No. 15-398

IN THE

Supreme Court of the United States

DIANE PETRELLA, next friend and guardian of minor N.P., minor C.P.; *et al.,*

Petitioner,

v.

SAM BROWNBACK, Governor of Kansas, in his official capacity; *et al*.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

This case presents important questions of federal law that have not been, but should be, settled by this Court:

(1) Whether education is "speech" within the meaning of the First Amendment, and whether a cap on voluntary education spending burdens speech. This Court has never addressed that question. The time has come for it to do so. Indeed, this case presents the precise question regarding the constitutionality of education spending caps that was reserved in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). This Court should grant review to establish that education is indeed "speech," as its dictionary definition, ordinary meaning, and this Court's precedent all suggest,[1] and the cap triggers strict scrutiny, not rationality review.

(2) Whether the spending cap can be constitutionally permissible when it acts as an obstacle to voluntary integration and social progress. This case involves members of a community banding together to ask not what the State can do for them, but what they can do together to avert a school funding crisis. Yet the answer of the State, Intervenors, and Tenth Circuit is: send your kids to private or parochial schools or hope that a billionaire makes a large donation to your public schools. Petitioners wish to act to support their *public* schools. They do not want to be forced into private, charter or religious schools. Their solution is to rely on *civic engagement* to improve local

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[1] When retracing the history of First Amendment rights, this Court explained that States "may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

public schools. But Kansas law, as upheld by the Tenth Circuit, prohibits them from banding together as a community at the ballot box to improve their local public schools.

The BIO filed by Intervenor/Respondents[2] ("Intervenors") improperly seeks to recharacterize Petitioners' claim. This case has nothing to do with the taxing authority of the district. As framed by the *first* Tenth Circuit panel, the question is whether this community can "*even attempt*[] to level the playing field." App. at 117. "Appellants' alleged injury, while flowing from the LOB cap, was not 'the inability of the district to raise unlimited funds,' but rather the alleged unequal treatment (manifested in, among other things, lower per pupil funding) that prevented them from even attempting to level the playing field." *Id*. (citations omitted). So framed, the question becomes: what does it mean to "*even attempt*" to level the playing field? What political action is available to a free people who want to "*attempt*" to do so? If we are to believe the State, the Intervenors, and the Tenth Circuit's *second* panel: Not much, despite the fact that the State of Kansas has itself provided unlimited taxing mechanisms for raising the necessary funds *See* K.S.A. 79-5040 (suspending all limits on local taxation). This is because the State prohibits spending those funds on education. K.S.A. 72-6433(b) (capping education spending); K.S.A. 72-6432 (imposing penalties for exceeding the cap on education spending).

The BIO repeats the refrain that Kansas' Education Spending Cap was adopted to ensure "equity", but Intervenors never define "equity" and completely

[2] Defendant/Respondents did not file a Brief in Opposition.

ignore the undisputed fact that the Education Spending Cap operates to ensure inequality.[3] While Intervenors claim that the spending cap "was adopted to help 'equalize the ability of districts with lower property wealth to **raise** money through use of the LOB" (BIO at 5, emphasis added), the cap does no such thing. It does the opposite. The cap does not generate a single penny for a single school district. Thus, the cap does not improve education for anyone, unless less education is an improvement.

Contrary to the BIO, Petitioners do not seek to convert the Kansas School Finance scheme into an "every district for itself" system (BIO at 1), nor do they seek to restrict education to the "upper stratum of society." (BIO at 5). Lifting the Spending Cap and allowing SMSD to increase its spending ***to the level of better funded districts*** will do neither of these things. The State scheme already employs an "equalization aid" mechanism which distributes more money to districts with lower property values. K.S.A. 72-6434.

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[3] Intervenors' arguments that SMSD deserves underfunding because SMSD students on average perform relatively well despite this underfunding (BIO at 9) is specious, unsupported by the record, and should be ignored. **The factual record of SMSD's underfunding is dramatic and was undisputed, nor is there any dispute that funding is linked to student achievement**. Intervenors cannot cite any evidence denying that SMSD students would perform better in the absence of the underfunding. Intervenors' argument does not change either the fact of the underfunding or make the inequality constitutionally permissible.

