No. _____

In The Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state, consistent with the First Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment, may adopt an education spending cap limiting the total amount of money that local public school districts may spend on education, in order to prevent parents and citizens from voluntarily increasing local funding to improve their children's access to knowledge.

PARTIES TO THE PROCEEDING

Petitioners are students and parents of students in Shawnee Mission Unified School District No. 512 ("SMSD"). Respondents who were Defendants below are the Governor of Kansas, the State's Attorney General, its Treasurer, and various State officers responsible for enforcing the school finance law. Respondents who were Intervenors below are students and parents of students in Kansas City Unified School District No. 500, Dodge City Unified School District No. 443, Hutchinson Unified School District No. 308, and Wichita Unified School District No. 259. Blue Valley Unified School District No. 229 and Shawnee Mission Unified School District No. 512 filed Amicus Curiae Briefs in the Tenth Circuit on behalf of Petitioners.

Petitioners who were Plaintiffs below are Diane Petrella, next friend and guardian of minor N.P., minor C.P.; Nick Petrella, next friend and guardian of minor N.P., minor C.P.; Michelle Trouve, next friend and guardian of minor J.T., minor Z.T., minor N.T.; Marc Trouve, next friend and guardian of minor J.T., minor Z.T., minor N.T.; Meredith Bihuniak, next friend and guardian of minor S.B., minor O.B., minor A.B., minor E.B.; Chris Bihuniak, next friend and guardian of minor S.B., minor O.B., minor A.B., minor E.B.; Mike Washburn, next friend and guardian of minor A.W., minor R.W.; Laurence Florens, next friend and guardian of minor A.W., minor R.W.; Paul Erdner, next friend and guardian of minor M.E.,

PARTIES TO THE PROCEEDING – Continued

minor A.E.; Julie Erdner, next friend and guardian of minor M.E., minor A.E.; Christophe Sailly, next friend and guardian of minor E.S., minor N.S.; Catalina Sailly, next friend and guardian of minor E.S., minor N.S.; John Webb Roberts, next friend and guardian of minor M.C.R., minor W.C.R.; Terre Manne, next friend and guardian of minor C.J.M.; Alison Barnes Martin, next friend and guardian of minor C.O.M., minor C.E.M.; Kurt Kuhnke, next friend and guardian of minor A.K.; Lisa Kuhnke, next friend and guardian of minor A.K.

Respondents who were Defendants below are Sam Brownback, Governor of Kansas, in his official capacity; Derek Schmidt, Kansas Attorney General, in his official capacity; Ron Estes, Kansas State Treasurer, in his official capacity; Randy Watson in his official capacity as Kansas Commissioner of Education; Jim McNiece in his official capacity as Chair of the Kansas State Board of Education; Janet Waugh in her official capacity as a member of the State Board of Education; Steve Roberts in his official capacity as a member of the State Board of Education; John W. Bacon in his official capacity as a member of the State Board of Education; Carolyn L. Wims-Campbell in her official capacity as a member of the State Board of Education; Sally Cauble in her official capacity as a member of the State Board of Education; Deena Horst in her official capacity as a member of the State Board of Education; Kenneth

PARTIES TO THE PROCEEDING – Continued

Willard in his official capacity as a member of the State Board of Education; Kathy Busch in her official capacity as a member of the State Board of Education; and Jim Porter in his official capacity as a member of the State Board of Education.

Intervenors-Respondents below were Evette Hawthorne-Crosby, next friend and guardian of minor B.C.; Joy Holmes, next friend and guardian of minor J.H.; Jim Holmes, next friend and guardian of minor J.H.; Jennifer Kennedy, next friend and guardian of minor O.K.; George Mendez, next friend and guardian of minor G.M.; Eva Herrera, next friend and guardian of minor D.H., minor G.H., minor K.H.; Monica Mendez, next friend and guardian of minor G.M.; Ramon Murguia, next friend and guardian of minor A.M.; Sally Murguia, next friend and guardian of minor A.M.; Ivy Newton, next friend and guardian of minor L.N.; Matt Newton, next friend and guardian of minor L.N.; Schelena Oakman, next friend and guardian of minor C.O.; Clara Osborne, next friend and guardian of minor N.W.; Misty Seeber, next friend and guardian of minor A.S., minor B.S.; David Seeber, next friend and guardian of minor A.S., minor B.S.; John Cain, next friend and guardian of minor L.C.; Becky Cain, next friend and guardian of minor L.C.; Meredith Gannon, next friend and guardian of minor L.G., minor A.G., minor G.G.; Jeff Gannon, next friend and guardian of minor L.G., minor A.G., minor G.G.; Andrea Burgess, next friend and guardian

