 1170, 402 P.3d 513 (2017) ("Gannon V")	47
	CONCLUSION	48
	CERTIFICATE OF SERVICE.....	51
	APPENDICES	2
	1. Appendix 1: Excerpt from Kansas’ Consolidated State Plan Regarding 2016 Performance Levels	
	2. Appendix 2: Kansas’ Consolidated State Plan	
	3. Appendix 3: 2016-2017 Annual Report	
	4. Appendix 4: Constitutional Protest of Sen. Hensley	
	5. Appendix 5: Contract Between WestEd and Legislative Coordinating Council	
	6. Appendix 6: “Estimating the Costs Associated with Reaching Student Achievement Expectations for Kansas Public Education Students,” Prepared by WestEd, dated March 15, 2018	
	7. Appendix 7: “Estimating the Costs Associated with Reaching Student Achievement Expectations for Kansas Public Education Students: Methods, Data, and Analysis Plan,” Prepared by WestEd, dated February 23, 2018	
	8. Appendix 8: WestEd PowerPoint Presentation delivered to the Joint Session of the Education Finance Committees of the Kansas Legislature on March 19, 2018	

9. Appendix 9: Transcript of Joint Meeting of the House K-12 Education Budget Committee and Senate Select Committee on Education Finance, dated March 19, 2018
10. Appendix 10: April 2, 2018 Amended Memorandum from WestEd Report Authors
11. Appendix 11: Total Funds Comparison
12. Appendix 12: Crosswalk for Funding Comparisons
13. Appendix 13: Material Prepared by Dr. Levin of American Institutes for Research
14. Appendix 14: House Judiciary HCR 5029 Constitutional Amendment, Testimony submitted by Schools for Fair Funding, dated April 3, 2018
15. Appendix 15: Cost Study Estimates Compared to S.B. 423
16. Appendix 16: Lego Illustration of Funding
17. Appendix 17: Statement by Representative Rooker regarding S.B. 423
18. Appendix 18: Base Comparison
19. Appendix 19: Material Posted by the Kansas State Department of Education
20. Appendix 20: What Does S.B. 423 Provide?
21. Appendix 21: April 30, 2018 Memo regarding 2018 House Substitute for Senate Bill 61
22. Appendix 22: U.S.D. 229 Assessment Results
23. Appendix 23: Graduation Rate Data
24. Appendix 24: Kansas Assessment Results – Taylor Scenario A - Math
25. Appendix 25: Kansas Assessment Results – Taylor Scenario A - ELA
26. Appendix 26: Kansas Assessment Results – Taylor Scenario B - Math

27. Appendix 27: Kansas Assessment Results – Taylor Scenario B – ELA
28. Appendix 28: Testimony of Commissioner Watson to House K-12 Education Budget Committee, dated March 21, 2018
29. Appendix 29: 2018 State of the State Address, Delivered by Gov. Brownback on January 9, 2018
30. Appendix 30: Excerpts from The Governor’s Budget Report for FY2019, Volume I
31. Appendix 31: State Special Education Funding of 92% Excess Costs
32. Appendix 32: Previous Equity Exhibits
33. Appendix 33: 2017-2018 Mill Rates
34. Appendix 34: LOB Budget Per Pupil
35. Appendix 35: 2017-18 KSDE Assessed Valuation Report
36. Appendix 36: Local Mills Needed for Mandatory 15% LOB
37. Appendix 37: 2017-18 Legal Max
38. Appendix 38: At-Risk and Bilingual Transfers from LOB
39. Appendix 39: December 5, 2017 Memo Regarding At-Risk Guidelines
40. Appendix 40: December 5, 2017 Memo Regarding 2016-17 At-Risk Students
41. Appendix 41: Demonstrative Exhibit Regarding At-Risk Funding and At-Risk Transfer
42. Appendix 42: General Fund Expenditures Excel Worksheet
43. Appendix 43: Supplemental General Fund (LOB) Expenditures Worksheet
44. Appendix 44: At-Risk K-12 Fund Expenditures Worksheet
45. Appendix 45: Consumer Price Index (CPI) Average
46. Appendix 46: Inflation

INTRODUCTION

Can the State of Kansas meet its burden to demonstrate that it adopted a school funding formula that meets the requirements of Article 6 of the Kansas Constitution? No.

By adopting Substitute for Senate Bill 423, as amended by House Substitute for Senate Bill No. 61, into law, the State has continued its pattern of underfunding public K-12 education. S.B. 423, when combined with the increased appropriations from 2017 Senate Bill 19 and adjusted for inflation, will only increase public education funding by \$252 million over the next five years. Comparatively, when the State hired an expert to tell it “how much” more money was needed, that expert estimated that funding should increase by somewhere between \$1.786 billion and \$2.067 billion.

As discussed in this brief, S.B. 423 – much like S.B. 19 – is an outlier that significantly underfunds education; it does so at a level far short of *every single* available indicator of what it actually costs to comply with the Kansas Constitution, including:

- The Recommendation by the Kansas State Board of Education (KSBE): The State is underfunding education by \$506 million *this year* according to the KSBE’s estimates.
- The Recommendation by the State’s Own Expert: The State paid \$245,000 to commission the WestEd Report. When that report estimated that constitutional compliance would cost somewhere between \$1.786 billion and \$2.067 billion in 2016-17 dollars, the State hastily ignored it.

- The Recommendation of Past Studies: Calculations in the record of “new money needed” for FY18 and F19 range from \$819 million to \$1.7 billion. *Gannon v. State*, 306 Kan. 1170, 1197-98, 402 P.3d 513 (2017) (“Gannon V”).

- The Recommendation Included in the Plaintiffs’ Newly Commissioned Cost Study: Plaintiffs also hired an expert to estimate the cost of constitutional compliance, which concluded that \$1.5 billion in 2017-18 dollars was needed.

On October 2, 2017, this Court declared:

With that regrettable history in mind, while we stay the issuance of today’s mandate through June 30, 2018, after that date we will not allow ourselves to be placed in the position of being complicit actors in the continuing deprivation of a constitutionally adequate and equitable education owed to hundreds of thousands of Kansas school children.

Gannon V, 306 Kan. at 1236.

While the number of failing students in Kansas continues to grow, funding levels do not meaningfully increase. Significantly more funding is necessary to remediate years of underfunding and move Kansas students to proficient. S.B. 423 does not provide the resources to accomplish this; the State cannot remedy a \$2 billion problem with \$252 million. Can this Court endorse a bill that all but *guarantees* that more than 8 out of every 10 African-American students will continue to be non-proficient in math? To avoid further harm to Kansas school children, this Court must declare S.B. 423 unconstitutional.

PROCEDURAL HISTORY

The *Gannon* history is summarized here. On March 2, 2017, this Court held 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.” *Gannon v. State*, 305 Kan. 850, 855-56, 390 P.3d 461 (2017) (“Gannon IV”). The Court provided the legislature “an opportunity to bring the state’s education financing system into compliance with Article 6” on or before June 30, 2017. *Id.* at 856.

On June 5, 2017, in response to the Court’s Order, the Kansas Legislature passed S.B. 19, which provided a \$292.5 million increase to education funding over a period of two years and significantly underfunded Kansas public education. On October 2, 2017, this Court declared S.B. 19 unconstitutional. *Gannon V*, 306 Kan. at 1172 (“[H]as the State met its burden of showing that this remedial legislation meets Article 6’s adequacy and equity requirements? We hold the State has not.”). The Court then gave the Kansas legislature clear instructions: fix the funding levels *by increasing the money that goes to Kansas schools* and show us how the Legislature concluded that amount was reasonably calculated to ensure constitutional compliance. *Id.* at 1236. This Court stated:

Once legislation is enacted, the State will have to satisfactorily demonstrate to this court by June 30, 2018, that its proposed remedy brings the state’s education financing system into compliance with Article 6 of the Kansas Constitution regarding the violations identified, i.e., both adequacy and equity. For those purposes, the State will continue to bear the burden of establishing such compliance and explaining its rationales for the choices made to achieve it.

Gannon V, 306 at 1173 (internal citations omitted).

On April 17, 2018, Governor Colyer signed S.B. 423 into law. On April 30, 2018, the Legislature adopted S.B. 61, which amended S.B. 423. The State bears the burden to demonstrate that S.B. 423, as amended, increased funding to Kansas K-12 public education in a manner that is “reasonably calculated to have all Kansas public education students meet or exceed the standards set out in *Rose*.” 306 Kan. at 1197. The State is necessarily obligated to consider the actual costs of having all Kansas public education students meet or exceed the standards set out in *Rose*. *Gannon IV*, 305 Kan. at 854; *Gannon v. State*, 298 Kan. 1107, 1170, 319 P.3d 1196 (2014) (“Gannon I”) (“[A]ctual costs remain a valid factor to be considered[.]”).

This Court has repeatedly told the State that it is not in compliance with the Constitution because it was not funding enough money. S.B. 423, once again, funds Kansas public education at a level far short of *every single* available indicator of what it actually costs to satisfy the Constitution. The adoption of S.B. 423 demonstrates a chronic pattern by the State to ignore this Court, and underfund public education.

STATEMENT OF THE FACTS

I. The State Has Continued to Underfund Education, Causing Achievement to Continue to Decline

It is important to remember why this matter is now pending before the Kansas Supreme Court *for the sixth time*: “the State [is] failing to provide approximately one-fourth of all its public school K-12 students with the basic skills of both reading and math, [and] is also leaving behind significant groups of harder-to-educate students.” *Gannon IV*, 305 Kan. at 855.

Unfortunately, the number of failing Kansas students continues to grow. Inadequacy continues to cut its swath.

According to 2016 assessment results, 58% of all Kansas students are non-proficient in reading (at Levels 1 and 2) and 67% of all students are non-proficient in math. *See* Appx. 1, at SFFF001125. “**Level 1 and 2 are categorized as not proficient. Levels 3 and 4 are proficient.**”¹ Appendix 1: Excerpt from Kansas’ Consolidated State Plan; *see also* Appx. 2, at KSBE002501 The “harder-to-educate” students are faring worse. Now, **72.3%** of economically disadvantaged students **are not proficient** in reading and **80.2%** **are not proficient** in math. *Id.* And, **79%** of African-American students **are not proficient** in reading and **86.8%** **are not proficient** in math. *Id.* This Court deemed the system unconstitutional in *Gannon IV* because “only 75% of all public school K-12 students” were testing at proficient levels (the Court was looking at students in Levels 2, 3, and 4). Since then, the KSBE has clarified that both Level 1 and 2 are considered non-proficient. Appx. 2, at KSBE002501. Considering this shift demonstrates that assessment results worse than what this Court considered in *Gannon IV*. ***More than 75% of African-American students are testing non-proficient (at Level 1 or 2) in reading and math.*** The achievement rates deemed unconstitutional in *Gannon IV* now seem enviable. The current level of funding cannot cure the declining achievement.

