

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**

**SUPPLEMENTAL APPENDIX TO
PETITION FOR WRIT OF CERTIORARI**

LAURENCE H. TRIBE
420 Hauser Hall
1575 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-1767

JONATHAN S. MASSEY
MASSEY & GAIL, LLP
1325 G Street, N.W., Suite
500 Washington, D.C. 20055
(202) 652-4511

TRISTAN L. DUNCAN
Counsel of Record
ZACH CHAFFEE-MCCLURE
WILLIAM F. NORTHRIP
SHOOK, HARDY & BACON L.L.P.
2555 Grand Blvd.
Kansas City, MO 64108
(816) 559-2040
tlduncan@shb.com

Counsel for Petitioners

November 17, 2015

TABLE OF CONTENTS

| | Page |
|---|---------|
| Brief of Amici Curiae Blue Valley Unified School District No. 229 and Shawnee Mission Unified School District No. 512 in <i>Petrella v. Brownback</i> , Case Nos. 13-3334 & 14-3023, filed in the United States Court of Appeals for the Tenth Circuit on April 7, 2014 | App 134 |

App 134

**SUPPLEMENTAL APPENDIX TO
PETITION FOR WRIT OF CERTIORARI**

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 13-3334, 14-3023

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

Plaintiffs-Appellants,

vs.

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

Defendants-Appellees.

Appeals From the United States District Court
For The District of Kansas
Civil Docket No. 2:10-CV-02661-JWL-KGG
The Honorable John W. Lungstrum, Senior United
States District Judge

BRIEF OF AMICI CURIAE BLUE VALLEY
UNIFIED SCHOOL DISTRICT NO. 229, AND
SHAWNEE MISSION UNIFIED SCHOOL
DISTRICT NO. 512 IN SUPPORT OF APPELLANTS
URGING REVERSAL

April 7, 2014

App 135

CHARLES W. GERMAN KS # 22305
DANIEL B. HODES KS # 24783
ROUSE HENDRICKS GERMAN MAY PC
1201 Walnut, Suite 2000
Kansas City, MO 64106
Tel: (816) 471-7700

Attorneys for Amici Curiae

TABLE OF CONTENTS

| | |
|--|----|
| INTRODUCTION AND INTEREST OF AMICUS CURIAE | 1 |
| SUMMARY OF ARGUMENT | 2 |
| ARGUMENT..... | 4 |
| A. The Kansas School Funding System Creates Greatly Unequal Outcomes | 4 |
| B. The LOB Cap Violates Equal Protection and First Amendment Rights of The Amici and Their Residents | 9 |
| 1. The LOB Cap Violates Fundamental Equal Protection Rights | 10 |
| 2. The LOB Cap Results In First Amendment Violations..... | 13 |
| C. Removing or Raising the LOB Cap Will Cause No Harm To Kansans | 16 |
| CONCLUSION | 17 |
| CERTIFICATE OF COMPLIANCE..... | 19 |
| CERTIFICATE OF SERVICE..... | 20 |

TABLE OF AUTHORITIES

CASES

| | |
|--|----------------|
| <i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)..... | 15 |
| <i>Citizens United v. FEC</i> , 558 U.S. 310 (2010) | 14, 15 |
| <i>Gannon v. State of Kansas</i> , No. 109, 2014 WL 895194 (Kan. Mar. 7,2014)..... | 3, 9, 11 |
| <i>Griswold v. Connecticut</i> , 381 U.S. 479 (1965)..... | 14 |
| <i>Keyishian v. Bd. of Regents</i> , 385 U.S. 589 (1967)..... | 14 |
| <i>McCutcheon v. FEC</i> , __ S.Ct. __, 2014 WL 1301866 (Apr. 2, 2014). | 15, 16 |
| <i>Meyer v. Nebraska</i> , 362 U.S. 390 (1923)..... | 13 |
| <i>Milliken v. Bradley</i> , 418 U.S. 717 (1974)..... | 12 |
| <i>Papasan v. Allain</i> , 478 U.S. 265 (1986)..... | 12 |
| <i>Petrella v. Brownback</i> , 697 F.3d 1285 (10th Cir. 2012)..... | 5, 9, 17 |
| <i>Republican Party of New Mexico v. King</i> , 741 F.3d 1089 (10th Cir. 2013)..... | 14 |
| <i>Riddle v. Hickenlooper</i> , 742 F.3d 922 (10th Cir. 2014)..... | 11, 12 |
| <i>San Antonio Independent School District v. Rodriguez</i> , 411 U.S. 1 (1973) | 10, 11, 12, 13 |