PARTIES TO THE PROCEEDING – Continued

of minor J.B.; Martha Pint, next friend and guardian of minor C.P.; Darrin Cox, next friend and guardian of minor J.C.; Lois Cox, next friend and guardian of minor J.C.; Danie Eldredge, next friend and guardian of minor A.E.; Josh Eldredge, next friend and guardian of minor A.E.; Glenn Owen, next friend and guardian of minor A.O.; Ryan Rank, next friend and guardian of minor M.R.; Beulah Walker, next friend and guardian of minor Q.W.; Bianca Alvarez, next friend and guardian of minor M.A.; Norma Del Real, next friend and guardian of minor P.D., minor V.D.; Adriana Figueroa, next friend and guardian of minor T.F.; Rebecca Fralick, next friend and guardian of minor M.S.; Consuelo Treto, next friend and guardian of minor A.T.; Melissa Bynum, next friend and guardian of minor T.B.; Bryant Crosby, next friend and guardian of minor B.C.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 787 F.3d 1242. App. 1. A prior opinion from the court of appeals holding Petitioners had standing to pursue their claims is reported at 697 F.3d 1285. App. 97. The district court's order granting Respondents' motion to dismiss and denying Petitioners' motion for preliminary injunction is reported at 980 F. Supp. 2d 1293. App. 54.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 2015. A petition for rehearing was denied on June 29, 2015. App. 122. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I

> Congress shall make no law . . . abridging the freedom of speech.

U.S. Const. amend. XIV, sec. 1, cl. 3, 4

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 12 of Kansas S.B. 7 provides:

> For school year 2015-2016 and school year 2016-2017, the board of any school district may adopt a local option budget ***which does not exceed the greater of***: (1) The local option budget adopted by such school district for school year 2014-2015 pursuant to K.S.A. 72-6433, prior to its repeal; or (2) the local option budget such school district would have adopted for school year 2015-2016 pursuant to K.S.A. 72-6433, prior to its repeal.

Kan. Reg. 274, § 12(a).

The now repealed K.S.A. 72-6433, which is incorporated into Section 12 of Kansas S.B. 7 (above) provides (in pertinent part):

> (a) As used in this section:
>
> > (1) "State prescribed percentage" means 33% of state financial aid of the district in the current school year.

. . .

(b) In each school year, the board of any district may adopt a local option budget which ***does not exceed the state prescribed percentage***.

INTRODUCTION

This case presents an opportunity for the Court to address an important question expressly left open in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973): whether the Constitution permits a state to enforce an education spending cap limiting the total amount of money that local public school districts may expend on education from the sums those districts are permitted by state law to raise by local taxation, even when the state distributes funding to public school districts on an unequal basis and local efforts to provide additional funding are necessary to overcome that state-imposed inequality and thereby more closely approximate parity among school districts. Here, Kansas seeks affirmatively to limit and restrict educational opportunities by imposing an education spending cap, in the name of "fairness" and "equity," labels it employs to describe not equality of *opportunity* but equality of *results*. The Tenth Circuit thereby held that the First Amendment and the Equal Protection and Due Process Clauses permit the state deliberately to handicap and purposefully disadvantage some school children in order to advantage others by comparison.

In *Rodriguez*, this Court had before it an equal protection challenge to a Texas school finance law that similarly included an education spending cap, one which would have made it impossible for the plaintiffs to bring their spending up to the level of other, better funded school districts. Writing in dissent, Justice White, joined by Justices Douglas and Brennan, argued that this Cap amounted to a violation of equal protection. *Id*. at 65-68 (dissenting opinion). The majority acknowledged that Justice White's analysis might indeed present a valid equal protection challenge, but it opined that the issue was not ripe because the parties in that case did not claim that the ceiling barred any desired tax increases. *Id.* at 53 n. 107 (citing *Hargrave v. Kirk*, 313 F. Supp. 944 (M.D. Fla.1970), *vacated on other grounds*, 401 U.S. 476, 91 S. Ct. 856, 28 L.Ed.2d 196 (1971)). The *Rodriguez* Court indicated the question would be reserved for another day, when it was ripe for review.