¹ According to the KSBE, both Level 1 and Level 2 demonstrate non-proficiency.

Subgroups	Reading/ Language Arts: Baseline Data	Percentage Not Proficient	Reading/ Language Arts: Long-term Goal	Math: Baseline Data	Percentage Not Proficient	Math: Long-term Goal
	(% scoring in Level 3 & Level 4)	(% not scoring in Level 3 & Level 4)	(% scoring in Level 3 & Level 4)	(% scoring in Level 3 & Level 4)	(% not scoring in Level 3 & Level 4)	(% scoring in Level 3 & Level 4)
	2016		2030	2016		2030
All students	42.0	58.0%	75.0	33.0	67.0%	75.0
Economically disadvantaged students	27.7	72.3%	75.0	19.8	80.2%	75.0
Children with disabilities	15.4	84.6%	75.0	10.9	89.1%	75.0
English learners	19.7	80.3%	75.0	15.4	84.6%	75.0
African-American students	21.0	79.0%	75.0	13.2	86.8%	75.0
Hispanic students	26.1	73.9%	75.0	18.7	81.3%	75.0
White students	48.4	51.6%	75.0	38.7	61.3%	75.0
Asian students	55.7	44.3%	75.0	54.6	45.4%	75.0
American Indian or Alaska Native students	31.5	68.5%	75.0	21.8	78.2%	75.0

The disturbing downward trend in student achievement is also documented in the KSBE’s 2016-17 Annual Report. See Appendix 3. The percentage of students performing at Level 1 (Level 1 and 2 are non-proficient) has *increased* for every grade and every subgroup since 2015 in **both** ELA and math. *Id.* at KSDE142069-70. The percentage of students testing at Levels 3 and 4 (demonstrating proficiency) on the ELA assessments has *decreased* for every grade and every subgroup since 2015. *Id.* at KSDE142069. In 2015, 27.7% of Free and Reduced Lunch students were testing in Levels 3 and 4; that number dropped to 23.9% in 2017. *Id.* Math results have remained relatively flat, but unacceptable. *Id.* at KSDE142070. Only 24.3% of Grade 10 students and 20.5% of Free and Reduced Lunch students are proficient in math.

Kansas students continue to receive an unconstitutional education *because of the State's* underfunding. The Legislature is well aware that its decision to underfund education is causing these decreases in student achievement. *See, e.g.,* Appendix 4: Constitutional Protest of Sen. Hensley. All of the evidence in this case and all evidence available to the Legislature when it adopted S.B. 423 demonstrates that “[m]oney matters in a statistically significant way,” which “of course, means that the lack of money has also made a difference.” *Id.* at LEG006625.

To the extent that the State attempts to argue that standards are “too high,” this argument should be disregarded. The assessment cut scores were set to “predict whether a student taking the Kansas assessment in grade 10 is on track for successfully scoring a postsecondary entrance score in grade 12 on the ACT and entering postsecondary education without the need of remediation.” Appx. 2, at KSBE002504. In other words, the State assessments are measuring whether a student is on track for college, which is necessary to comply with the *Rose* standards. *See Gannon IV*, 305 Kan. at 912 (“Beyond high school graduation rates, however, we observe that—as numerous experts testified at trial—in today’s society, a college education is important to obtaining a competitive place in a modern economy.” and noting that the *Rose* standards include “(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.”) The Court noted that the overlap between the *Rose* standards and college

readiness motivated the decision by the Kansas State Department of Education (“KSDE”) “to measure whether a student was performing at a level that was considered ‘on-track for college success.’” *Id.*

The current assessment rates are not in line with the goals for the State that are articulated in its Consolidated Plan, which would require that, by 2030, “75% of students score in performance levels 3 & 4 combined on the Kansas state assessment.” *Id.*, at KSBE002501-2502.

II. The State Commissioned a New Study to Estimate the Costs of Providing a Constitutional Education, Which Estimated that Education Spending Should Increase By at Least \$1.786 Billion

On January 31, 2018 – in response to this Court’s decision in *Gannon V* – the Legislative Coordinating Council (“LCC”) retained WestEd and Dr. Lori Taylor of Texas A&M to “provide evidence of overall funding amounts and allocation of resources between districts that would ‘produce an education system reasonably calculated to achieving those Rose standards.’” *See* Appendix 5: Contract Between WestEd and LCC, at LEG005915.

On March 15, 2017, Dr. Lori Taylor and WestEd released their study (the “WestEd Report”), which claims to “predict the level of necessary spending for individual school district[s] and the state overall” to achieve certain performance thresholds. *See* Appendix 6: “Estimating the Costs Associated with Reaching Student Achievement Expectations for Kansas Public Education Students,” Prepared by WestEd, dated March 15, 2018 (“WestEd Report”), at LEG006133. In advance of the study’s release, the WestEd Report authors presented the Legislature with an overview of the

study's methodologies, the data that the study intended to consider, and explained the performance thresholds that the study would use. Appendix 7: "Estimating the Costs Associated with Reaching Student Achievement Expectations for Kansas Public Education Students: Methods, Data, and Analysis Plan," Prepared by WestEd, dated February 23, 2018. The WestEd Report was presented to a Joint Session of the Education Finance Committees to the Kansas Legislature on March 19, 2018. See Appendix 8: WestEd PowerPoint Presentation delivered to the Joint Session of the Education Finance Committees of the Kansas Legislature on March 19, 2018 and Appendix 9: Transcript of Joint Meeting of the House K-12 Education Budget Committee and Senate Select Committee on Education Finance, dated March 19, 2018.

The performance thresholds identified in the Report translated the *Rose* standards into measurable outcomes, and then estimated what it would cost the State to reach those outcomes. See generally Appx. 6, at Ch. 3.² The Report sets forth two separate performance thresholds, each of which incorporated different performance goals and would cost different amounts to obtain. The Report estimated that reaching the performance targets contemplated by each scenario would require an increase in annual spending between \$1.786 billion and \$2.067 billion in 2016-17 dollars. *Id.* at LEG006138 (Table 17).

² Plaintiffs dispute that the targeted performance levels encompassed by the two thresholds (described as Scenario A and Scenario B) would necessarily comply with the Court's definition of "adequacy." For instance, the goals for the State that are articulated in its Consolidated Plan are much higher, and would require that, by 2030, "75% of students score in performance levels 3 & 4 combined on the Kansas state assessment." Appx. 2, at at KSBE002501-2502. Nevertheless, the amount of money that Dr. Taylor's study suggests is necessary to achieve constitutional compliance closely aligns with virtually every other estimate in the record.

The Report’s first performance threshold is referred to as “Scenario A: Approaching on track” (alternatively referenced as “approaching on track for college readiness”) and its second threshold is “Scenario B: On track” (alternatively referenced as “on track for college readiness”). *Id.*, at LEG006133.

“Scenario A: Approaching on track” would recommend the funding levels necessary to ensure that by 2021-22:

- 90% of all Kansas students would achieve a level 2, 3, or 4 on the state ELA and math assessments. *Id.*, at LEG006117, 6113 (“Under the scenario of achieve levels 2, 3, and 4 a target of 90% performance was set to be achieved at the end of the 2021-22 school year.”); and
- Each district achieves a 95% graduation rate. *Id.*, at LEG006118, 6133.

“Scenario B: On track” would recommend the funding levels necessary to ensure that by 2021-22:

- 60% of all Kansas students would achieve a level 3 or 4 on the state ELA and math assessments. *Id.* at LEG006116, 6133 (“Under the scenario of achieve college ready (levels 3 and 4) a target of 60% performance was set to be achieved at the end of the 2021-22 school year[.]”); and
- Each district achieves a 95% graduation rate. *Id.* at LEG006118, 6133.

The performance goals encompassed by Scenarios A and B are graphically represented in the Report in Table 15 (*see id.* at LEG006133):

Table 15. Percentage of students meeting performance thresholds under two different scenarios

	ELA Assessment (Level 2+)	Math Assessment (Level 2+)	ELA Assessment (Level 3+)	Math Assessment (Level 3+)	Graduation Rate
Scenario A: Approaching on track	90%	90%			95%
Scenario B: On track			60%	60%	95%

The Report estimates that reaching the performance targets contemplated by each scenario would cost differing amounts in 2016-17 dollars:

Table 17. Overall investment for base and compensatory support under two scenarios

	Cost Estimate (\$)	Percent Increase Over Current	Per Pupil Cost Estimate (\$)
Current K-12 Spending	\$4.652 billion	n/a	\$9,313
No compensatory support	\$5.103 billion	9.7%	\$10,419
Compensatory support for Scenario A	\$6.438 billion	38.4%	\$13,144
Compensatory support for Scenario B	\$6.719 billion	44.4%	\$13,717

As Table 17 of the Report demonstrates, Scenario A would require annual spending of \$6.438 billion (a \$1.786 billion increase in 2016-17 dollars). *Id.* at LEG006138. Reaching the Scenario B performance targets would require annual spending of \$6.719 billion (a \$2.067 billion increase in 2016-17 dollars). *Id.* (Table 17).

The WestEd Report found “an important part of this study was the estimation of cost efficiency or inefficiency . . . In model one, the average cost efficiency score was 0.956, indicating that buildings were producing nearly 96% of their potential output, on average. Appx. 6, at LEG006508. The study identified two possible explanations for the efficiency:

- “Decreased spending over last seven years combined with sustained effort to improve performance” and
- “Systematically school districts are exceedingly good at the efficient uses of their resources.” Appx. 8, at LEG006716.

During the presentation of the WestEd Report, Dr. Taylor also highlighted the importance of considering and accounting for inflation in any school funding formula.

Dr. Taylor testified:

It would be crucially important to incorporate something related to the Consumer Price Index, and the Midwest CPI seems like a very reasonable strategy to use for Kansas, but it – I used to work with the Federal Reserve System. So we’re very much totally into the whole inflation measurement thing, and it’s important to recognize that these are estimates of real resources and that, as the prices change over time, one would need to also change the – the dollar estimates.

