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**Testimony Regarding Article VI  
of the Kansas Constitution  
Presented to the Special Committee on a Comprehensive  
Response to the School Finance Decision**

**By Attorney General Derek Schmidt  
December 19, 2017**

Mr. Chairman, members of the committee:

Thank you for this opportunity to testify today. I commend you for focusing on steps the Legislature must take to bring the state's school funding system into compliance with the requirements of the Kansas Constitution as required by the most recent order of the Supreme Court in *Gannon v. Kansas*. I encourage you to enact whatever curative legislation you intend by the beginning of March to account for time for the bill to be enrolled, considered by the Governor, and then the state's litigation team, in consultation with counsel representing the Legislature or each house thereof, will have ample time to properly consult with interested parties, to gather the necessary information from the legislative record, and to brief the State's defense prior to the deadline ordered by the Supreme Court.

Even as you focus on the immediate actions needed to cure the constitutional defects in the state's school funding system, I appear today to encourage you to think more globally about the constitutional architecture under which this dispute has arisen. The thoughts I share today are intended for your consideration as you address the "comprehensive" portion of your charge.

In the half century since the current language of Article VI of our Constitution was adopted, the People of Kansas have said little about its meaning while the Legislature and the Courts have spoken volumes. Perhaps this debate – in the Legislature and in the Courts – has taken our state to just where the People want it to be. But perhaps not.

To get to the point: I respectfully suggest it is time for a thoughtful, global discussion in our state about whether Article VI, Section 6, of the Kansas Constitution as it is currently written and as it has been interpreted over the past half century truly reflects how the People of the State of Kansas intend these important decisions about school funding to be made.

Let me be quick to emphasize that I am urging a “thoughtful” and “global” discussion – not an *ad hoc* response to the funding decisions at hand. Not an excuse for inaction. Not a method for some to vent disagreement with the Supreme Court or others to vent disagreement with the Legislature.

Consider this: In the half century since the People of the State of Kansas enacted the current language of Article VI, Section 6, of the Kansas Constitution, the 15 key words<sup>1</sup> the People adopted have spawned more than 1,000 pages of judicial decisions interpreting them. And that volume is increasing exponentially. Even so, I ask you to consider this: Does anybody really know what must be done next or precisely what the Constitution requires the Legislature to do in order to satisfy the duty the People have imposed on it? Has this increasing volume of litigation and judicial interpretation brought clarity? Or consensus?

My overall suggestion is simple: It’s appropriate to ask the People if the system of applying the Constitution to school-funding acts of the Legislature that has developed case-by-case really is what the People had in mind. Or more to the point, in light of the past half century of experience, are there clarifications or changes to the duty imposed by the People on the Legislature, and the process for enforcing that duty, that the People themselves wish to make?

After all, “[a]ll political power is inherent in the people...,” Kan. Const. Bill Rts, Sec. 2, and all of us – the Legislature, the Courts, the Executive – are doing our best to adhere to the “people’s constitution,” *Gannon*, 298 Kan. 1107, 1168, as we understand it. So I am suggesting you ask the People – thoughtfully, not vindictively – whether this process really is what they had in mind or whether they would prefer to give more particular instruction to their officials in the Legislature, the Courts and the Executive Branch.

Only the Legislature can decide whether to bring the People themselves into this discussion. See Kan. Const. Art. XIV. You alone – not the Executive, not the Courts – are the People’s gatekeepers.

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<sup>1</sup> The 15-word reference is to the opening sentence of Art. VI, Sec. 6(b). Other language in Article VI, Sec. 1 speaks to the Legislature’s duty to “provide for intellectual, educational, vocational and scientific improvement...”

### Comparison of Legislature's Art. VI Duty to Enact Law and Art. X Duty to Enact Law

There is precedent for the People of Kansas giving their government clearer instruction on how to meet constitutional duties. To illustrate, consider the differences between the duty the People have imposed on the Legislature to enact law to fund schools (Kan. Const. Art. VI, Sec. 6) and the duty imposed to enact law related to reapportionment (Kan. Const. Art. X, Sec. 1). Both are emotional subjects with a wide range of political perspectives. Both involve rights of citizens (education and one person one vote). Both have unique dynamics that complicate the Legislature's actions (schools involving raising and expending money, reapportionment involving federal constitutional rights). Both tend to be highly litigated.