That day has come. In the 42 years since *Rodriguez*, the constitutionality of education spending caps has evaded judicial review. This case, however, presents in fully ripe form the very question reserved in *Rodriguez*: Kansas distributes funding unequally among its school districts and then utilizes an education spending cap to prevent districts that receive less state funds from voluntarily spending more of their lawfully raised local funds to narrow the gap between them and better-funded districts. Although the Shawnee Mission School District ("SMSD") receives less per pupil than comparable school districts in

Kansas, and as a result faces a budgetary crisis, the state's Education Spending Cap flatly prohibits it from making up part of the difference by spending more of its locally raised funds on classroom instruction, even though its citizens are willing and able to raise those additional resources and dedicate them to the education of the district's children. The Tenth Circuit rejected the constitutional challenges of SMSD parents and students to this perverse form of reverse equalization.

In a nation founded on liberty, self-governance, equal opportunity, and local initiative, it is perhaps surprising that any state would prohibit local citizens from banding together to improve their public schools through collective civic action at no cost to the citizens of other localities in the State and without harm to their children. But Kansas strangely does just that. Its citizens are free to spend unlimited amounts of their money on junk food, video games, and other threats to the best interest of their children, but are barred by the state from acting collectively to increase local spending to improve their local schools. The Cap literally handicaps some children wrongly perceived as "advantaged" in order to achieve state-wide mediocrity.

What makes this case extraordinary is that it does not call on this Court to set a school funding *floor* to dictate the minimum amount of funding required of any level of government to provide an adequate education. Instead, this case involves a government-imposed *ceiling* – an education spending

cap, akin to the spending caps governments sometimes set on campaign funding. What makes this case even more extraordinary is that, in the face of the state's budgetary crisis and an increasingly socioeconomically diverse student population in SMSD, this case does not involve a request that the state alter its property or other taxes, allocate more of the revenue raised by the state toward unmet educational needs, or divert resources from some districts to others. It does not involve passing the buck, political paralysis or White Flight. Rather, it involves a community of citizens ready, willing, and able to engage in civic self-sacrifice for the betterment of their community's school children's educational needs and to help integrate an increasingly diverse student population voluntarily. But the State of Kansas stops them cold and prohibits that collective democratic action.

The constitutionality of State imposed barriers to voluntary local education spending is a question of overwhelming constitutional importance that warrants this Court's review now that it has, at long last, been ripely presented. At a time when public schools across the nation are wrestling with dramatic budget cuts and are searching for ways to increase funding and fulfill the promise of *Brown v. Board of Education*, it is nothing less than amazing that any state would inhibit its people from doing just that.

Review is also warranted to ensure doctrinal coherence between the Court's evolving jurisprudence on speech-related spending caps, including both spending caps on election campaigns and spending

caps on education. In the 42 years since *Rodriguez*, the Court has addressed spending caps on political speech, and has held that such caps violate the First Amendment, and cannot be justified by any "leveling" theory – either a theory as perverse as that adopted by Kansas (where the local spending that the state seeks to prohibit is itself designed to offset a gap in the state's own provision of state funding) or a theory that simply seeks to limit the spending of some citizens in order to prevent them from enlarging their expressive opportunities as compared with those of others. But this Court has not had the opportunity to consider whether spending caps on education, a particularly valuable form of speech (*see 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")), similarly offend the First Amendment.[1]

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[1] This case does not implicate the authority of the state or its subdivisions, unhindered by the First Amendment, to choose what statements to make and what views to express in the state's name. *Contrast, e.g.*, *Walker v. Tx. Div., Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239 (2015). Although the speech that the state's cap abridges reaches children through their public schools and their teachers as public employees and is in that sense not classically private, the constitutional principles that treat pure "government speech" as not subject to the Free Speech Clause of the First Amendment are therefore inapposite here. In any event, the question presented by this case is one that arises under the Equal Protection and Due Process Clauses of the Fourteenth Amendment and not solely under the Free Speech Clause.