Appx. H, at 89:4-19. Dr. Taylor also had the following exchange with Senator Hensley:

SENATOR HENSLEY: One of things that we did not do in the ‘92 school finance law – I was actually in the house at that time – is we did not build in a CPI index. We didn’t index the base budget per pupil, which I think was a real big mistake on our part and going back to Representative Rooker’s question, you would advise us to do that under – under this.

DR. LORI TAYLOR: Most definitely, yes, sir. I would – I would advise the – the use of some sort of inflation adjustment, and it – it can be very attractive to automate that rather than requiring debate and – on that end.

Id. at 107:21-108:10.

III. The WestEd Report Recommended that the State Spend at Least \$451 Million Per Year to Maintain the Predicted Achievement Increases After its Initial Investment

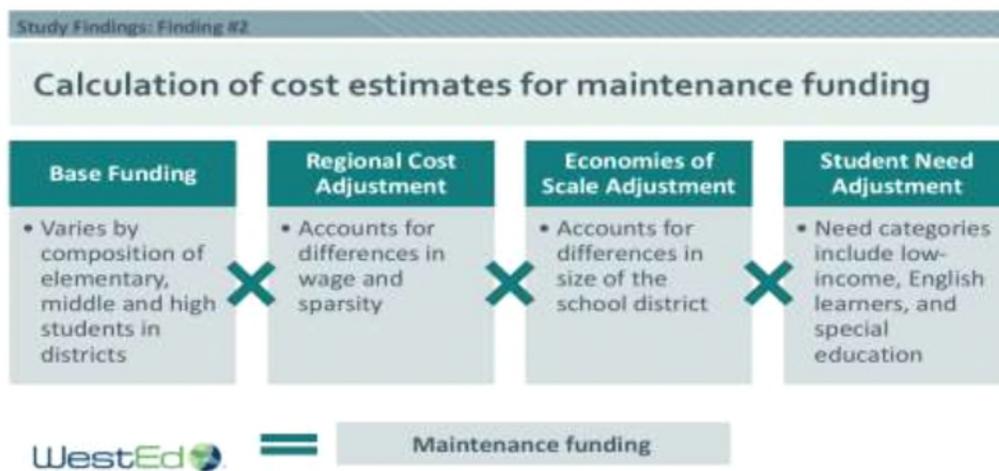
The WestEd Report predicts that once the State funded Scenario A or B, and increased achievement to the target levels set out in each scenario, it would cost a certain amount to “sustain that level of excellence from year to year.” Dr. Taylor testified:

DR. LORI TAYLOR: Okay. So thank you very much for the question. The study kind of comes in two parts. There is a – an estimate of the cost for long-run maintenance after the state has

transitioned to the performance thresholds that it set for itself, what are – would it take to maintain – to sustain that level of excellence from year to year. And so that what maybe inartfully was labeled, “maintenance,” is the estimate for sustaining in the long run, after the transition period has finished, the performance threshold of the 95 percent graduation, which is the state’s long-run goal, and an expectation that year to year all of the districts will accomplish the same sorts of progress with respect to tested performance. Okay? But then there – one has a transition, and over the transition period one is making progress towards that goal of the – the long-run estimate at 95 percent graduation rate and sustainable – everybody’s growth – everybody’s at grade level and progressing from one year to the next remaining at grade level. So the – the transition estimates which we’ll present to you today would incorporate the glide path towards those long-run goals. But in the long run what the state has set for itself is that once the transition period has been – has been completed, the – we wanted to estimate what would be the long-run cost of continuing to maintain that level of excellence.

Appx. H, at 21:5-22:12.

“Maintenance funding” is calculated by multiplying the base funding recommendation by the three adjustments recommended by the Report (regional cost, economies of scale, and student need). *See* Appx. 8, LEG006717.



Maintenance funding does not include the additional compensatory support necessary to reach the outcomes predicted in Scenarios A and B. *See* Appx. 2: WestEd Report, at LEG006134. “Compensatory support” is the amount of money needed to meet the performance thresholds set forth in Scenarios A or B. *Id.* When asked to clarify the difference between the maintenance and compensatory scenarios, the WestEd Report authors indicated that maintenance level funding would not allow school districts to meet the performance thresholds. Appendix 10: April 2, 2018 Amended Memorandum from WestEd Report Authors, at LEG006410.

The reality is that – because of chronic underfunding – many school districts are not performing at a level that demonstrates compliance with the *Rose* standards. “[T]he compensatory scenarios can be considered a remedial, one-time investment in the public education system (spread out over a five-year period) to support school districts and their respective students to ‘catch-up’ and achieve the identified performance thresholds.” *Id.*

The State’s study confirms that correcting the disastrous results of the State’s decision to fund education at unconstitutional levels will require a remedial investment of somewhere between \$2.402 billion and \$2.718 billion, if phased in over five years. Appendix 11: Total Funds Comparison. At the end of the five-year phase-in, the WestEd Report’s Scenario A will be underfunded by \$1.759 billion and the Scenario B will be underfunded by \$2.075 billion. Appendix 12: Crosswalk for Funding Comparisons.

The State, in adopting S.B. 423, significantly underfunded the amount that its expert estimated was needed to reach constitutional compliance. Worse, the funding

provided by S.B. 423 – in addition to falling considerably short of funding either Scenarios A or B – falls short of even “Maintenance funding.”

In response to a request for additional information, Dr. Taylor provided the Legislature with estimates of what “Maintenance funding” would cost in 2016-17, 2017-18, and 2018-19. She estimated that to increase the graduation rate from its current level to a 90% graduation rate would require \$85 million in additional funds in 2016-17 dollars. Appx. 8, at LEG006722 (\$4.737B - \$4.652B). To “[b]ring[] forward the cost study estimates to 2018-19” would require “Additional Funding” in the amount of \$430 million (\$115 million for 2017-18 and \$315 million for 2018-19), for a grand total of additional funding of \$515 million **for 2018-19**.

	2016-17	Additional Funding for 2017-18	Additional Funding for 2018-19
Maintenance	\$4.737 billion	+\$115 million	+\$315 million

Id.

To maintain current failure rates (where 67% of all Kansas students are failing math and 58% are failing reading) would cost the State \$515 million *in 2018-19*. S.B. 423 does not provide \$515 million *next year* or even the year after that. Because the maintenance level funding is considered an “ongoing and perpetual investment,” the necessary increases would need to be made *each year*. Appx. 10, at LEG006410.

Based on the data provided to the Legislature, the State can expect that S.B. 423’s funding levels will (at best) produce the same levels of non-proficient students. At worst, and far more likely, S.B. 423’s funding levels will further contribute to the ever-declining

achievement results. *See* Appx. 1, at SFFF001125; Appx. 3, at KSDE142069-70. This is unacceptable; 67% of students are already failing math and 58% are failing reading.

IV. The State Commissioned a Peer Review of the WestEd Report and Other Kansas Cost Studies

The State subjected the WestEd Report to peer review by Dr. Jesse Levin. *See* Appendix 13: Material Prepared by Dr. Levin of American Institutes for Research. On March 29, 2018, Dr. Levin issued a report titled “Review of Kansas Education Cost Studies – Second Report” (the “Levin Review”). The purpose of the Levin Review was to review the WestEd Report “focusing on the methodology used and the corresponding results in order to inform the current discussion surrounding the forthcoming remedy ordered by the Kansas State Supreme Court.” Appx. 13, at LEVIN000055. Dr. Levin concluded that the WestEd Report was “a quality piece of work which has been thought through and implemented carefully.” *Id.*, at LEVIN000064.

Dr. Levin also provided a peer review of past cost studies conducted in Kansas, including the LPA study. Dr. Levin referred to the LPA study as “an impressive piece of work that represents an immense undertaking . . . the methodology and application seemed to be carefully thought out and implemented very well.” *Id.*, at LEVIN000043.

V. Plaintiffs Commissioned a Peer Review of the WestEd Report

Plaintiffs also commissioned a WestEd Report peer review, and the results further validate the WestEd Report. On March 23, 2018, Dr. Bruce Baker issued his “Review of Kansas Cost Studies.” Appx. 14, at LEG005996-6026. He concluded that the WestEd

Report “provides reasonable guidance for moving forward on state school finance policy reform, with a few caveats.” *Id.* at LEG005996. Dr. Baker further states:

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.

Id. at LEG005999.

VI. Plaintiffs Commissioned Their Own Study of the Costs of Constitutional Compliance

Following *Gannon V*, Plaintiffs requested that JL Myers Consulting and Picus Odden & Associates estimate the cost of complying with the Kansas Constitution and this Court’s directives in *Gannon V*. In March of 2018, JL Myers Consulting and Picus Odden & Associates provided Plaintiffs with the “Myers-Picus Report,” which concluded that \$1.5 billion in additional funding was needed to reach constitutional compliance. *See* Appx. 14, at LEG006032. The Report, conducted by experts in the field, *see id.* at LEG006031-32, closely aligns with the WestEd Report. Despite using a different methodology, both of the newly-commissioned studies estimated that at least \$1.5 billion in 2017-18 dollars is needed to achieve constitutional compliance.

Notably, both the WestEd Report and the Myers-Picus Report also closely align with other estimates for achieving constitutional compliance in Kansas. Appx. 14, at LEG005994. The Myers-Picus Report further bolsters Plaintiffs’ contention that all of

the evidence in the record demonstrates that a significant increase in funding – far above what S.B. 423 provides – is necessary to achieve constitutional compliance.

VII. After Receiving the WestEd Report, the State Adopted S.B. 423 and Funded Less Than What Its Expert Predicted was Necessary to Adequately Fund Education.

On April 17, 2018, Governor Colyer signed S.B. 423 into law. On Monday, April 9, 2018, the KSDE notified the State that S.B. 423 contained an \$80 million error. While S.B. 423 appropriated \$191 million for FY19, districts could only spend \$112 million of that money. *Compare* Appx. 19: KSDE Estimated Aid Increase **Intended** by Legislature, at KSDE142025 (\$106,460,111) *with* Appx. 19: KSDE Estimated Aid Increase **Approved** by Legislature, at KSDE142035 (\$26,688,457).