App 138

| | |
|---|------|
| <i>Shelton v. Tucker</i> , 364 U.S. 479 (1960)..... | 14 |
| <i>West Virginia State Bd. of Ed. v. Barnette</i> , 319 U.S. 624 (1943)..... | 14 |
| STATUTES | |
| K.S.A. 72-6405, <i>et seq.</i> | 4 |
| K.S.A. 72-6433 | 3, 5 |

INTRODUCTION AND INTEREST
OF AMICUS CURIAE¹

The Shawnee Mission School District (“SMSD”) is the 3rd largest in the state of Kansas, with over 26,000 full-time equivalent students and over 1,800 full-time equivalent teachers in 43 schools, serving a population over 72 square miles. Nearly 6% of the state’s students are educated in the Shawnee Mission School District.

The Blue Valley School District (“BVSD”) is the 4th largest in the state of Kansas, with over 21,000 full-time equivalent students and over 1,700 full-time equivalent teachers in 34 schools, serving a population over 91 square miles. Nearly 5% of the state’s students are educated in the Blue Valley School District.

The assessed valuation for the land in SMSD and BVSD exceeds \$5 billion, and thus the taxpayers in these two districts alone account for 15% of the property valuation in the entire state of Kansas. Nonetheless, each of the school districts sits in the *bottom* 15% of available per-pupil operational budgeting even after taking full advantage of the (wrongfully capped) local option budget (the “LOB”). Because of the number of students for whom the districts are responsible, issues relating to school funding are of paramount importance to SMSD and BVSD.

Because SMSD and BVSD depend heavily upon the LOB in funding education for the students in their districts, and because the Kansas funding formula

¹ All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than Amicus Curiae or its counsel made a monetary contribution intended to fund its preparation or submission.

discriminates against these districts and constrains their ability to use the LOB to achieve *equality*, this brief supports the arguments championed by the Appellants in this case, the *Petrella* plaintiffs. Specifically, SMSD and BVSD support that any LOB Cap must be considered under strict scrutiny review, and that the LOB Cap may not be used to promote inequality of funding nor to restrict the First Amendment rights of the students and their families.

SUMMARY OF ARGUMENT

ALL ANIMALS ARE EQUAL BUT SOME
ANIMALS ARE MORE EQUAL THAN
OTHERS.

George Orwell, *Animal Farm*

The residents in SMSD and BVSD account for 15% of the total assessed property valuation in Kansas. Yet once the uniform mill levy is collected, and sent along with a portion of sales and income taxes to the general state fund for education, it is redistributed pursuant to a formula that has consistently resulted in the districts receiving a far lower amount of “state financial aid” for education compared to their peers. Consequently, BVSD and SMSD are underfunded on a per-pupil basis as against the other school districts in Kansas. While parents and taxpayers in the school districts are funding suitable education *elsewhere*, SMSD and BVSD are thus unable to provide equal opportunities for their children.

To make matters worse, this inequality is ensured by a statutory cap on the LOB, codified at K.S.A. 72-6433. While districts may adopt a LOB to supplement education funding, such spending may not exceed 31% of the district’s entitlement to state financial aid. Because of the complex formula by which state

financial aid for education is dispensed, BVSD and SMSD understand that it is almost necessarily true that some districts will receive more state financial aid dollars than others. And yet, because the LOB is capped *as a percentage of the already-unequal state financial aid allocation*, it precludes SMSD and BVSD from attempting to achieve equality in funding even where it is clear that citizens in these school districts would support higher *local* taxes for *local* education.