Thus, the significant constitutional question presented is whether the reserved question from *Rodriguez* permits application of deferential rationality review as employed by the court below or instead demands application of strict scrutiny either under this Court's recent First Amendment jurisprudence or under the related *Meyer v. Nebraska* and *Pierce v. Society of Sisters* line of precedent recognizing the fundamental character of parents' rights to direct the upbringing of their children, at least in the educational realm. Indeed, Justice Kennedy has observed that, had *Meyer* and *Pierce* been decided in recent times, they might have been better resolved under the First Amendment. This case accordingly presents a welcome opportunity to bring much needed doctrinal coherence to constitutional jurisprudence as it pertains to state limits on spending to advance expressive aims.

STATEMENT OF THE CASE

I. The School District Finance and Quality Performance Act.

Kansas allocates some of the lowest funding in the State to the Petitioners' school district, the Shawnee Mission School District ("SMSD"). Then, through the use of an education spending cap, it perversely prohibits citizens within SMSD from using additional local spending to support their schools with revenues SMSD raises under the taxing power delegated to it

by the people of Kansas. The resulting oppressive ceiling in funding not only deprives SMSD's schoolchildren of the benefits their parents opt to direct toward their education but also prevents their parents from redressing the gross disparity in funding that leaves them without the educational benefits received by schoolchildren in other Kansas school districts (which are funded by the state at higher levels).

Local school districts may adopt a "Local Option Budget" ("LOB") to supplement the financing received from the state. School districts may tax property within the district to raise funds for the LOB. In Kansas, there are no caps on *taxing* authority. K.S.A. 79-5040. But the amount of LOB *spending* is capped, and expenditures above the Cap are penalized dollar for dollar. In short, Kansas law imposes a ceiling on local spending on public education, even if the people themselves are willing to spend on such education more of the funds Kansas law permits them to raise through local taxation. In effect, Kansas tells these parents that they can raise more money as long as they spend it on anything *but* educating their children. Nothing in Kansas law would prevent local parents from devoting these tax revenues to burning schoolbooks for fuel, but the Spending Cap prevents them from using the same revenues to teach their children how to read those same schoolbooks.

Because of the Spending Cap, SMSD faces a state-created funding crisis, which has forced it to

lay off hundreds of teachers, slash programs, increase class sizes, and close neighborhood schools. At the same time, SMSD's minority and English Language Learner student populations have skyrocketed, with a 116% increase. SMSD has the resources to devote towards its schools, but the State prohibits its citizens from *using* those resources to improve their children's education and to facilitate a more ethnically diverse neighborhood. The citizens within SMSD have shown a consistent willingness to increase local spending to support public schools. However, Kansas law prohibits this local self-help.

A. State Financial Aid.

Kansas's Education Spending Cap originated in the School District Finance and Quality Performance Act ("SDFQPA"), which was first enacted in 1992. Under the SDFQPA, the State distributed "State Financial Aid" – the amount of base level funding to which each school district was entitled – pursuant to a complex formula that allocated different levels of funding per pupil by counting some pupils as more than one pupil. *See Gannon v. Kansas*, 319 P.3d 1196 (Kan. 2014). State Financial Aid was calculated by multiplying the "Base State Aid Per Pupil" ("BSAPP") (a fixed dollar value per pupil) by the district's "Adjusted Enrollment" (the number of full-time students enrolled in a district, modified by various weightings relating to student needs and costs to educate). *See* K.S.A. 72-6410(a), (b)(1); *Gannon*, 319 P.3d at 1205.

SMSD consistently ranks well below the State average in total state aid per pupil, per year. App. 132.

The state provided "State Financial Aid" through two sources "Local Effort" and "General State Aid." Each district was required to levy a property tax of 20 mills, the proceeds of which constituted the district's Local Effort. *See* K.S.A. 72-6416(b). If the Local Effort was less than the amount of State Financial Aid to which a district was entitled, the State made up the difference with "General State Aid." K.S.A. 72-6416(b). Conversely, if the Local Effort exceeded the amount of a district's State Financial Aid, the excess funds were redistributed to other school districts. *Id*.; K.S.A. 72-6431(c). Because of its relatively high property values, SMSD consistently ranks in the bottom 5% of districts statewide in General State Aid per pupil. App. 126.