As a result of the error, the Kansas Legislature amended S.B. 423 on April 30, 2018 by adopting S.B. 61. S.B. 423, as amended, does the following:

- It increases funding to Kansas public schools by \$252 million over the next five years (when the amounts are adjusted for inflation). Appendix 20: What Does S.B. 423 Provide?; Appendix 21: April 30, 2018 Memo regarding 2018 House Substitute for Senate Bill 61, at KSDE142192. Accounting for inflation, Kansas school districts will receive:

- \$192 million in “new money” in FY19;
- \$11.5 million in “new money” in FY20;
- \$14.5 million in “new money” and FY21;
- \$15.8 million in “new money” in FY22; and

- \$18.2 million in “new money” in FY23.

Appx. 20. Almost half of the “new money” for FY19 actually comes from the \$96 million increase previously provided in S.B. 19. The General Fund will only increase by \$152.1 million (the increased General State Aid and Special Education State Aid.), and will then be reduced by \$8 million to fund the new facilities weighting. Appx. 21, at KSDE142192.

Further, \$35 million of the “new money” is Supplemental General State Aid. *Id.* While this will provide property tax relief and allow certain districts to lower their mill levies, that money will never increase the district’s budget or make it to the classroom.

- It adopts a base significantly lower than what numerous studies have recommended. The base will be set at:

- \$4,165 for FY19;
- \$4,302 for FY20;
- \$4,439 for FY21;
- \$4,576 for FY22; and
- \$4,713 for FY23.

S.B. 61, at Sec. 4(e); Appx. C, at KSDE142191. This base is far lower than what is recommended by the numerous expert bodies that have made recommendations regarding where the base should be set. Appendix 18: Base Comparison.

- It exacerbates inequities by mandating a 15% LOB, see S.B. 61, Sec. 5(a). S.B. 423, as amended, requires each school district to adopt an LOB equal to 15% of the school district’s Total Foundation Aid, but only equalizes this mandatory LOB to the

81.2 percentile. *See* S.B. 61, Sec. 5(a); *see also* Sec. 1(a) (“It is the public policy of the state of Kansas to require school districts to adopt a local option budget pursuant to K.S.A. 2017 Supp. 72-5143 . . . Commencing in school year 2018-19, all school districts shall have a local option budget that is at least 15% of such school district’s total foundation aid.”).

- It exacerbates inequities among districts by retaining a protest petition and election process relating to efforts to increase a school district’s LOB authority, *see* S.B. 61, §5(c). The maximum LOB amount that a school district may adopt without being subject to a protest petition is 30% of its Total Foundation Aid. S.B. 61, at Sec. 5(b). Increasing LOB to the state prescribed percentage (33%) is still subject to protest petition. *Id.* at Sec. 5(c), 5(k).

- It exacerbates inequities among districts by requiring school districts to transfer from the LOB an amount proportional to the amounts of its Total Foundation Aid attributable to the at-risk and bilingual weightings to their at-risk and bilingual funds.

- It fails to give school districts the amount of funding that they need to comply with the State’s accountability provisions, but – at the same time – incorporates new “penalties” for districts that do not meet accreditation standards, *see* S.B. 423, §11. S.B. 423 attempts to fix a \$2 billion problem with \$252 million. This clearly does not meet the Court’s definition of an “adequate” level of funding. Adding insult to injury, however, S.B. 423 also penalizes districts for failing to meet accreditation standards while State knowingly refusing to provide the resources necessary to meet those standards.

WestEd estimated that the required “investments each year” necessary to achieve constitutional compliance would cost somewhere between \$1.786 billion and \$2.067 billion in 2016-17 dollars. Appx. 6: WestEd Report, at LEG006139. The Legislature (likely anticipating a much lower estimate³) hastily discarded the WestEd Report and instead adopted S.B. 423. The State cannot fix a \$2 billion problem with \$252 million. This Court should declare S.B. 423 unconstitutional.

ARGUMENTS AND AUTHORITIES

S.B. 423, like its predecessors, does not comply with the adequacy and equity requirements of Article 6 of the Kansas Constitution. As Plaintiffs demonstrate herein:

- S.B. 423 does not provide a level of funding that is reasonably calculated to allow all Kansas public education students to meet or exceed the standards set out in *Rose*, and – therefore – does not satisfy the adequacy requirements of Article 6;
- S.B. 423 exacerbates inequities among districts by retaining a protest petition and election process following efforts to increase a school district’s LOB authority, and – therefore – does not satisfy the equity requirements of Article 6; and
- S.B. 423 contains new provisions that cause additional equity violations by denying school districts reasonably equal access to substantially similar educational opportunity through similar tax effort.

³ In fact, the expert was chosen based on the (apparently incorrect) assumption that she would conclude that little to no new funding was actually necessary. Jonathan Shorman, *No tax increase for Kansas schools, GOP leaders*, WICHITA EAGLE (Dec. 15, 2017 10:25 AM), <http://www.kansas.com/news/politics-government/article189906674.html> (“‘We’re focused on finding experts who can help show the court that funding is adequate,’ Wagle said.”).

Because the State cannot meet its burden to satisfy both the adequacy and equity requirements of Article 6, S.B. 423 should be declared unconstitutional.

I. THE STATE BEARS THE BURDEN TO DEMONSTRATE CONSTITUTIONAL COMPLIANCE

In *Gannon V*, this Court tasked the State with the following burdens:

1. The burden to demonstrate that S.B. 423 is constitutional *in all aspects*.

Gannon V, 306 Kan. at 1237. (“The State continues to bear the burden of establishing compliance with the constitutional requirements . . .”).

2. The burden to explain its rationale for adopting S.B. 423. *Gannon V*, 306 Kan. at 1182 (citing *Gannon IV*, 305 Kan. at 856 (“The State will bear the burden of explaining its rationales for the choices made to achieve compliance.”). This requires the State to “identify other remedies that the legislature considered” and “explain why it made its particular choice.” *Id.*

3. The burden to demonstrate that it increased funding, and that the increase in funding is “reasonably calculated to have all Kansas public education students meet or exceed the standards set out in *Rose*.” *Gannon V*, 306 Kan. at 1207 (“We conclude the State has failed to meet its burden to show the additional funds are ‘reasonably calculated to have all Kansas public education students meet or exceed the standards set out in *Rose*.’”).

4. The burden to demonstrate “the validity of any methodology used in crafting a funding formula or arriving at funding amounts.” *Gannon V*, 306 Kan. at 1192. This includes explaining “why, how, or by how much, any of these levels [of

student achievement] are going to be improved by its proposed level of funding.” *Gannon V*, 306 Kan. at 1202.

5. **The burden to demonstrate that any funds targeted to at-risk students “will be adequate for the underperforming students of [the particular] subgroup to meet the *Rose* standards.”** *Gannon V*, 306 Kan. at 1207. The Court has “expressly reject[ed] the State’s occasional contention . . . that [this Court was] concerned exclusively with the underperforming subgroups and that only their performance caused by inadequate funding was the basis for the Article 6 violation.” *Id.* at 1202.

6. **The burden to demonstrate the “efficacy of [any adopted] changes to meet the standard of constitutional adequacy.”** *Gannon V*, 306 Kan. at 1211.

7. **The burden to demonstrate that it was “mindful of the connection between equity and adequacy.”** *Gannon V*, 306 Kan. at 1212. The State “should remain cautious of challenges arising from an increased reliance upon LOB-generated funding (and less upon BASE-generated funding).]” *Id.*

II. THE STATE CANNOT MEET ITS BURDEN

This Court should conclude that S.B. 423 is unconstitutional because it does not comply with either the adequacy or equity requirements. There is no evidence that was presented to the Legislature on which it could rely to conclude that S.B. 423 is constitutional. And, to the extent the State intends to argue otherwise by citing to minutes that were placed on kslegislature.org on or about Thursday, May 3, 2018, Plaintiffs ask that this Court disregard those arguments because of the Legislature’s delay in providing this information, which Plaintiffs have not yet had the opportunity to review.

A. S.B. 423 is an outlier that is immediately subject to criticism.

S.B. 423 is an outlier. *See* Appx. 14, at LEG005994. In *Gannon V*, this Court rejected S.B. 19, in part because it was an outlier, stating:

S.B. 19 as outlier

Finally, we further note other calculations in the record of “new money needed” for fiscal year 2018 and fiscal year 2019 are considerably higher than the \$292.5 million presented by the State. At the high end is \$1.7 billion as calculated by the plaintiffs by averaging the legislatively ordered cost studies performed by A & M in 2002 and the LPA in 2005-2007 and then adjusting for inflation. And next highest is approximately \$893 million as presented to the governor by the Kansas State Board of Education (SBE) in its budget for fiscal year 2018 (base of \$4,604 for around \$565 million) and fiscal year 2019 (base of \$5,090 for approximately \$328 million). The next highest is \$819 million as calculated by plaintiffs using the panel’s fiscal year 2014 proposed base of \$4,980 in fiscal year 2018 and continuing to adjust for inflation by increasing that base to \$5,055 in fiscal year 2019. The fact these wide-ranging calculations have been presented does not along resolve the issue of adequate funding. The magnitude of the difference between those calculations and S.B. 19’s, however, emphasizes the need for the State to truly demonstrate the validity of its funding approach and the financial figures that approach produces.

Gannon V, 306 Kan. at 1206.

Much like S.B. 19, S.B. 423 is also an outlier. *See* Appx. 14, at LEG005994. S.B. 423 provides far less than estimates contemplated by the Court in *Gannon V*, including:

- The Recommendation of Past Studies: In *Gannon V*, this Court noted that “other calculations in the record of ‘new money needed’” for FY18 and F19 ranged from \$819 million to \$1.7 billion. 306 Kan. at 1197-98. The high end represents the estimate of \$1.7 billion “as calculated by the plaintiffs by averaging the legislatively ordered cost

studies.” The low end is the \$819 million “as calculated by plaintiffs using the panel’s fiscal year 2014 proposed base of \$4,980 in fiscal year 2018 and continuing to adjust for inflation by increasing that base to \$5,055 in fiscal year 2019.”

- The KSBE’s Recommendation. The State is underfunding education by \$506 million *this year* according to the KSBE’s estimates. The KSBE recommended that funding increase by \$893 million by FY19. Last year, when it adopted S.B. 19, the State increased funding for FY18 by \$195 million. Before the adoption of S.B. 423, the State was \$698 million short of the KSBE’s recommendation for FY19. S.B. 423, as amended, will provide approximately \$192 million in additional funds for FY19, resulting in a deficit of \$506 million for FY19.