The Kansas Supreme Court's recent decision in *Gannon v. State of Kansas*, No. 109,335, 2014 WL 895194 (Kan. Mar. 7, 2014) – a decision not available to the district court in this case – does not cure the inherent inequality, and nor does the legislative response to *Gannon* announced on April 7, 2014. The *Gannon* opinion's focus on "equity" for school districts with lower property valuation does nothing for districts like BVSD and SMSD, whose residents' property, income and sales tax contribution is redistributed in Topeka, and who are barred from raising further funds by the LOB Cap. Indeed, the fact that SMSD and BVSD may be "property-wealthy" has no bearing on whether education funding is sufficient; rather, it *emphasizes* the Orwellian result that SMSD and BVSD are *precluded* from achieving equality with rural and urban districts alike in spending per pupil, and, are therefore "revenue-poor" when it comes to public education.

Indeed, even while trumpeting purported equality, the Kansas funding formula (and specifically the LOB Cap) instead places limitations and burdens on the equal protection as well as First Amendment rights of SMSD and BVSD and their citizens. It is for these reasons that SMSD and BVSD support the Appellants' position that the LOB Cap must be subjected to strict

scrutiny. When analyzed under the correct standard, it will be clear that there is no compelling state interest served by the LOB Cap. The district court applied erroneously a less exacting standard of review, and thus erred in holding that the *Petrella* plaintiffs had not shown a likelihood of success on the merits. SMSD and BVSD submit that the district court's order denying preliminary injunctive relief should be reversed.

ARGUMENT

A. The Kansas School Funding System Creates Greatly Unequal Outcomes

School funding has been a contentious issue in Kansas for roughly the last half-century. The issue intensified in 1992 with the passage of the School District Finance and Quality Performance Act, K.S.A. 72-6405 *et seq.* (the "SDFQPA" or "Act"). The Act's new formula established a two-pronged system of statewide support for education (via "State Financial Aid" and "Local Effort"). The system is funded by a uniform mill levy on all districts (as well as certain sales and income taxes), and small districts are aided via a low-enrollment weighting mechanism. The consequent reduction in funds to larger districts, such as SMSD and BVSD, was purportedly to be addressed by a supplemental local option budget ("LOB"), but spending via the LOB was limited to no more than 25% of a district's general fund allocation. Districts such as SMSD and BVSD were therefore precluded from raising and then spending more than 25% of the general fund budget. The LOB Cap has been raised on occasion, and now sits at 31%. K.S.A.72-6433 (a)-(b); *see also Petrella v. Brownback*, 695 F.3d 1285, 1290-91 (10th Cir. 2012). Raising the LOB Cap to 33%, as contemplated in the legislative response to *Gannon*,

may be of minor help but will not approach what is actually needed by the districts.

Meanwhile, the SMSD and BVSD's general state financial aid assessments have been flat to decreasing over the last several years on an inflation-*unadjusted* basis – which also limits their ability to raise money via a LOB directly tied to the amount of general state aid.² Of the 283 districts that received “General State Aid” in 2012-13, SMSD received \$2,972.58 per pupil – less than all but 14 districts. BVSD received \$3,067.02 per pupil – 265th out of 283. Exhibits at 1-6 (“General State Aid for Kansas USDs 2012-13,” available at <http://www.ksde.org>). By contrast, large districts such as Kansas City (\$5,674.37) and Dodge City (\$5,816.01) received nearly twice the General State Aid per pupil as SMSD/BVSD, and districts such as Doniphan and Elk Valley received over \$8,000 per pupil. *Id.*

SMSD and BVSD's relative position does not improve when the total available operational budget per-pupil is considered following addition of LOB. For 2012-13, BVSD (\$7,361.02) and SMSD (\$7,036.36) ranked in the bottom 15% of districts by this metric, once again well behind Kansas City (\$8,694.23) and Dodge City (\$8,803.35). See Exhibits at 11-18 (“FY13 Legal Max,” provided by BVSD).³ In raw terms, in

² On an *adjusted* basis, base and unrestricted state financial aid to schools statewide has dropped by over 20% over the last ten years alone. See Exhibits at 8 (*Tallman Education Report*, available at <http://tallmankasb.blogspot.com>).