The extent of SMSD's underfunding is apparent from a brief comparison with the neighboring Kansas City Kansas School District (U.S.D. 500) ("KCKSD"). In the 2013-14 school year KCKSD received $8,915 per pupil in total state aid. *Id*. at 132. SMSD received barely half that: $4,514 per pupil. *Id*.

B. Local Option Budgets and Supplemental Funding.

The SDFQPA permitted districts to supplement their State Financial Aid by enacting LOBs. K.S.A.

72-6433(a)(2), (c).[2] But the State caps a district's LOB at a percentage of its State Financial Aid entitlement ("the Education Spending Cap"). K.S.A. 72-6433(b). Thus, districts receiving more State Aid are allowed to have larger LOBs. SMSD always maxes out its LOB.

The end result of all the restrictions on spending is that SMSD is forced by state law to spend less per pupil than the State average in total expenditures. App. 133. Again, a comparison to KCKSD is apt. With its local option budget and other funding sources, KCKSD was able to spend $15,388 per pupil on classroom education in the 2013-14 school year. *Id.* In contrast, Kansas's Education Spending Cap held SMSD's spending to only $12,378 per pupil that year, over $3,000 per pupil less than KCKSD and $300 less per pupil less than the Kansas state average. *Id*. As the record before the District Court established, these were not one-year anomalies; rather, the Kansas Education Spending Cap has kept SMSD's spending in the bottom half of Kansas school districts. *Id*. at 128.

This per-pupil disparity translates into large annual sums. For example, in the 2013-14 school year, SMSD would have needed to raise an additional $40.17 million to bring its per-pupil expenditures up to the level of KCKSD's spending (not including

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[2] *See* recent amendments, 34 Kan. Reg. 274 § 12 (Apr. 2, 2015), discussed in Part II.

federal dollars), which is another 22% of SMSD's general fund – a staggering state-created wealth-disparity. Including federal dollars, the disparity rises to $63.6 million, or an additional 35% of the general fund. Similarly, an additional $37.6 million to SMSD would have been needed to eliminate the per-pupil disparity with Wichita (U.S.D. 259) in 2013-14 (not including federal dollars). Including federal dollars, the disparity rises to $46.6 million. Because spending was capped at the prescribed levels, SMSD could not overcome these gross disparities.

The Kansas school finance system's underfunding, coupled with the Education Spending Cap, results in a significant detriment to districts like SMSD. This detriment can be seen in SMSD's current funding crisis and is manifested in a crippling loss of teachers, loss of foreign language programs, larger class sizes, closure of neighborhood schools, and loss of property values. As a state court in Kansas has found, "[s]tudies in Kansas have shown that money does make a difference." *Gannon v. Kansas*, 2013 WL 146092, ¶199 (Kan. Dist. Ct., Jan. 10, 2013). Because the level of school funding is causally linked to educational quality and student achievement, the Education Spending Cap unquestionably impairs the education of Kansas students. But no such causal link need be established, any more than the litigants challenging spending caps in the election campaign context had to prove that more spending would translate into more electoral victories. What matters is that the state has deliberately imposed ceilings on

how much local citizens are permitted to spend on activities intrinsically linked to protected speech. The fact that those ceilings *aggravate* state-created inequities rather than rectifying them makes matters worse but likewise is not a necessary element of the First Amendment claim advanced in this litigation.

II. The Classroom Learning Assuring Student Success Act ("CLASS Act").

In April 2015, the Kansas legislature replaced the SDFQPA with the Classroom Learning Assuring Student Success Act ("CLASS Act"). 34 Kan. Reg. 272 § 4. Although the CLASS Act alters the state's school financing system in some respects, the funds to which a district is entitled under the Act "will be based in part on, and be at least equal to, the total state financial support as determined for school year 2014-2015 under the [SDFQPA] prior to its repeal." *Id*., § 4(b)(3). The CLASS Act provides block grants to school districts for the 2015-16 and 2016-17 based on adjustments to the General State Aid to which districts were entitled under the SDFQPA for 2014-15 school year. *Id*. at § 4(b)(3), § 6.

More importantly, the CLASS Act preserves the Education Spending Cap. It contains an LOB provision, nearly identical to that in former K.S.A. 72-6433. Kan. Reg. 274, § 12(a). For SMSD, that cap is 33% because its voters have consistently made the choice to spend more on local education, even if it imposes a greater tax burden. App. 24 [87 F.3d 1242,

1256 (10th Cir. 2015)] (citing Kan. Reg. 272, § 4(b)(3) and explaining that "[d]espite the changes to Kansas' system of school financing, the core elements challenged by [Petitioners] remain.").