S.B. 423 also provides far less than the new cost estimates that are part of the bill’s legislative history, including:

- The Recommendation by the State’s Own Expert: The State paid \$245,000 to commission the WestEd Report, which estimates that funding should increase by between \$1.786 billion and \$2.067 billion in 2016-17 dollars. This Report was deemed reliable by two different peer reviews. Funding the WestEd Report’s investment all within FY19 would cost somewhere between \$1.861 billion and \$2.154 billion in 2018-19 dollars. *See* Appx. 11: Total Funds Comparison. To fund the WestEd Report’s investment over a five-year period would require upward adjustments for inflation. *See* Appx. 10, at LEG006414. At the end of a five-year phase-in, the total funding needed to reach the WestEd Report’s recommendation would be somewhere between \$2.402 billion and \$2.718 billion. Appx. 11. Comparatively, at the end of S.B. 423’s five-year phase-

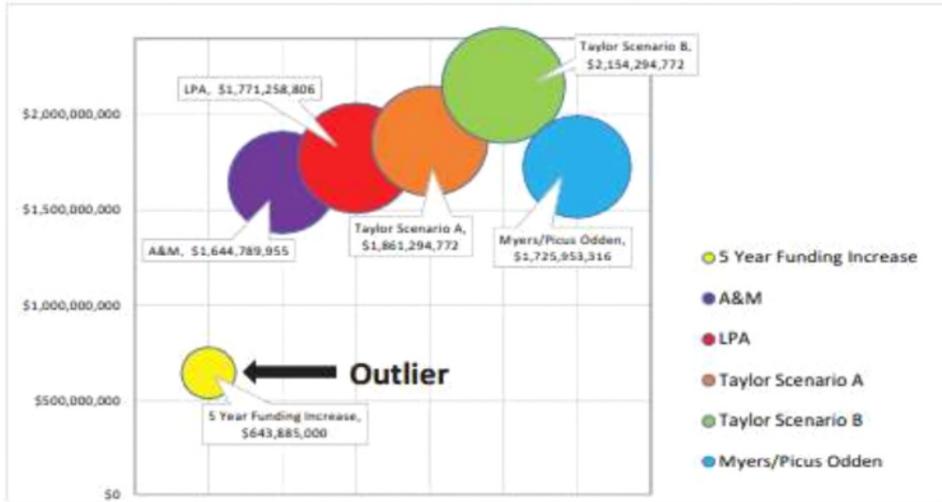
in, funding will only increase by \$644 million. *Id.* The State is not even funding one-third of the need by the end of five years. *Id.*

- The Recommendation Included in the Plaintiffs’ Newly Commissioned Cost Study: After *Gannon V*, Plaintiffs requested that experts estimate the cost of complying with the Kansas Constitution and this Court’s directives in *Gannon V*. In March of 2018, JL Myers Consulting and Picus Odden & Associates provided Plaintiffs with the “Myers-Picus Report,” which concluded that \$1.5 billion in additional funding in 2017-18 dollars was needed to reach constitutional compliance. *See* Appx. 14, at LEG006032. The Report, conducted by experts in the field, *see id.* at LEG006031-32, closely aligns with the WestEd Report and with the other estimates of what it costs to achieve constitutional compliance in Kansas. *Id.* at LEG005994

Both of these newly-commissioned studies should be considered by this Court as further evidence of S.B. 423’s status as an outlier. In fact, the consistency between the WestEd Report and other studies was specifically cited by Dr. Levin as part of his support of the WestEd Report. He noted that the results of the WestEd Report “tell a qualitatively similar story to that of the previous cost function study.” Appx. 13, at LEG005936. He further explained that the qualitative studies told by both the LPA study and the A&M study were also similar. His report concludes that “both studies point to a need for significant additional funding to support an adequate education in the state.” *Id.* at LEG005950.

When these recommendations are aligned, it is immediately apparent that S.B. 423 is an outlier:

**Unmet Need:
Cost Study Estimates for FY19
Compared to Funding Increase over 5 Years**



See Appendix 15: Cost Study Estimates Compared to S.B. 423. S.B. 423’s funding levels simply do not stack up to the level of funding needed to attain constitutional compliance.



Appendix 16: Lego Illustration of Funding.

In *Gannon V*, this Court warned that because of the magnitude of the difference between the funding provided by S.B. 19 and estimates of what it would cost to achieve constitutional compliance, the State needed “to truly demonstrate the validity of its funding approach and the financial figures that approach produces.” *Gannon V*, 306 Kan. at 1206. Once again, however, the State has adopted a vastly smaller level of funding than is actually needed to comply with the Constitution and wholly fails to demonstrate a valid basis for reaching that funding level. The State cannot show that it relied on a valid funding approach in adopting S.B. 423. Instead, the Legislature once again funded education based on what it believed it could “afford” without sacrificing potential votes during the upcoming election.

B. S.B. 423 is politically motivated and does not reflect cost-based decisions that are reasonably calculated to have all students meet or exceed the standards set out in *Rose*.

The State’s brief will, predictably, blame this Court, the Plaintiffs, its own expert, and the Constitution for placing impossible demands on the Kansas Legislature. Plaintiffs implore this Court to ignore those arguments. The demands placed on the Kansas Legislature by the people of Kansas cannot be ignored simply because those demands are challenging. Any blame for the Kansas Legislature’s failure to follow this Court’s mandates can be placed squarely on the Legislature itself. As Representative Hodge stated,

I hope the voters wake up and see the reason why we don’t have decent things in this state — like health insurance for everybody, like lower sales tax on food, like schools, like good roads — the reason why we don’t have those things is because the majority party runs the agenda and doesn’t let those things come to the floor in a timely fashion[.] Look at this. We’re

doing education at midnight-30 when we've known what this was supposed to be like since October. That's our problem.⁴

The State should have been more concerned with fixing the constitutional deficiencies identified in the Court's October 2 Order and less concerned with political compromise. *Gannon v. State*, 304 Kan. 490, 513, 372 P.3d 1181 (2016) ("Gannon III"). It was not. The State cannot fail to adequately fund education at a constitutional level because the members of its Legislature do not, for political reasons, want to take the actions necessary to ensure constitutional compliance. As this Court has warned:

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 III, 304 Kan. at 513 (internal citations omitted).

Nevertheless, political compromise is exactly what motivated the adoption of S.B.

423. Representative Rooker described it as follows:

As the clock ran out on the regular session and Senate leadership obstructed meaningful process, the House Speaker crafted a compromise plan to get the process moving Meetings were held on Friday, April 6, with legislative leaders to break the logjam because the Senate was obstructing progress and both legislative and court deadlines loomed"

⁴ Sherman Smith, *Opponents of Kansas school finance plan see future budget disaster*, TOPEKA CAPITOL JOURNAL (Apr. 9, 2018 5:43 PM), <http://www.cjonline.com/news/20180409/opponents-of-kansas-school-finance-plan-see-future-budget-disaster>.

Appendix 17: Statement by Rep. Rooker (emphasis added).

Representative Rooker described frustration with “the midnight deadline, the Senate filibuster and the intractability of the Senate leaders.” *Id.* The adoption of S.B. 423 was exactly what Representative Rooker described it as: “a compromise plan.” And, while the adoption of S.B. 423 was clearly a “political compromise,” it was not a well thought-out one. It resulted in “surprises,” including the \$80 million error that was corrected by S.B. 61. *Id.* S.B. 423 was not a good faith attempt by the Legislature, which has known new legislation would be necessary since October 2, 2017, to adopt a constitutional school finance plan.

Political difficulty is not a valid reason to adopt an unconstitutional bill.

C. S.B. 423 does not appropriately account for inflation.

In FY19, the first year of S.B. 423, funding to Kansas school districts will increase by \$192 million. Between FY20 and FY23, funding will marginally increase, but no CPI adjustment will take place until FY24. S.B. 423, at Sec. 2(e)(6); S.B. 61, at Sec.4(e)(6).

There is no disagreement that inflation must be accounted for in any funding formula. Dr. Taylor instructed the Legislature that it was “crucially important.” Appx. 9, at 89:4-19; *see also id.* at 107:21-108:10; *see also* Appx. 14, at LEG005999 (in which Dr. Baker explains the need to consider wage inflation to adjust for the fact that there are “changes in the competitive wages for school employees, most notably teachers” that are not addressed by making CPI adjustments). Dr. Levin acknowledged that inflation needed to be accounted for because it “erodes the value of the dollar over time.” Appx. 13, at LEVIN000076. This Court has acknowledged the effects of inflation. *Gannon V,*

306 Kan. at 1200 (“adjusting for inflation essentially only preserves the status quo on student performance”).

The State, in adopting S.B. 423, did not consider that the cost of funding an education has risen because of inflation. *See* Appx. 18: Base Comparison (the base is lower than any other recommended base despite ever-increasing costs). Nor did it consider that inflation will increase the cost of providing an education in the out years of the five-year phase-in period. The State’s decision to ignore inflation for FY20-23 renders S.B. 423 unconstitutional.

When inflation is accounted for, funding will only increase by \$60 million between FY20 and FY23. Appx. 20. The State bears the burden to demonstrate how this amount of money is reasonably calculated to have all students meet or exceed the standards set out in *Rose*. It cannot. For perspective purposes, by FY12, the cuts to education funding that began in FY09 totaled more than \$511 million. *Gannon I*, 298 Kan. at 1115 (“cuts to BSAPP in fiscal years 2009 to 2012 totaled more than \$511 million”); *Gannon IV*, 305 Kan. at 880 (“By fiscal year 2012...the legislature had reduced BSAPP to \$3,780. In total, the reduction to education funding through these BSAPP reductions constituted a loss of more than \$511 million to local districts.”) (citing *Gannon I*, 298 Kan. at 1114-15). S.B. 423 does not even attempt to restore those cuts for the next school year to get education “back on track”; it provides only \$192 million next year, barely covers the cost of inflationary increases for FY20-23, and does nothing to remedy the damages caused by the past cuts.

The State’s own expert completely obliterates any argument that \$192 million can generate the results required to reach constitutional compliance. Pursuant to the WestEd Report, to maintain current failure rates (where 67% of all Kansas students are failing math and 58% are failing reading) would cost the State \$515 million *in 2018-19*. Next year, S.B. 423 does not provide that.

