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Testimony Before Joint Committee on Judiciary
Comment on Potential School Funding Changes Re: *Gannon*
Mike O'Neal, Kansas Chamber CEO
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Chairmen and members of the joint Committee:

In the infamous words of the late Yogi Berra, "It's *déjà vu* all over again." Once again, the Kansas Legislature finds itself having to respond to yet another round of school finance litigation and threats from this Supreme Court. I say "this" Supreme Court and not "the" Supreme Court because Kansas legal history shows that "who" serves on the Court makes a huge difference in how a static State Constitution is interpreted. Sometimes it's a 180 degree difference.

In considering a response to the latest edict from this Supreme Court in the *Gannon* case, lawmakers are naturally discussing possible constitutional amendments to address the Court's violation of the Separation of Powers doctrine and the threat to close schools over a controversy representing only a handful of districts and a miniscule percentage of overall school funding. Those same discussions and proposals were considered back in the 2005 Special Session in the wake of the *Montoy* case and the Court's threat of school closure then. Recall that a bipartisan vote in the 2005 Special Session and signature by a Democrat Governor enacted not only an unprecedented ramp-up of school funding but also a prohibition against school closures or the enjoining of distribution of school funds as a remedy ever again. A decade later and still only about 55 cents on the tax dollar gets to the classroom and districts are still suing.

One proposed constitutional amendment could include beefing up the existing Art. 2, Sec. 24 provision that has made it clear for over 150 years that it is the Legislature that controls the state's purse strings. Why, after 150 years should we now be needing to consider clarifying that provision? The answer: "this" Supreme Court.

By the way, note that Art. 2, Sec. 22, sets out the doctrine of legislative immunity. This is the section that protects the Legislature from being sued. Staff will be happy to brief you on the case of *State, ex rel Stephan v. House of Representatives.* 236. Kan. 45 (1984) The Court can't force the Legislature to do anything it is not inclined to do on its own. Rather, "this" Court

has determined that it will maneuver around that inconvenient constitutional barrier by threating to forbid the State from implementing anything the Legislature enacts, thereby preventing schools from opening, while claiming that it will not be the Court doing it but rather the Legislature. The Court is playing the political card in a case where they have found the issue does not involve a "political question". The political question doctrine serves to instruct the judicial branch to decline jurisdiction in cases which are essentially non-justiciable because they involve uniquely political decisions which are best left to the legislative branch as a matter of public policy.

Another proposed constitutional amendment could include adding a provision or provisions to the Education article, Art. 6., to add a constitutional prohibition against school closure, e.g. Article 6, Sec. 6 is the provision on "finance" that has been implicated in both the pending *Gannon* case and the *Montoy* case that spawned the 2005 Special Session. That provision was adopted by Kansans in 1966, 50 years ago. Why, in the 50 year history of this provision should we be needing to consider an amendment to this provision? The answer: "this" Supreme Court.

Earlier I suggested that who serves on the Court makes a huge difference in constitutional interpretation sometimes. Such has been the case with school finance. In 1994 the sitting members of the Kansas Supreme Court had before them a similar school finance lawsuit, one where the Plaintiffs were challenging provisions of the new school finance formula passed in 1992. The question before the Court was whether the School District Finance and Quality Performance Act (SDFQPA) made suitable provision for public education. Even though the 1966 constitutional provision was not changed in any way between 1994 and 2005 or 2016, the Kansas Supreme Court had vastly different things to say with regard to the proper interpretation of the provision and the Court's own role in determining constitutionality.

I have attached relevant quotes from the Court's opinion in *U.S.D. 259 v. State.* (Attachment A.) Suffice it to say that our Court in 1994 had a view of the constitution and its limited role in deciding school finance cases which mirrors the view of the Texas Supreme Court in its recent decision there and which is in direct conflict with "this" Court's view. In *U.S.D 259*, our Court acknowledged that: "The funding of public education is a complex, constantly evolving process. The legislature would be derelict in its constitutional duty if it just gave each school district a blank check each year…. Rules have to be made and lines drawn in providing 'suitable financing'. The drawing of these lines lies at the very heart of the legislative process and the compromises inherent in the process."