³ Thus, when Appellants analyze *Total Expenditures* per Pupil and find that SMSD is in the bottom third, they are dramatically *understating* the level of discrimination that SMSD and BVSD are suffering. Because operational dollars include only instructional spending and other operating costs, and exclude adult education, capital and debt expenditures, those operational

2013, BVSD was only allowed to spend \$155 million on operations to educate *over 21,000* students, while Kansas City had \$167 million available to educate *under 19,000* students. *Id.* This is strikingly unequal. In order that the Amici districts could equalize just to what their neighbors in Kansas City are allowed to spend from an operational standpoint, the new LOB Cap would have to be raised to 50.11% for BVSD and 55.44% for SMSD. *See* Exhibits at 19 (“FY13 Legal Max”(2), provided by BVSD).⁴

The results of this inequality have been distressing for SMSD and BVSD. And because these areas boast the highest cost-of-living in the State of Kansas, the results of lower funding are even more pronounced. Since 2009, SMSD has been forced to reduce its budget by nearly \$30 million, eliminated over 250 teachers, and closed four schools. SMSD also reduced funding for and/or eliminated everything from elementary school debate and string programs to middle school intramurals to high school language and biomedical programs, nor increased fees for all-day kindergarten and a new “activity participation fee.” *See* Exhibits at 20-24 (SMSD Budget Reduction Summaries, available at <http://smsd.org>).

During the same time period, BVSD was forced to cut or reallocate well over \$10 million from its budget, and laid off 10 teachers in addition to staff attrition. BVSD was also forced to eliminate specialist, IT and

dollars are the single most important metric by which a child’s educational opportunity can be measured.

⁴ Additionally, as detailed in that same spreadsheet (Exhibits at 19), the disparity only widens when one considers the \$16.5 million in federal education funds received by Kansas City, as compared to under \$1 million for BVSD and \$5.4 million for SMSD.

custodial positions, among others, and reduce various technology expenses, while increasing learning resource fees, activity participation fees, and facility rental fees. See Exhibits at 25-28 (BVSD Budget Reduction Summaries, provided by BVSD).

At the same time, student-teacher ratios (and class sizes) are increasing each year, in direct contrast to other districts that are favored by the inequitable system. At this stage, for example, BVSD will not add a kindergarten teacher until the ratio exceeds 24/1, and will not add a middle school teacher until the ratio exceeds 31/1. This is an inexorable, and most damaging, result when spending is wrongfully capped while nearly 90% of a district budget goes to salaries and benefits. At a time when more students need more resources—that the citizens would support and pay for—the LOB Cap prevents SMSD and BVSD from meeting the needs of their students in the best possible manner, or even achieving equality with other Kansas school districts in operational spending.

These cuts, staff reductions and class size increases would have likely been avoidable had the districts been able to raise and spend more in LOB to approach funding equity with surrounding districts such as Kansas City. And there can be no doubt that the residents of SMSD and BVSD districts would support such an effort. Since 1998, the voters in the BVSD have voted three times in favor of money to purchase and improve schools, facilities, and technology, and the *smallest* Yes percentage was 57%. (And in 2006, over 62% of BVSD voters approved a LOB increase). Similarly, SMSD voters approved the last two education funding referenda by *over a 2-to-1 margin*, and also by a comfortable margin raised the LOB in

2007. Exhibits at 29-32, 40-43 (School Districts Voting History, available at <http://jocoelection.org>).

Given the current statutory scheme, LOB spending is the only way meaningfully to address these problems. As a matter of statute, BVSD and SMSD cannot turn to bond monies to fund operations; and what little other existent funds (or donations) that could conceivably be reallocated to operational expenses do not provide a sustainable solution. Only the LOB is targeted towards classroom learning, and only an increase in (or removal of) the cap can suffice.

Finally, in response to the recent decision in *Gannon*, the Kansas Legislature has proposed certain “fixes” as of the date of this brief that could yet exacerbate the discrimination faced by SMSD and BVSD (along with a very minor LOB Cap increase). These “fixes” may deepen the conflict between the “equity” principles in *Gannon* and the First Amendment and Equal Protection rights of the districts’ citizens. As a state legislator candidly recognized, the “fixes” are simply “moving it from Peter’s pot to put in Paul’s pot.” See Exhibits at 48 (Wichita Eagle editorial: “Keep Funding Fix Simple,” April 3, 2014).