Admittedly, the WestEd Report does contemplate funding the “one-time investment” needed to reach Scenarios A or B over a phased-in period. To do so would require upward adjustments for inflation. *See e.g.*, Appx. 10, at LEG006414. At the end of a five-year phase-in contemplated by S.B. 423, the total funding needed to reach the WestEd Report’s recommendation would be somewhere between \$2.402 billion and \$2.718 billion. Appx. 11.⁵ Comparatively, at the end of S.B. 423’s five-year phase-in, funding will only increase by \$644 million. *Id.* The State is not even funding one-third of the need over its five-year phase-in. *Id.*

S.B. 423’s increases in the out-years are so insignificant that the practical effect is to merely cover the cost of inflation.⁶ As this Court acknowledged in *Gannon V*, and as

⁵ There is no consensus on what rate should be used for inflation. Even the WestEd Report authors use two different rates. Originally, the authors used a 2.4% CPI. Appx. 8, at LEG006723. When they provided the Legislature with additional data in Appx. 10, the authors calculated inflation using the 5-year historical CPI of 0.965%. Appx. 10, at LEG006414. Plaintiffs use a 2.1% change in its calculations of inflation. *See, e.g.*, Appx. 11. Plaintiffs base this off the 2.1% change in 2017. *See* Appendix 45: Consumer Price Index (CPI) Average; Appendix 46: Inflation. Plaintiffs urge this Court to use the 2.1% change. An inflation rate of 0.965% is far too low in light of the 2.2% average since 1997, the 1.7% average since 2010, and the 2.1% change in 2017. *Id.*

⁶ Again, Plaintiffs used the 2.1% change for these calculations. If Plaintiffs used the 2.4% change that the WestEd Report used to estimate inflation (*see* Appx. 8, at LEG006723), the entirety of the increases in FY20 and FY21 would be consumed by inflation.

the LPA study concluded, “adjusting for inflation essentially only preserves the status quo on student performance.” 306 Kan. at 1200. Maintaining the current status quo of student performance in Kansas equates to maintaining a system in which 58% of all Kansas students are non-proficient in reading, 67% of all students are non-proficient in math, 72.3% of economically disadvantaged students are not proficient in reading, and 80.2% are not proficient in math. Appx. 1, at SFFF001125. Currently, Kansas students are not meeting – much less exceeding – the standards set out in *Rose*. The level of funding provided in S.B. 423 will not change that.

S.B. 423 does add a CPI increase to the base starting in FY24 and continuing for subsequent years. S.B. 423, at Sec. 2(e)(6); S.B. 61, at Sec.4(e)(6). However, Plaintiffs reiterate the same concerns that they previously raised with S.B. 19, and which caused the Court to state, “Recent history lends some credence to plaintiffs’ arguments regarding sufficient state revenue and the possibility that the inflation adjustment will not be funded if revenue falls short.” *Gannon V*, 306 Kan. at 1184. Regardless, S.B. 423 is unconstitutional.

D. The newly-commissioned studies are valid studies on which this Court should rely to conclude that S.B. 423 is unconstitutional.

Under S.B. 423, the State will not fund what it actually costs to comply with the Kansas Constitution. The State has once again ignored the actual costs of providing an education and instead adopted a formula based solely on political compromise and the amounts of funds deemed to be available for appropriations. *See, e.g., Montoy v. State*, 279 Kan. 817, 818-19, 112 P.3d 923 (2005) (“Montoy IV”). Considering all of the

evidence available, there is no basis for anyone – much less the State – to conclude that S.B. 423 is reasonably calculated to have all Kansas public education students meet the *Rose* standards, to comply with the Court’s October 2 Order, or to accomplish constitutional compliance. The funding provided by S.B. 423 falls far short of every indicator available to the State as to what it actually costs to meet *Rose*, including the two newly-commissioned studies: (the WestEd Report and the Myers-Picus Report).

Both of these studies confirm what Plaintiffs have suspected – a significant increase in education funding is necessary to ensure constitutional compliance. In light of these two studies, funding at the levels recommended by the KSBE and the Panel will not raise achievement levels to a constitutionally acceptable level (although, even funding to those levels would require a significant increase over what is provided by S.B. 423)

E. The WestEd Report, based largely on the KSBE’s Consolidated State Plan, is not too ambitious.

Presumably, the State will attempt to distance itself from the WestEd Report by arguing that the performance thresholds it incorporates are “too ambitious” and – if funded at that level – Kansas public education students would get an “extra”-constitutional education. These arguments should be disregarded. **While the *Rose* standards are often described as minimal standards, they are not meaningless.**

The performance thresholds incorporated into the WestEd Report (Scenarios A and B) were an attempt by the authors to translate the *Rose* standards into measurable outcomes. *See generally* Appx. 6, at Ch. 3. The authors did not pluck these performance thresholds from thin air.

The Report clearly explains that several factors were considered when setting the thresholds, including (1) current assessment and graduation data; (2) the State’s ESSA plan (or the “Consolidated State Plan,” attached as Appendix 2); and (3) “past performance of the state’s education system and conditions under which that performance occurred.” Appx. 6, at LEG006487.

These well-thought-out performance thresholds are not – as the State will argue – “too ambitious.” Some districts have already been able to achieve those standards in a system that has been “inadequately funded for at least 12 of the last 15 years.” *Gannon V.*, 306 Kan. at 1173 (“the education financing system has been judicially declared to be inadequately funded for at least 12 of the last 15 years—through school year 2016-2017”). The Blue Valley school district (“U.S.D. 229”) is already meeting the 95% graduation rate, WestEd Scenario A, and WestEd Scenario B. *See* Appendix 22: U.S.D. 229 Assessment Results; Appendix 23: Graduation Rate Data, at SFFF00126 (demonstrating that U.S.D. 229 is one of the 76 districts that has a graduation rate of 95% or higher). In U.S.D. 229, less than 10% of all students are performing at Level 1, and more than 60% of all students are performing at either Level 3 or 4. The WestEd Report’s Scenarios are not aspirational goals for U.S.D. 229 – it is that district’s reality. With the proper level of funding, all Kansas school districts could be performing as well as U.S.D. 229.

Other districts are also achieving WestEd Report level achievement. More than one-quarter of Kansas school districts already have a 95% graduation rate. *See generally* Appx. 23 (76 out of 286 districts have a graduation rate exceeding 95%). There are 180

Kansas schools that demonstrate compliance with Scenario A’s math target because they have 10% or less of their students scoring in Level 1 on the State math assessments. Appendix 24: Kansas Assessment Results – Taylor Scenario A. There are 119 Kansas schools that have 10% or less of their students scoring in Level 1 on the State ELA assessments. Appendix 25: Kansas Assessment Results – Taylor Scenario A – ELA.

Similarly, there are numerous Kansas schools that are already performing at the levels contemplated by the WestEd Report’s Scenario B. *See* Appendix 26: Kansas Assessment Results – Taylor Scenario B – Math, *and* Appendix 27: Kansas Assessment Results – Taylor Scenario B – ELA. There are 118 Kansas schools that have 60% or more of their students scoring in Levels 3 and 4 on the State math assessments. Appx. 26. There are 133 Kansas schools that have 60% or more of their students scoring in Levels 3 and 4 on the State ELA assessments. Appx. 27. The goals set forth in the WestEd Report are not too aspirational. Kansas educators know how to educate students to the *Rose* standards, to meet the KSBE’s goals, and to educate at the level contemplated by the WestEd Report. But, they *all* need the funding to do it.

When the Legislature adopted S.B. 423, it was well aware that the performance thresholds in the WestEd Report were not “too ambitious” and instead were carefully guided by the KSBE. In fact, comparing the WestEd Report to the KSBE’s goals demonstrates that WestEd may have underestimated the level of achievement that would satisfy *Rose*, which is not surprising given the KSBE’s proven ability to measure and implement the *Rose* standards. This Court has remarked in the past on the Legislature’s faith in the KSBE’s ability to “understand[], measur[e], and implement[]” the *Rose*

standards. *Gannon IV*, 305 Kan. at 864-65. The Court’s language is not just laudatory; the KSBE is remarkably capable of understanding, measuring, implementing the *Rose* goals.

The KSBE’s Consolidated State Plan, which the WestEd Report took into consideration in setting its performance thresholds, demonstrates this. The Consolidated State Plan is a mandatory document that the State was required to submit pursuant to the Elementary and Secondary Education Act of 1965 (“ESEA”), as amended by the Every Student Succeeds Act (“ESSA”). Kansas submitted a Plan signed by both Commissioner of Education Randy Watson and former Governor Brownback. *See* Appx. 2: Kansas’ Consolidated State Plan, at KSBE002491. In that Plan, the State makes assurances to the federal government. The plan, which was posted for public comment, relied on feedback from Kansas Chambers, the business community, and “over 2,000 Kansans.” Appendix 28: Testimony of Commissioner Watson to House K-12 Education Budget Committee, dated March 21, 2018, at 29:12-25.

One of the long-term goals that the State committed to in its Consolidated Plan would require that Kansas graduate 95% of all of its students in all districts, schools, and all subgroups in the four-year adjusted cohort by the year 2030. Appx. 2, at KSBE002506. This graduation goal, which the State is likely going to attack as too high, was incorporated into both the Consolidated State Plan and the WestEd Report. And, “it is not an out of the sky number.” Appx. 28, at 30:1-22. The KSBE carefully chose a graduation rate based on data demonstrating that the jobs available to students who have not graduated from high school are dwindling at an alarming rate. Appx. 2, at

KSBE002506. As Commissioner Watson testified, “for every percent that you go off of that number [95% graduation rate] you have a detrimental effect to students[.]” Appx. 28, at 30:8-22. The State will have “some interesting . . . dilemmas in front of us related to economic development of our state” if it is not graduating at least 95% of its students. *Id.* at 19:15-20.

The State also committed to a long-term goal to have “75 percent of students score in performance levels 3 and 4 combined on the Kansas state assessments in English language arts and mathematics by 2030.” Appx. 2, at KSBE002501. These goals are also supported by former Governor Brownback. During the 2018 State of the State Address, former Governor Brownback recommended that the State comply with *Gannon V.* See Appendix 29: 2018 State of the State Address, at GOV005436-5437. In his Budget Report, Governor Brownback reiterated these objectives and asked the KSBE to reach certain goals, consistent with those in their Consolidated State Plan, including: (1) a 95% statewide graduation rate; and (2) a statewide post-secondary effectiveness rate of 75%. See Appendix 30: The Governor’s Budget Report for FY2019, at GOV005547.