But the level of detail in the instruction the People have given their government in how to handle these two difficult decisions is notably different.

In the education funding context (Kan. Const. Art. VI, Sec. 6(b)), the People have given only 15 words of guidance. (Copy attached as Exhibit A). But in the reapportionment context (Kan. Const. Art. X, Sec. 1), the People have given 445 words of guidance. And in those 445 words, the People have given explicit instruction to their Legislature, their Courts and their Executive about how to perform the duties the People have imposed on them. (Copy attached as Exhibit B).

The contrast between the detailed guidance on reapportionment and the lack of guidance on education funding is stark. Consider:

**How to measure the duty?** In reapportionment, the People have instructed their government that the test for compliance is whether reapportionment is "on the basis of the population of the state as established by the most recent census of population taken and published by the United States bureau of the census" with two specific adjustments for certain students and military personnel. Kan. Const. Art. X, Sec. 1(a). By contrast, the People have given no guidance on how to determine whether education funding provisions are "suitable," leaving to the judiciary the determination that suitability contains "equity" and "adequacy" and the adoption by judicial action of a constitutional test for each. Whatever the merits of the test, the current test for adequacy cannot possibly be what the People intended when they enacted Article 6, Section 6(b), because the so-called *Rose* standards were not created by the Kentucky Supreme Court until more than two decades later.

**How to seek judicial review?** In reapportionment, the People have instructed their government which court shall determine whether a statute is constitutional and established special rules, procedures and timeframes for making such determinations.

By contrast, the People have given no such guidance on how school funding litigation is to be handled – leaving to the Legislature the establishment of processes (i.e., three-judge panel? No three-judge panel? Certain notice to Legislature prior to filing suit, etc.) and to the Courts exclusive control of the timelines.

**How to cure a constitutional infirmity?** In reapportionment, the People have instructed their government precisely how to deal with a constitutional infirmity in a reapportionment map – if the Court strikes it down, the Legislature must promptly enact a new map under strict timelines and so on and so forth until a constitutional law is in place. Kan. Const. Art. X, Sec. 1(b)&(c). The People have made clear that the Courts are to determine whether a reapportionment map is constitutional and have specifically instructed their Legislature that it may not second-guess the Court but instead “shall enact a statute of reapportionment conforming to the judgment of the supreme court.” Kan. Const. Art. X, Sec. 1(c). By contrast, the People have given no such instruction in school funding – which results in understandable struggles about what remedies are appropriate (or even possible) and, in extreme circumstances, discussions about a “constitutional crisis” as two co-equal branches of government each seek to fulfill what they sincerely believe to be their instructions from the People.

**Who may participate?** In reapportionment, the People have instructed their government precisely who is to be allowed to participate in determining whether the Constitution is satisfied. They have directed that “the supreme court, in accordance with its rules, shall permit interested persons to present their views.” Kan. Const. Art. X, Sec. 1(d). By contrast, the People have given no such guidance in school funding – and as a result, participation by interested persons other than the Plaintiffs and Defendant in a given school-finance case may be limited by ordinary judicial practice. For example, in the *Montoy* case, the Supreme Court denied a request by the Legislature to participate in oral argument, and in *Gannon* it denied a request by the Shawnee Mission school district to enter the case and also an effort to allow counsel to represent the views of the Legislative Coordinating Council in oral argument.

**How often may challenges be brought?** In reapportionment, the People have instructed that the constitutionality of legislative districts may be challenged once per decade – and no more. Kan. Const. Art. X, Sec. 1(e). That is true even if substantial changes in circumstances, such as sharp population shifts, would otherwise cause the apportionment to violate the Constitution. By contrast, the People have given no such instruction in school funding. As a result, once a case ends, a new one may be filed as soon as a plaintiff – any plaintiff – has a grievance with the system.

### Recommendation

To be clear, I am not suggesting that the particular guidance given by the People to their government on how to handle reapportionment disputes should be replicated in the school-funding context. Rather, my point in contrasting Article VI with Article X is merely to suggest that it is reasonable – and precedented – to ask the People of the State of Kansas whether they wish to give more specific instruction to their government about how to handle and resolve difficult and ongoing constitutional disputes, such as that over school funding.