While Intervenors complain that unlimited local funding would make a child's education dependent on the wealth of the district in which they reside, the undisputed factual record demonstrates that reality already exists—*by state design*. The State itself has created unequal state funding; the State itself has erected wealth-based disparities by giving more money to Intervenors and depriving Petitioners of equal funding.

Intervenors' overblown rhetoric regarding their fear of "runaway spending" (BIO at 6) (as if more education is a threat to society), illustrates that the only true "equity" served by the Spending Cap, is a Procrustean equity, an "equity" that seeks to cut anyone aspiring to better education for their children down to size. Whether a state may rely upon this kind of "equity" to justify limiting the educational opportunities of some children is an important question with national import that strongly warrants this Court's review. Furthermore, the upshot of Intervenors' "runaway spending" argument, is that the citizens in SMSD must not be allowed to vote to fund their schools because they cannot be trusted to do so responsibly. This Court rejected this exact argument in *Schuette v. Coalition to Defend Affirmative Action*, where it explained "[w]ere the Court to rule that the … *electorate's power* must be limited because the people cannot prudently exercise that power …, that holding would be an unprecedented restriction on the *exercise of a fundamental right* …." 134 S. Ct. 1623, 1637 (2014) (emphasis added).

The BIO incorrectly says that "Petitioners seek to force the State of Kansas to fund a statewide public education system in a very specific way: by requiring the state to grant its political subdivisions unlimited

taxing and budget authority." BIO 2. That is untrue. Kansas has substantial latitude to fund school systems. The one thing it cannot do is violate the federal Constitution. Petitioners thus ask for narrow, surgical relief squarely within the purview of this Court – the elimination of the unconstitutional education spending cap. *See Missouri v. Jenkins*, 495 U.S. 33, 51 (1990) (enjoining spending caps shows "a proper respect for the integrity and function of local government institutions. Especially … where, as here, those institutions are ready, willing, and—but for the operation of state law curtailing their powers—able to remedy the deprivation of constitutional rights themselves.").

ARGUMENT

I. Whether Education Is Speech and Whether a Cap on *Voluntary* Education Spending Burdens Speech Are Important Federal Questions That Have Not Been, but Should Be, Settled by This Court.

Intervenors argue that the Education Spending Cap does not violate any First Amendment rights because education is not speech and that the Campaign Finance Cases cited by Petitioners are inapplicable. These arguments illustrate why certiorari is warranted. Intervenors focus on the Tenth Circuit's statements that "education is speech, the LOB cap burdens education, therefore the LOB Cap burdens speech" and that these premises are "seriously flawed." BIO at 16. But neither the Tenth Circuit nor Intervenors ever explain why education is not speech. This case presents a foundational, compelling question that this Court ought to answer: is education speech or isn't it? And upon what basis is it possible that education is *not* speech, when "speech", as that term

has been interpreted by this Court, is the expressive communication of ideas? *See* Petition at 26-32 (discussing First Amendment cases).

The same is true for Intervenors' argument that "no court has ever recognized that a limit of public funding of education constitutes a limit on speech." (BIO at 16). This argument fails to appreciate the second step in the analysis, the nature of the government action. Here, the Spending Cap deprives Kansas citizens, including Petitioners, of the freedom to provide more information and expression to their children when the community is willing to fund it locally. Government actions restricting expression traditionally trigger heightened First Amendment scrutiny. Therefore, Petitioners' claim is not unlimited, it fits within this Court's First Amendment jurisprudence.