This Court has already recognized the quandary in which these property-wealthy but revenue-poor districts find themselves. Specifically, the LOB Cap results in unequal treatment, “(manifested in, among other things, lower per-pupil funding) that prevented them from even attempting to level the playing field.” *Petrella*, 697 F.3d at 1295. It is this unequal treatment that violates the rights of the districts and their citizens and students.

B. The LOB Cap Violates Equal Protection and First Amendment Rights of The Amici and Their Residents

SMSD and BVSD support the legal arguments made by the Petrella plaintiffs for reversing the district court and finding that strict scrutiny must apply to the LOB Cap on local spending. As not to restate those arguments here, SMSD and BVSD want to emphasize two points: first, that the inequality inherent in the SDFQPA and the LOB Cap is characteristic of an equal protection violation; and second, that the First Amendment rights of the SMSD and BVSD patrons – students and their families – are violated by the LOB Cap.

1. The LOB Cap Violates Fundamental Equal Protection Rights

There is no dispute that pursuant to the SDFQPA funding scheme, the State of Kansas unequally funds public schools. Nor can it be disputed that SMSD and BVSD are near the bottom of the list in terms of receiving state financial aid, and only through a maximum-allowable-by-law Local Effort do they even reach a per-pupil operational number that is less than what is available to than over 80% of their peers. Yet, the LOB Cap functions to preclude these districts from even attempting to seek equality. This requires a strict scrutiny review under the Equal Protection Clause of the Fourteenth Amendment, because the rights of parents and children to pursue knowledge and be treated equitably are fundamental.

The district court understood this discrimination to exist, but held that “a state *may* ... discriminate against wealthier districts if the measure is rationally related to a legitimate purpose.” Aplt. Appx. 3592

(emphasis in original). But this rationality review cannot be countenanced under the Fourteenth Amendment where fundamental rights are impacted by the discrimination. Indeed, in the case relied upon by the district court, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 50 n.107 (1973), the Supreme Court anticipated this issue and noted that Texas had adopted a similar spending cap, but declined to address its constitutionality because, *inter alia*, plaintiffs there – like the *Gannon* plaintiffs in Kansas – sought more money from the state (e.g., a “positive right”). At least three justices in *Rodriguez* recognized, however, that the spending cap would likely violate the Equal Protection Clause because it eliminated the plaintiffs’ ability to obtain equal funding for their schools. *See id.* at 67, 69-70 (White, J. dissenting).⁵

Similarly, this Court recently held in *Riddle v. Hickenlooper* that a Colorado spending cap that resulted in political contributors being allowed to donate more to major-party candidates rather than write-in candidates violated the Equal Protection Clause, as applied, and granted summary judgment to the Plaintiff-contributors. 742 F.3d 922 (10th Cir. 2014). Judge Gorsuch’s thoughtful concurrence in *Riddle* details the challenged contribution cap scheme in a manner parallel to the challenged education cap

⁵ For this reason and others described in Appellants’ Brief, SMSD and BVSD do not believe that *Rodriguez* is the correct line of precedent for the constitutional law analysis. The district court’s opinion ignores the positive vs. negative-right distinction, and also incorrectly considers (and indeed, embraces) the uncontroverted fact that the Kansas scheme provides unequal, lower funding to the undersigned districts and then precludes their voters from exercising their fundamental rights to equalize such funding.

system in this case.⁶ The same result should obtain here when the LOB Cap is analyzed.

Rodriguez and other Supreme Court cases have further recognized the paramount importance of local control within individual school districts, and the rights of parents to provide more “knowledge” to their children beyond what the State is willing to provide. *See Rodriguez*, 411 U.S. at 49 (noting that the “merit of local control” for public education was universally affirmed by the Court, and that it is “vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well”); *Milliken v. Bradley*, 418 U.S. 717, 741 (1974) (“No single tradition in public education is more deeply rooted than local control over the operation of schools”); *see also Papasan v. Allain*, 478 U.S. 265, 287-88 (1986) (“funding disparities based on differing [naturally occurring] local wealth...are a necessary adjunct of allowing meaningful local control over school funding,” specifically where the variations were traceable to “school district funds available from local real estate taxation, not to a state decision to divide state resources unequally...”). For this reason, the *Rodriguez* court explicitly held that “[i]n part, local control means ... the freedom to devote more money to the education of one’s children.” *Rodriguez*, 411 U.S. at 49.