The KSBE is the constitutional body charged with supervising the educational interests of the State. See, e.g., Appx. 28, at 33:5-10 (“Well, the state board as you know by Constitution sets the standard, sets the goals, you set the funding.”). The KSBE has set these targets. Whether they are aspirational is for it to decide. The KSBE has found these goals crucial, and not aspirational. Commissioner Watson testified:

I don’t believe the state board will back off of this because it’s not an out of the sky number. It was why do we have to lead the world because if – for every percent that you go off of that number you have a detrimental

effect to students being able to hold a job into the middle class in our state. On the other side you have fewer students that are capable of holding the jobs and the businesses that they need and desire. And I don't think the state board will back off of that goal.

Appx. 28, at 30:8-19.

The KSBE goals are also not “too ambitious.” The KSBE’s goals were derived from the *Rose* standards and “[f]indings from the Georgetown Public Policy Institute, Center on Education and the Workforce,” specifically, “that 71 percent of Kansas jobs will require a postsecondary certificate or degree by 2020.” Appx. 2. at KSBE002503. The goals for the State that are articulated in its Consolidated Plan are in-line with the standards articulated in *Rose*, and would require that, by 2030, “75% of students score in performance levels 3 & 4 combined on the Kansas state assessment.” Appx. 2, at KSBE002501-02. In anticipation of the State’s arguments otherwise, Plaintiffs ask this Court to reject any arguments that the thresholds set forth in the WestEd Report, and derived from the Consolidated Plan, are “too ambitious.”

F. Additional Funding is Necessary to Ensure Compliance with the Rose Standards Related to College-and-Career Readiness

The State must demonstrate that S.B. 423’s funding is “reasonably calculated to have all Kansas public education students meet or exceed the standards set out in *Rose*.” *Gannon V*, 306 Kan. at 1207. This Court acknowledged that *Rose* factors (vi) and (vii), which are aimed at “obtaining a competitive place in a modern economy,” often requires a college education. *Gannon IV*, 305 Kan. at 912 (“[A] college education is important to obtaining a competitive place in a modern economy.”). The State now directly measures compliance with these two *Rose* standards by measuring whether students are

“performing at a level that [is] considered ‘on-track for college success.’” *Id.* According to those assessments, Kansas students are not in compliance with the *Rose* standards.

By 2020, to be competitive in a modern economy, 71% of Kansas students will need to have a postsecondary certificate or degree. Appx. 2. at KSBE002503. Thus, to comply with *Rose*, Kansas students must be poised to obtain a postsecondary education. Currently, 58% of all Kansas students are **non-proficient** in reading and 67% of all students are **non-proficient** in math. *See* Appx. 1, at SFFF001125. The State cannot demonstrate how the adoption of S.B. 423 will result in constitutional compliance.

G. S.B. 423 continues to knowingly underfund special education.

In *Gannon V*, this Court warned the State that the underfunding of special education aid could be relevant to whether overall funding is adequate. 306 Kan. at 1185. S.B. 423 continues the State’s pattern of underfunding special education aid, and – combined with its overall underfunding – this deliberate decision further contributes to S.B. 423’s unconstitutionality.

When the Legislature adopted S.B. 423, it retained the requirement that Special Education be funded at 92% of excess costs. K.S.A. 72-978. It has continuously maintained this funding requirement for the purpose of supplementing federal allocations under the Individuals with Disabilities Education Act.⁷ Yet, special education aid will be underfunded by \$40 million in FY19. Appendix 31: State Special Education Funding of 92% Excess Costs. While the State did increase special education aid for FY19, it still

⁷ *See* <http://www.ksde.org/Agency/Division-of-Learning-Services/Early-Childhood-Special-Education-and-Title-Services/Special-Education/Special-Education-Fiscal-Resources/Categorical-Aid>.

failed to appropriate the additional money that it knew it would cost to fully fund 92% of excess costs. The State intentionally under-appropriated special education aid. This under-appropriation shifts those excess costs onto other parts of the formula. Districts have been obligated to meet the unwavering state and federal mandates for special education. Since special education aid has not increased to meet those increased costs, school districts have been forced to cannibalize funding from general funds and LOB funds to meet these requirements. Such cannibalization will continue to be required since S.B. 423 once again underfunds this aid. The \$40 million that the State underfunded will need to come from some other source. The State cannot argue that the districts will be able to use the \$192 million in “new money” to increase achievement in Kansas without also acknowledging that at least \$40 million of that “new money” will continue to be cannibalized to ensure that districts are in compliance with mandates for special education.

H. “Returning to *Montoy*” should not be the State’s goal and does not ensure compliance with adequacy test.

Presumably, the State will argue that S.B. 423 returns to *Montoy*-level funding and is thus constitutional. There are several problems with this argument. The State cannot merely adopt a base that would have been sufficient in FY09 to fund education ten years later, especially in light of (1) increased standards; (2) changed demographics; and (3) inflation. Simply adjusting for inflation alone would require a base of \$5,248 in FY19. Appx. 18.

Second, even if the level of funding was restored “back to *Montoy*” levels, that would not demonstrate compliance with this Court’s adequacy test. The Court did not adopt an adequacy test that merely required the State to demonstrate that it is funding education at the same level that it funded education ten years ago. This Court held that the State has the burden to demonstrate that the funding is reasonably calculated to have all Kansas public education students meet or exceed the standards set out in *Rose. Gannon V*, 306 Kan. at 1207. The State cannot demonstrate that funding education at the *Montoy*-level base is reasonably calculated to have all Kansas public education students meet or exceed the standards set out in *Rose*. The State has never actually funded the base at that level. *Gannon V*, 306 Kan. at 1177 (“And although the 2009 legislature had initially established BSAPP at \$4,492 for fiscal year 2010 and beyond, the actual appropriation for fiscal year 2010 was reduced to \$4,012—a difference of \$480 per pupil”). And, the evidence at trial and in the record since shows that spending at the *Montoy* pre-cut levels still produced the unacceptable failure rates noted by this Court. This would indicate that even those post-*Montoy* spending levels were insufficient.

I. S.B. 423 violates Article 6’s equity requirement because it retains a protest petition and election process regarding LOB.

S.B. 423 exacerbates inequities among districts by retaining a protest petition and election process relating to efforts to increase a school district’s LOB authority. S.B. 423, at Sec. 4. In *Gannon V*, this Court stated:

The plaintiffs urge us to rule that the State has not [met its burden to establish that S.B. 19 meets the equity requirement of Article 6] because S.B. 19 creates, or exacerbates existing inequities by:

- Expanding the purposes for which capital outlay funds may be used;
- Reinstating a protest petition and election process relating to efforts to increase a school district's LOB authority;
- Basing the LOB equalization formula on each preceding year's LOB rather than the current year's; and
- Allowing some districts to receive at-risk funding for 10% of their enrollment even if that number exceeds the number of students actually meeting the criteria for such funding that applies to all other districts.

We find merit in each of the plaintiffs' contentions after applying the equity test relevant to an Article 6 analysis.

Gannon V, 306 Kan. at 1213.

Plaintiffs concede that the State fixed three of the four equity violations identified in *Gannon V*. See S.B. 423, at Sec. 5 (fixing bullet point no. 3 by calculating supplemental general state aid using current year's LOB instead of LOB for the "immediately preceding school year"); Sec. 9 (fixing bullet point no. 4 by removing the 10% at-risk floor; Sec. 14-15 (fixing bullet point no. 1 by removing utilities and insurance from acceptable capital outlay expenses). However, by retaining the protest petition and election process described in bullet point no. 2, the State did not fully ensure that S.B. 423 comports with this Court's equity test.

In adopting S.B. 423, the State once again unconstitutionally conditions a school district's ability to fund an education for its students on the whims of local voters, in violation of the Kansas Constitution. This creates unequal access to funding, and allows wealthier districts more educational opportunity through that funding. See, e.g.,

Appendix 32: Plaintiffs' Previous Equity Exhibits 503 and 504; *see also* R.Vol. 131, at Pls' Ex. 503-504; R.Vol. 135, p.1409; R.Vol. 140, p.15 (FOF ¶40).

In *Gannon V*, after considering Plaintiffs' evidence, this Court concluded:

S.B. 19's provision reinstating the LOB protest-petition process for all increases violates the equity requirement of Article 6. In short, many districts are effectively denied an access reasonably equal to the one afforded these other districts—access that is needed in order to make a similar tax effort, *e.g.*, impose a comparable mill levy. So it logically follows that because of this lost access they cannot as readily avail themselves of the advantages that would flow from that tax effort, *i.e.*, a substantially similar educational opportunity. *See Gannon I*, 298 Kan. at 1175. In other words, the State has failed to meet its burden of establishing that the LOB provision complies with the equity standard of Article 6. *See Gannon IV*, 305 Kan. at 856.

Gannon V, 306 at 1229.

S.B. 423 retains the protest petition requirement for any district that wants to increase its LOB above 30% of Total Foundation Aid. S.B. 61, at Sec. 5. This Court has already identified that as an equity violation. The State offers no justification for its decision to include a provision that this Court has explicitly told it violates the Kansas Constitution. S.B. 423 should be deemed unconstitutional for its violation of the equity requirement of Article 6.

J. S.B. 423 further violates Article 6's equity requirement by mandating that all districts adopt a 15% Local Option Budget

This Court has repeatedly warned the State about increased reliance upon LOB-generated funding. *See, e.g., Gannon V*, 306 Kan. at 1212 (warning the State to “remain cautious of challenges arising from an increased reliance upon LOB-generated funding”); *Gannon III*, 304 Kan. at 501 (observing that the State's decision to rely on increased LOB

funding to adequately fund K-12 education brought with it various challenges and cautioning “if local funding is to continue, this disparate effect has to be limited so it complies with Article 6”); *Gannon I*, 298 Kan. at 1173-74 (“legislat[ure’s] increase in the LOB cap exacerbates the wealth-based disparities between districts”) (quoting *Montoy III*, 279 Kan. at 840). And, Justice Biles warned the State that doing what S.B. 423 does could very well create additional equity violations. (“And I think greater reliance on the LOB to meet basic educational needs squarely creates an equity problem. Because you’re not equalizing at 100%, so that, so even though you’re at 81.2, the more you rely on LOB for basics, you’re going to have to look at that equalization number because otherwise just to meet the basics some taxpayers are going to have to tax themselves harder than other taxpayers and that seems to me to be a pretty big problem the way this thing is set up right now.”).