To date, I am unaware of efforts to have a global discussion of this sort. Most proposed constitutional amendments, dating at least as far back as the Special Session in 2005, are proposed to address specific aspects such as the relationship between the Legislature's spending power in Article II and the duties in Article VI, or the ability of the Court to enter certain remedies.

A more global discussion would be aimed at inviting the People either to clarify their intent regarding school funding disputes or to reaffirm that the current system has the support of the People. While I favor reform, in my view, either outcome would have the benefit of bringing greater certainty to the process. It seems to me a global discussion should address issues such as:

**Who may bring a constitutional challenge to a school funding law?** (Ironically, the namesake for the current lawsuit, Luke Gannon, and indeed all of the individually named plaintiffs, were dismissed from the litigation for failure to establish any individualized educational harm. In fact, the individual plaintiffs could be collectively (and proudly) described as educational overachievers.).

**What court should the challenge be brought in?** Should these challenges begin before an ordinary district court? If so, which one? Or before a special panel? If so, how should it be constituted? Or should they originate in the Supreme Court?

**What duties are included in the “suitable” provision for school funding that the Constitution requires?** Are “equity” and “adequacy” really the components? Are they the *only* components or are there others not yet identified by litigation?

**What are the appropriate tests to measure suitability?** Is the equity test adopted by the Supreme Court the test the people prefer? Is the adequacy test? Or do the people prefer different tests – perhaps more strict, perhaps more permissive, perhaps neither more strict nor more permissive but simply different?

**Should there be constitutional timelines on school finance litigation?** Timelines for the Legislature to act? Timelines for the Courts to act? Consequences for failing to meet those timelines?

**What standard of review should Courts use in reviewing school funding decisions by the legislature?** Scrutinize strictly? Highly deferential? Somewhere in between? Is there a difference between review for equity and review for adequacy?

**What should be the remedy if the supreme court finds school funding law unconstitutional?** Disabling the offending statute (in effect, closing schools)? Ordering that funds be reorganized within the state treasury (as contemplated by the Panel in this case)?

**What should be the consequences for the Legislature if it violates a Court order on school funding?** Held in contempt? Not paid until the State comes into compliance (see, e.g., Art. 15, Sec. 7: "The legislature may reduce the salaries of officers, who shall neglect the performance of any legal duty.")? Not allowed to adjourn until compliance is achieved?

**How should "adequacy" of funding be determined?** By reference to expert testimony? Cost studies? Other legislative testimony? Other testimony in court? By inputs? By outcomes? By recommendations of the State Board of Education?

**Who should be allowed/required to participate in school finance litigation?** Only districts/plaintiffs who choose to file lawsuits? Or other districts with different interests? Or the Legislature itself since it is subject to the constitutional duty? Or the State Board of Education since its determinations often are considered?

The above is not an exhaustive list. Rather, it is a sampling of the types of questions that a thoughtful, global discussion of our current constitutional architecture regarding school funding could consider.

#### Determining Adequacy: Need for a Citizens' Veto?

One further thought: Who should have the final say in determining whether school funding is "adequate"?

Determining whether a law is "equitable" – i.e., fair to all – is a traditional role of courts. But determining whether an amount of funding is "adequate" is more traditionally a

legislative function, not a judicial function. Perhaps that is why adequacy litigation tends to invite the greatest rancor and risk of constitutional crisis: It squarely pits the Judiciary's constitutional duty to determine what the law is against the Legislature's constitutional duty to control the public purse strings.

Given that unique dynamic, perhaps the People should be asked to resolve the matter when the two branches of their state government come to an impasse. Is the Legislature correct in its determination of adequacy? Or is the Court correct?

Should we let the People decide? After all, it is their Constitution.

I have no specific proposal today, but I think the concept is one worth discussing. Unusual problems sometimes require unusual solutions. For example, many states have some form of a "citizen's veto" that provides a mechanism for citizens to determine directly whether a statute enacted by the legislature should be allowed to enter into force. The people, not the government, get the final say before a new law may enter into force.<sup>2</sup>

Perhaps there is a way this concept, which exists in nearly half the states but not in Kansas, could be narrowly adapted so the People of Kansas can "veto" a decision of the Legislature that inadequately funds schools or, in the alternative, can "veto" a decision of the Supreme Court that incorrectly interprets the adequacy requirement. At issue, after all, is the meaning of the "people's Constitution."