Intervenors also argue that the LOB cap is not a "Spending Cap" but a "taxation cap." BIO at 5 (citations omitted). But a cursory review of the applicable statutes eviscerates this argument. K.S.A. 72-6433(b) creates the LOB and states "[i]n each school year, the board of any district may adopt a local option *budget* which does not exceed the state prescribed percentage." (emphasis added). K.S.A. 72-6432, the statutory penalty provision, is similarly about expenditures: "in case a district *expends* in any school year an amount for operating expenses which exceeds its general fund budget, the state board shall determine the excess and deduct the same from amounts of general state aid payable to the district during the next school year." Neither statute limits or penalizes excess taxation. Indeed, in 1999 Kansas expressly suspended all limits on local taxation. *See* K.S.A. 79-5040. Contrary to Intervenors' unsubstantiated position, the statutes themselves clearly

establish ***on their face*** that the cap is a ***spending*** cap. Furthermore, both *Rodriguez* note 107 and *Hargrave v. Kirk*, cited therein, involved what could be called "taxation caps." 411 U.S. at 50 n. 107; *Hargrave v. Kirk*, 313 F. Supp. 944, 946 (M.D. Fla. 1970) (subsequently vacated on other grounds. *See* Petition at 4). Neither Court suggested that because those laws formally involved limitations on the state's delegation of taxing authority, they were somehow immune from constitutional challenge. Indeed, the *Hargrave* Court held the taxing cap unconstitutional for lack of any legitimate state interest.

Because the Cap is a limit on *spending*, not on *taxing*, this case does not involve a supposed "right" of some members of the community to tax their neighbors, as the BIO incorrectly asserts. Petitioners claim no such right. Rather, the Spending Cap would prevent the community from spending more on education – an expressive activity – even if every taxpayer in the district wished to do so. The Cap burdens speech because it constricts the "marketplace of ideas" and prevents local government from being responsive to local needs. *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011) is instructive on this point. There this Court stressed that the First Amendment guarantees an "uninhibited, robust and wide-open" "marketplace of ideas" so that "government may be responsive to the will of the people". *Id*. at 2828-29 (citing *NY Times Co. v. Sullivan*, 376 U.S. 254, 69 (1964)); *Id*. at 2829-30 (Kagan, J. dissenting). Kansas' Spending Cap does the opposite. It amounts to little more than a government scheme to compel silence, destroy freedom of choice in the education and rearing of children,

and limit the overall quantity of education. *See McCutcheon v. FEC*, 134 S. Ct. 1434, 1449 (2014).[4]

Further, Intervenors' "tax their neighbors" argument has no logical end. No court has suggested that free speech and associational rights are protected *only* when the speakers or associations involved enjoy unanimous support. The fact that some of Petitioners' neighbors might vote against increased local school spending is irrelevant to Plaintiffs' fundamental rights to advocate and ask for greater funding and seek a vote that, if successful, can translate their persuasive success into political action.[5]

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[4] Of course, even if the LOB Cap were a limitation on taxing authority, that would not immunize the cap from Petitioner's First Amendment challenge. "It is settled that speech can be effectively limited by the exercise of the taxing power." *Speiser v. Randall*, 357 U.S. 513, 518 (1958), citing *Grosjean v. American Press Co*., 297 U.S. 233 (1936) (treating an exercise of taxing power as a limit on speech).

[5] Intevenor's wrongly would have this Court believe that Kansas has vested all power over education in the State, as if it operates the schools under a form of central-planning. This is incorrect The people of Kansas established a *decentralized* system of public education and delegated power directly to school districts, who operate independently from the State, and are vested with statutory home rule power. Kan. Const. art 6, § 5; K.S.A. 72-8205(e). Kansas has organized itself to empower local citizens to discuss and *act* on local school needs, but the Cap interferes with that locus for the exercise of civic engagement and political liberty. *See* Kansas Bill of Rights ¶ 20; U.S. Const., amend X (reserving power to the states "or to the people"). That constitutional delegation of and reservation of power by and for the people have federal constitutional implications because petitioners' liberty interests are directly at stake. *See, e.g.*, *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) ("Federalism also protects the liberty of all persons within a State by ensuring that