The Texas Supreme Court, in their very recent ruling in *Morath*, stated: …."our judicial responsibility is not to second-guess or micromanage Texas education policy or to issue edicts from on high increasing financial inputs in hopes of increasing educational outputs. There doubtless exist innovative reform measures to make Texas schools more accountable and efficient, both quantitatively and qualitatively. Judicial review, however, does not license second-guessing the political branches' policy choices, or substituting the wisdom of 9 judges for that of 181 lawmakers. Our role is much more limited, as is our holding. Despite the imperfections of the current school funding regime, it meets minimum constitutional requirements".

The Kansas Legislature is faced with the current Court's view on the subject, a view that suggests the Court reserves the right to usurp both the legislative and executive branches when its personal view is at odds with the policy makers who answer to their constituents. It is not the only view. Time will tell who will occupy the seats on the Court come January. Constitutional provisions were intended by our founders to be enduring and not subject to the whims of the unelected. We would caution against rushing to amend the constitution every time a court acts contrary to the intent of the people. The remedy, as our Court has acknowledged, lies with the people and there currently exists a mechanism for the public to express its displeasure with members of the Court.

Nevertheless, if the question becomes not one of "if" but, rather, 'how" the state constitution should be amended, we would recommend that it take the form of placing in the constitution what you have already provided for in state law, i.e., a provision making it clear that the Court has no power to directly or indirectly force closure of or prevent commencement of public schools as a proposed remedy in a school finance case. It's a cruel irony that a Court that so publically espouses the right to a public education would be so cavalier in threatening to deny our children access to that public education if the Legislature fails to capitulate to the Court's demands over an incredibly small piece of overall funding. In 2005, legislators who could barely agree with each other on the time of day were united in agreement in limiting the Court's power over whether schools opened or closed.

Given the current posture of the case and the deadline imposed by the court it is prudent for the Legislature to act expeditiously to respond with regard to the equity phase. We believe the Legislature came up with an appropriate response during the 2016 Regular Session. Your response addressed the need for an equalization formula and protected your schools' funds. During the upcoming Special Session, the Legislature should address the issue of LOB equalization from the standpoint of what is best for the constituencies and taxpayers they represent. A solution does not require throwing more taxpayer money at the problem. The Kansas Supreme Court has acknowledged in this *Gannon* litigation that

"equity does not require the legislature to provide equal funding for each student or school district". The Court has also acknowledged that the test of the funding scheme becomes a consideration of "whether it sufficiently reduces the unreasonable, wealth-based disparity so the disparity then becomes constitutionally acceptable, not whether the cure necessarily restores funding to the prior levels."

The Kansas State Department of Education has expertise in making the mathematical calculations necessary to ensure equalization of districts based on the adopted test of "reasonably equal access to substantially similar educational opportunity through similar tax effort." The Legislature has already appropriated funds in the 2016 legislative session to operate schools during the 2016-2017 school year. Those funds should be transferred to the KSDE with the firm promise that KSDE will distribute the funds in a manner that accomplishes equalization. Use of the term "block grant" is appropriate. A "grant" implies a promise in exchange for release of funds. The Feds have mastered this. KSDE should be given the authority, if authority does not already exist, to identify all unencumbered funds in the USD system and allocate those resources in a manner sufficient to address the Court's equity concerns.

For the future, consider capturing a portion of the 20 mill levy and/or a portion of LOB levies for the purpose of funding equalization, rather than creating an annual equalization entitlement program at additional taxpayer expense. It is not the Court's function nor should it be within its power to disrupt educational pursuits in the state where the Legislature has committed 50% of its entire State General Fund budget to K-12. Also, in anticipation of the "adequacy" phase of the pending litigation, use the "block grant" to extract a promise from KSDE, and in turn the USD's, that funds will be allocated in a manner "reasonably calculated to assist students in achieving the outcomes set forth in statute." You're being sued over adequacy in an environment where you have no control over outcomes.

We applaud Attorney General Schmidt's efforts to ask the Court to exercise prudent judicial temperament and restraint and stand down with regard to the school closure threat. Our members, as ultimate consumers of the educational product of this state, stand ready to work with our education partners and legislators to help ensure our schools remain open and free from unwarranted judicial intervention. We have confidence that a solution that protects both our schools and Kansas taxpayers will be the result of your deliberations. Our schools want to open. We want schools to open. You want our schools to open. The question is whether the Court wants them to open.