⁶ 742 F.3d at 932, 933 (Gorsuch, J. concurring) (emphasis in original) (“there is something distinct, different, and more problematic afoot when the government *selectively* infringes on a fundamental right,” and that “the only reason I can imagine for Colorado’s challenged regulatory scheme is a bald desire to help major party candidates at the expense of minor party candidates. Whether that rationale could save Colorado’s scheme seems to me highly doubtful.”).

The inability of SMSD and BVSD to provide such opportunities – or *even the same opportunities* as other districts – due to a state-mandated funding inequality must be strictly scrutinized. The Fourteenth Amendment protects “the power of parents to control the education of their own.” *Meyer v. Nebraska*, 362 U.S. 390, 401 (1923). This fundamental right to educate one’s children is infringed when their school districts cannot provide educational opportunities equal to other school districts due to the Kansas funding scheme. The fundamental rights of these districts’ residents as to property, association, and voting are also infringed by the unconstitutional funding scheme. SMSD and BVSD urge that these equal protection violations be reviewed under strict scrutiny, which virtually compels the conclusion that the *Petrella* plaintiffs have shown a likelihood of success on the merits, which in turn means that a preliminary injunction should have been issued.⁷

2. The LOB Cap Results In First Amendment Violations.

The LOB Cap and the funding scheme also restrict the First Amendment rights of SMSD’s and BVSD’s patrons and taxpayers. These districts provide education to children starting at age 5, and there can be no argument that the actions that go on in their classrooms are protected First Amendment activities. *See, e.g., Keyishian v. Bd. of Regents*, 385 U.S. 589, 603

⁷ The district court also read the *Meyer* line of precedent far too narrowly (Aplt. Appx. 3580-81) and then concluded erroneously that the *Petrella* plaintiffs were seeking the right to “control all aspects” of the funding system for education. *Id.* The district court should instead have recognized plaintiffs sought the traditional fundamental rights described in *Meyer*, et al., and then applied strict scrutiny.

(1967) (“The classroom is peculiarly the ‘marketplace of ideas’”); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) (“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”); *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 637 (1943) (“That [Boards of Education] are educating the young for citizenship is reason for scrupulous protection of Constitutional [First Amendment] freedoms of the individual”). Thus, when Kansas law denies citizens the right to fund their school districts to provide a particular amount of education, such action “contract[s] the spectrum of available knowledge” in violation of the First Amendment. See *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

The issue of money-as-speech has, of course, recently become more prevalent in the campaign finance realm, with the Supreme Court’s recent series of rulings that restrictions on funding political speech violate a fundamental right. See *Citizens United v. FEC*, 558 U.S. 310, 350 (2010) (“The rule that political speech cannot be limited based on a speaker’s wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker’s identity.”); see also *Republican Party of New Mexico v. King*, 741 F.3d 1089, 1092 (10th Cir. 2013) (affirming preliminary injunction against spending cap as violative of First Amendment: “restrictions on money spent on speech are the equivalent of restrictions on speech itself”) (citing *Buckley v. Valeo*, 424 U.S. 1, 19 (1976)). Indeed, “[t]o require one person to contribute at lower levels than others ... is to impose a special burden on broader participation in the democratic process.” *McCutcheon v. FEC*, __ S.Ct. __, 2014 WL 1301866, at *13 (Apr. 2, 2014) (invalidating aggregate limits on

how much money a donor may contribute to all candidates or committees).

Where the government “seeks to use its full power...to command where a person may get his or her information, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.” *Citizens United*, 558 U.S. at 356. Here, the Kansas government seeks to control *how much* information students may get from their public schools, and refuses to allow SMSD, BVSD and their taxpayers and parents to expand that flow of information. That state statutory suppression violates the First Amendment.