What is "adequate" is, ultimately, for the People to decide. Perhaps the People should be given the final say as to what is "adequate" when their Legislature and their Courts fundamentally disagree.

### Conclusion

Mr. Chairman, I appreciate the opportunity to testify today. My purpose is to suggest that our state would be better off if the People were allowed to either reaffirm that the system of determining school funding is working as intended, or to determine that modifications and clarifications are needed. That seems, to me, a wholly reasonable

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<sup>2</sup> A recent nearby example was use of that authority by the People of Nebraska to overturn a statute, enacted by the Unicameral over the governor's veto, that would have repealed that state's capital punishment statute. Through a constitutional "citizen's veto," the People of Nebraska rejected that legislative enactment.

discussion. But, of course, what I think on this question is beside the point – what matters is what you think because, in our constitutional system, only you in the Legislature have the ability to decide to ask the People what they prefer.

I hope these thoughts are helpful as you consider the difficult but important questions before you. I would stand for questions.



**EXHIBIT A**

West's Kansas Statutes Annotated Constitution of the State of Kansas (Refs & Annos) <b>Article 6.</b> Education
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K.S.A. Const. Art. 6, § 6

§ 6. Finance

Currentness

(a) The legislature may levy a permanent tax for the use and benefit of state institutions of higher education and apportion among and appropriate the same to the several institutions, which levy, apportionment and appropriation shall continue until changed by statute. Further appropriation and other provision for finance of institutions of higher education may be made by the legislature.

(b) The legislature shall make suitable provision for finance of the educational interests of the state. No tuition shall be charged for attendance at any public school to pupils required by law to attend such school, except such fees or supplemental charges as may be authorized by law. The legislature may authorize the state board of regents to establish tuition, fees and charges at institutions under its supervision.

(c) No religious sect or sects shall control any part of the public educational funds.

**Credits**

Laws 1861, p. 59; Laws 1966, Sp. Sess., ch. 10.

**EXHIBIT B**

West's Kansas Statutes Annotated

**Constitution** of the State of Kansas (Refs & Annos)

**Article 10.** Apportionment of the Legislature

K.S.A. Const. Art. 10, § 1

**§ 1. Reapportionment** of senatorial and representative districts

Currentness

(a) At its regular session in 1989, the legislature shall by law reapportion the state representative districts, the state senatorial districts or both the state representative and senatorial districts upon the basis of the latest census of the inhabitants of the state taken by authority of chapter 61 of the 1987 Session Laws of Kansas. At its regular session in 1992, and at its regular session every tenth year thereafter, the legislature shall by law reapportion the state senatorial districts and representative districts on the basis of the population of the state as established by the most recent census of population taken and published by the United States bureau of the census. Senatorial and representative districts shall be reapportioned upon the basis of the population of the state adjusted: (1) To exclude nonresident military personnel stationed within the state and nonresident students attending colleges and universities within the state; and (2) to include military personnel stationed within the state who are residents of the state and students attending colleges and universities within the state who are residents of the state in the district of their permanent residence. Bills reapportioning legislative districts shall be published in the Kansas register immediately upon final passage and shall be effective for the next following election of legislators and thereafter until again reapportioned.

(b) Within 15 days after the publication of an act reapportioning the legislative districts within the time specified in (a), the attorney general shall petition the supreme court of the state to determine the validity thereof. The supreme court, within 30 days from the filing of the petition, shall enter its judgment. Should the supreme court determine that the **reapportionment** statute is invalid, the legislature shall enact a statute of **reapportionment** conforming to the judgment of the supreme court within 15 days.

(c) Upon enactment of a **reapportionment** to conform with a judgment under (b), the attorney general shall apply to the supreme court of the state to determine the validity thereof. The supreme court, within 10 days from the filing of such application, shall enter its judgment. Should the supreme court determine that the **reapportionment** statute is invalid, the legislature shall again enact a statute reapportioning the legislative districts in compliance with the direction of and conforming to the mandate of the supreme court within 15 days after entry thereof.

(d) Whenever a petition or application is filed under this section, the supreme court, in accordance with its rules, shall permit interested persons to present their views.

(e) A judgment of the supreme court of the state determining a **reapportionment** to be valid shall be final until the legislative districts are again reapportioned in accordance herewith.

**Credits**

Laws 1861, p. 61; Laws 1974, Ch. 457, § 1; Laws 1988, ch. 405.