Nevertheless, the State has attempted to meet its obligation to fund education at a constitutional level by mandating a 15% LOB. And, it does so under the previous equalization mechanism that only equalizes to the 81.2 percentile.

“LOB-generated funds do not provide the same fixed amount to every student regardless of their locale.” *Gannon V*, 306 Kan. at 1203-04. When LOB is equalized to the 81.2 percentile, the tax effort necessary to raise a certain level of funding varies widely from district to district. Until this point in the litigation, the Court has tolerated the past decision by the Legislature to equalize LOB to 81.2 percentile. But, that is not because this level of equalization is without its flaws. Rather, the Court has previously deemed this level of funding as tolerable because of the optional nature of the LOB, and

the fact that the funds could be used to “enhance[] a district’s ability to perform its basic function.” *Gannon V*, 306 Kan. at 1219 (citing *Gannon III*, 304 Kan. at 506). The Court – when comparing the equalization between capital outlay and supplemental general state aid – held, “[w]hile these disparities are acceptable when computing aid in the smaller and less flexible capital outlay arena, the degree of inequity among the districts is too great when considering that the LOB has developed into such a major source of basic, and versatile, educational funding.” Because part of the LOB is now mandatory, more equalization is necessary.

Equalizing LOB to the 81.2 percentile when the LOB is *mandatory* denies school districts reasonably equal access to substantially similar education opportunity through similar tax effort. Appendix 33: 2017-2018 Mill Rates. The mills necessary to fund LOB currently vary significantly, from 4.559 to 33.825. *Id.* For instance, 54 districts get between \$126 and \$563 per pupil per mill levied. Appendix 34: LOB Budget Per Pupil. These districts will clearly receive more educational opportunity with less tax effort. Such a result is in violation of the Court’s equity test. There is a very wide range of tax effort required for each district to raise the now-mandated 15% LOB. *See* Appendix 36: Local Mills Needed for Mandatory 15% LOB. To raise the mandated part of the LOB will require some districts to only levy 2.3 mills, while one district will be required to levy 18.9 mills. *Id.*

S.B. 423 denies school districts reasonably equal access to substantially similar education opportunity through similar tax effort. This Court should declare S.B. 423 unconstitutional. *See Gannon V*, 306 Kan. at 1222. (“[I]n previous situations where the

legislature has exacerbated wealth-based disparities while attempting to cure past inequities that violate our state constitution, we have rejected the legislative change.”).

K. S.B. 423 further violates Article 6’s equity requirement by requiring a transfer from the LOB to the at-risk and bilingual funds.

Under S.B. 423, the education of at-risk and bilingual students will be dependent, in part, on LOB-generated funds. This is not equitable because “LOB-generated funds do not provide the same fixed amount to every student regardless of their locale.” *Gannon V*, 306 Kan. at 1203-04. In *Gannon V*, this Court stated:

Although related, this particular problem should not be confused with another one that is also potentially created by the legislature’s increased reliance on LOB funding. Specifically, some school boards or their voters may reject raising their LOB percentages to obtain funding—whether through higher mill levies alone or together with supplemental state aid—to replace those monies that have been lost by a lowered BASE.

Id. at 1205.

Because districts can have varying LOB percentages, and some are not even able to access the additional 3% because of the protest petition/election requirement, S.B. 423 creates unequal access to funding for at-risk and ELL students and they will not have substantially similar educational opportunities to their counter-parts in other districts. Quite literally, the level of education that they receive will be dependent on their zip code. Reliance on the LOB for at-risk and bilingual funding is an equity violation because it denies subgroups within school districts reasonably equal access to substantially similar education opportunity through similar tax effort. *See* Appendix 38: At-Risk and Bilingual Transfers from LOB. Districts with higher LOBs will be required

to target more dollars to their at-risk and bilingual students. Conversely, districts with lower LOB percentages will be required to target fewer dollars to those students, thus discriminating against them by providing those students with less educational opportunity *based solely on the wealth of the district and its ability to pass an election*. These districts do not receive the same educational opportunity pursuant to the same tax effort, which violates this Court's equity test.

Further, this change will not – as the State will attempt to argue – solve any adequacy issues. Presumably, the State will argue that this equity violation was an attempt to target funds to at-risk programs and student, since at-risk funds may only be spent on students who meet at least one of the ten criteria for at-risk students. *See, e.g.*, Appendix 39: December 5, 2017 Memo Regarding At-Risk Guidelines and Appendix 40: December 5, 2017 Memo Regarding 2016-17 At-Risk Students. The reality is that most districts are already spending more money on at-risk programs and students than this change will require. *See* Appendix 41: Demonstrative Exhibit Regarding At-Risk Funding and At-Risk Transfer.

This change compromises the equity of funding, while providing no positive impact on adequacy.

CONCLUSION

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

- (1) Declare S.B. 423 unconstitutional.
- (2) Enter a finding that the Legislature should appropriate at least enough money to meet the KSBE's request for additional resources for FY19. This would

require that the State fund a base of \$5,090 for FY19, costing an additional \$506 million this year.

(3) Enter a finding requiring the full funding of Special Education at 92% of Excess Costs as required by statute.

(4) Phase in additional increases in the out-years to reach the approximate additional \$1.786 – \$2.067 billion (in 2016-17 dollars) indicated by the State’s own cost study.

(5) Incorporate a CPI increase to the amounts funded during any phase-in period to reach adequacy.

(6) Remove any requirement that LOB authority be linked to a protest/election requirement.

(7) Remove any requirement that LOB funding be mandatory, or equalize any mandatory LOB to the 100th percentile.

(8) Remove any provisions that require mandatory transfers from LOB that discriminate based upon the percentage of LOB adopted.

Plaintiffs request that the Court maintain its June 30, 2018 deadline for these unconstitutional provisions to be remedied. Absent a constitutional cure, Plaintiffs request that the implementation of the finance system be declared void. Plaintiffs would further request the opportunity to brief exceptions to any spending injunction to allow for the preservation and security of district properties and systems should that be necessary.

Dated this 7th day of May, 2018.

Respectfully submitted,

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APPENDICES

1. **Appendix 1:** Excerpt from Kansas' Consolidated State Plan Regarding 2016 Performance Levels
2. **Appendix 2:** Kansas' Consolidated State Plan
3. **Appendix 3:** 2016-2017 Annual Report
4. **Appendix 4:** Constitutional Protest of Sen. Hensley
5. **Appendix 5:** Contract Between WestEd and Legislative Coordinating Council
6. **Appendix 6:** "Estimating the Costs Associated with Reaching Student Achievement Expectations for Kansas Public Education Students," Prepared by WestEd, dated March 15, 2018
7. **Appendix 7:** "Estimating the Costs Associated with Reaching Student Achievement Expectations for Kansas Public Education Students: Methods, Data, and Analysis Plan," Prepared by WestEd, dated February 23, 2018
8. **Appendix 8:** WestEd PowerPoint Presentation delivered to the Joint Session of the Education Finance Committees of the Kansas Legislature on March 19, 2018
9. **Appendix 9:** Transcript of Joint Meeting of the House K-12 Education Budget Committee and Senate Select Committee on Education Finance, dated March 19, 2018
10. **Appendix 10:** April 2, 2018 Amended Memorandum from WestEd Report Authors
11. **Appendix 11:** Total Funds Comparison
12. **Appendix 12:** Crosswalk for Funding Comparisons
13. **Appendix 13:** Material Prepared by Dr. Levin of American Institutes for Research
14. **Appendix 14:** House Judiciary HCR 5029 Constitutional Amendment, Testimony submitted by Schools for Fair Funding, dated April 3, 2018
15. **Appendix 15:** Cost Study Estimates Compared to S.B. 423

16. **Appendix 16:** Lego Illustration of Funding
17. **Appendix 17:** Statement by Representative Rooker regarding S.B. 423
18. **Appendix 18:** Base Comparison
19. **Appendix 19:** Material Posted by the Kansas State Department of Education
20. **Appendix 20:** What Does S.B. 423 Provide?
21. **Appendix 21:** April 30, 2018 Memo regarding 2018 House Substitute for Senate Bill 61
22. **Appendix 22:** U.S.D. 229 Assessment Results
23. **Appendix 23:** Graduation Rate Data
24. **Appendix 24:** Kansas Assessment Results – Taylor Scenario A - Math
25. **Appendix 25:** Kansas Assessment Results – Taylor Scenario A - ELA
26. **Appendix 26:** Kansas Assessment Results – Taylor Scenario B - Math
27. **Appendix 27:** Kansas Assessment Results – Taylor Scenario B – ELA
28. **Appendix 28:** Testimony of Commissioner Watson to House K-12 Education Budget Committee, dated March 21, 2018
29. **Appendix 29:** 2018 State of the State Address, Delivered by Gov. Brownback on January 9, 2018
30. **Appendix 30:** Excerpts from The Governor’s Budget Report for FY2019, Volume I
31. **Appendix 31:** State Special Education Funding of 92% Excess Costs
32. **Appendix 32:** Previous Equity Exhibits
33. **Appendix 33:** 2017-2018 Mill Rates
34. **Appendix 34:** LOB Budget Per Pupil
35. **Appendix 35:** 2017-18 KSDE Assessed Valuation Report

36. **Appendix 36:** Local Mills Needed for Mandatory 15% LOB
37. **Appendix 37:** 2017-18 Legal Max
38. **Appendix 38:** At-Risk and Bilingual Transfers from LOB
39. **Appendix 39:** December 5, 2017 Memo Regarding At-Risk Guidelines
40. **Appendix 40:** December 5, 2017 Memo Regarding 2016-17 At-Risk Students
41. **Appendix 41:** Demonstrative Exhibit Regarding At-Risk Funding and At-Risk Transfer
42. **Appendix 42:** General Fund Expenditures Excel Worksheet
43. **Appendix 43:** Supplemental General Fund (LOB) Expenditures Worksheet
44. **Appendix 44:** At-Risk K-12 Fund Expenditures Worksheet
45. **Appendix 45:** Consumer Price Index (CPI) Average
46. **Appendix 46:** Inflation