It is further notable that SMSD and BVSD have a large population that currently attends local private and parochial schools, and yet Kansas permits unlimited voluntary spending on such forms of education. Indeed, between 2000 and 2010, the percentage of school-age population within the SMSD enrolled in public schools dropped from 82.47% to 79.67%. Exhibits at 53 (“Demographics and Enrollment Projection Study,” February 2014, at 163, available at <http://smsd.org>). This is a double whammy because it dramatically reduces state financial aid to the districts, and represents further evidence that while certain types of speech are not being burdened (and are in fact enhanced), the speech fostered by SMSD and BVSD is so burdened, in violation of the First Amendment.

“If the First Amendment protects flag burning, funeral protests, and Nazi parades – despite the profound offense such spectacles cause – it surely must protect political campaign speech despite popular opposition.” *McCutcheon*, 2014 WL 1301866, at *5. It surely must also protect the right of parents to spend

their own money to provide access to better public education. The district court refused to recognize these First Amendment rights, and that decision must be reversed.

C. Removing or Raising the LOB Cap Will Cause No Harm To Kansans

The Appellees will argue, as they have consistently, that the Act and the LOB Cap are designed to ensure that “funds spent on education are spent equitably across the state,” and that removing the LOB Cap would fail to “maintain equity” and “prevent other districts from competing for teachers, staff and students.” But this theoretical straw man ignores the *actual* Orwellian reality: in attempting to make all school districts equal, the LOB Cap functions only to make some school districts more equal than others.

Accordingly, any such arguments from the State must be rejected, because SMSD and BVSD neither seek nor expect a world where they can “prevent other districts from competing for teachers, staff and students.” Further, the Appellees’ argument is, of course, negated by the fact that the *neighboring* district to SMSD, Kansas City, currently expends nearly 20% more per pupil than SMSD is permitted to, and that these expenditures can go towards teachers and staff in an area with a *lower cost of living*. As this Court recognized in the prior appeal, these districts and the *Petrella* plaintiffs simply want to “attempt to level the playing field” in those regards. *Petrella*, 697 F.3d at 1295. This is not a quest for “wealth-based funding.” Instead, SMSD and BVSD want the equality to which they are entitled, and the ability to deliver a quality education just as other districts do. At a minimum, the students in these districts deserve at least that much.

App 154

CONCLUSION

All school districts should be allowed – indeed, encouraged – to pursue excellence for their students, and the LOB Cap must be strictly scrutinized where it stands in the way and conflicts with First Amendment freedoms. Strict scrutiny review will show that there is no compelling state interest served by the LOB Cap, and that garnering equality in education as argued by the State – a result *negated* in actuality by the cap – can be accomplished by less restrictive means. This Court should reverse the holding of the district court and direct the entry of a preliminary injunction, because the *Petrella* plaintiffs have shown a high likelihood of success.

Dated: April 7, 2014

Respectfully submitted,

/s/ Charles W. German

Charles W. German

KS # 22305

Daniel B. Hodes

KS # 24783

ROUSE HENDRICKS GERMAN MAY PC

1010 Walnut St., Ste. 400

Kansas City, MO 64106

(816) 471-7700 (Telephone)

(816) 471-2221 (Telecopy)

Counsel for Amici Curiae Blue Valley Unified

School District No. 229, and Shawnee Mission

Unified School District No. 512

App 155

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d), because it contains 4,665 words, as determined by Microsoft Word 2010, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: April 7, 2014

ROUSE HENDRICKS GERMAN MAY PC

By: /s/ Daniel B. Hodes
Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

Per the Court's March 18, 2009 General Order regarding ECF procedure, the undersigned certifies as follows:

- (1) All required privacy redactions have been made;
- (2) The ECF submission is an exact copy of the hard copies of this filing that are being submitted to the Court;
- (3) This ECF submission was scanned for viruses and is free of viruses.

Dated: April 7, 2014

ROUSE HENDRICKS GERMAN MAY PC

By: /s/ Daniel B. Hodes
Counsel for Amici Curiae

App 156

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2014, I caused the foregoing to be filed with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by ECF, which will provide notice to all counsel of record in this matter.

Dated: April 7, 2014

ROUSE HENDRICKS GERMAN MAY PC

By: /s/ Daniel B. Hodes
Counsel for Amici Curiae