Intervenors suggest that the Spending Cap does not prevent Petitioners from donating money and asking for the charity of billionaires or other private donors. (BIO at 17). But the idea that the federal Constitution protects billionaires' speech to meaningfully effect education reform through donations, while average Americans are left out in the cold, turns constitutional values on their head. Citizens, who ideologically believe in public education *and* want to express their support collectively have as much of a First Amendment interest in expressing those beliefs. Petitioners desire to spend more local money on their neighborhood, *public*, not private, schools because they wish to associate with *public* schools. It is no answer to say a private donation or a private or religious school is an equivalent proxy. This Court has long recognized that flat prohibitions of entire media of speech are not permissible. *Schneider v. New Jersey*, 308 U.S. 147 (1939). It is as though a ban on newspapers were defended by pointing out that there's always the Internet. Petitioners don't want to stop reform-minded billionaires; all they ask is that the state not chill their own grassroots reform efforts.

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laws enacted in excess of delegated government power cannot direct or control their actions").

II. *Rodriguez* Reserved This Exact Claim and Does Not Compel a Decision in Favor of Respondents; Rather, the Question of Whether a State May Cap *Voluntary* Local Education Spending Is an Important Federal Question That Has Not Been, but Should Be, Settled by This Court.

SMSD cannot spend as much money on educational services for its students as other districts can, and the Spending Cap prevents SMSD residents from making up the difference. This is the exact claim anticipated in *Rodriguez*. 411 U.S. at 50 n. 107.

Intervenors' only response is that this case is not a negative rights case, because petitioners "want to tax all of their neighbors." As previously noted, this specious argument is based on Intervenors' mischaracterization of the Spending Cap as a taxing cap.

III. Whether the Spending Cap Can Be Constitutionally Permissible When It Acts As an Obstacle to Voluntary Integration and Social Progress, As It Does in SMSD, Is an Important Federal Question That Has Not Been, but Should Be, Settled by This Court.

Intervenors seem to take the polarizing position that because Petitioners do not challenge Kansas' race-based weightings, Petitioners may not challenge *any* aspect of Kansas' unequal school finance system, and that they can only vindicate their equal protection claims based upon a reverse-discrimination argument. But Intervenors concede that the inequalities originate in the different weightings that the law assigns to minority and English Language Learner students (BIO at 10), and the unequal treatment is then locked in place by the Cap. Because the unequal treatment

is enshrined by the Cap, Petitioners are able to challenge it directly and are not limited to challenging the weightings. Petitioners are the masters of their own complaint. Indeed, that was precisely the situation in the *Rodriguez* fn. 107, in which the Court focused not on the reasons for the unequal funding but on the fact that the State of Texas first imposed unequal funding and then entrenched the unequal funding with a cap.

Petitioners come from a community that values education and diversity—and is undergoing skyrocketing voluntary integration. They have no desire to engage in a divisive race-conscious reverse discrimination lawsuit against the state based on the weightings in an attempt to improve their children's education by taking resources from minority or economically disadvantaged students. Nor do they believe that the law limits them to pursuing such a claim. Rather, Petitioners wish to act collectively with their neighbors to raise local funds to improve the education of all children, and facilitate ongoing integration. Contrary to Intervenors' bare assertion, it is irrefutable, and was stipulated by Defendant/Respondents below, that SMSD is a community undergoing voluntary integration and has seen a 116% increase in its economically disadvantaged, minority and English Language Learner populations and that the cap burdens this social progress. See 2/11/11 Agreed Stipulations of Fact, D. Kan. Case No. 2:10-cv-02661-JWL-KGG, Doc. No. 56 at 1 ¶ 4. Prominent scholars have recognized that "cross-racial alliances and social mobility" should be encouraged. *See* Sheryll Cashin, *Place Not Race: A New Vision of Opportunity in America* (2015) at xix. This case involves exactly the kind of civic self-sacrifice that the Constitution should protect. *Id*. at 103 (explaining that "civic engagement" and "strong

public schools" are "critical ingredients to making place or region an engine of opportunity.").

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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