III. The Procedural History of the Case.

On December 10, 2010, Petitioners brought suit in the District Court for the District of Kansas pursuant to 42 U.S.C. § 1983, claiming the Kansas school finance system violates their constitutional rights under the First and Fourteenth Amendments.

On March 11, 2011, the District Court dismissed Petitioners' claims for lack of standing. Petitioners appealed. The Tenth Circuit reversed and remanded. App. 97 [*Petrella v. Brownback*, 697 F.3d 1285 (10th Cir. 2012)].

On October 29, 2013, the District Court entered an order dismissing under Rule 12 all of Petitioners' claims that were based on violations of Petitioners' fundamental rights or that would otherwise require subjecting the school finance laws to heightened scrutiny. App. 54.

The Tenth Circuit affirmed, holding denial of the preliminary injunction was proper. *Id.* at 26. The Tenth Circuit held that rationality review, not strict scrutiny, applied and ruled that petitioner likely would not succeed on the merits under such deferential review. *Id.* at 50. The Court of Appeals opined that the Education Spending Cap was not a limit on

protected speech, and it rejected the applicability of its First Amendment decisions striking down caps on political spending. *Id.* at 46. The Tenth Circuit also held that the Education Spending Cap did not infringe the right of association or other fundamental liberties. *Id*.

On June 29, 2015, the Tenth Circuit denied a timely petition for rehearing. *Id.* at 122.

REASONS FOR GRANTING THE PETITION

This case presents an important question reserved by this Court's decision in *Rodriguez*: whether a state may impose an education spending cap limiting the amount of locally raised funds that citizens may devote to classroom education. The question implicates important questions regarding Freedom of Speech, Equal Protection, and Due Process. Further, this case involves matters of great public importance with broad implications for public education across the country.

The Tenth Circuit erred in holding strict scrutiny did not apply to review of Petitioners' claims. The Tenth Circuit's erroneous holding is based on a fundamental misapplication of this Court's First Amendment and Equal Protection precedent. For the reasons that follow, this Court should grant plenary review.

I. Review by This Court is Necessary to Address the Education Spending Cap Issue Expressly Left Open in *Rodriguez* over 40 Years Ago.

The Kansas school finance law deprives Petitioners of equal protection of the law by intentionally providing lower funding to Petitioners' schools and then freezing the unequal funding in place, barring the community self-help needed to overcome the state-imposed inequality. The Tenth Circuit erred in holding Petitioners' equal protection claims were not subject to strict scrutiny. This Court's review is necessary to ensure the equal protection of the law to public school students and their parents.

A. This case presents an opportunity for the Court to address the equal protection challenge specifically reserved in *Rodriguez*.

In *Rodriguez*, this Court recognized that "[t]he persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters. In part, local control means . . . **the freedom to devote more money to the education of one's children**." *Id*. (emphasis added). Justice White, writing in dissent, was even more pointed. He expressly argued that the State's **ceiling** on local spending amounted to a violation of equal protection. *Id*. at 65-68 (dissenting).

The majority of the Court did not disagree on the merits with Justice White's analysis. Rather, the Court noted that the issue was not ripe for decision because the tax rate in the case before it was far below the state cap, and "Appellees do not claim that the ceiling presently bars desired tax increases in Edgewood or in any other Texas district." *Id*. at 50 n. 107, citing *Hargrave v. Kirk*, 313 F. Supp. 944 (M.D. Fla.1970), *vacated on other grounds*, 401 U.S. 476 (1971).

Thus, *Rodriguez* establishes the three requirements for a viable equal protection challenge to an education spending cap:

> (1) a state's underfunding of a school district,
>
> (2) a cap on local spending, and
>
> (3) citizens' willingness to voluntarily increase local spending to overcome the state's underfunding.

This case plainly satisfies all three requirements:

> (1) the state aid to SMSD is in the bottom 5% of all districts, underfunding SMSD to a gross degree,
>
> (2) the Education Spending Cap prevents increased local spending, and
>
> (3) SMSD parents, patrons, and administrators desire to raise local spending to correct the underfunding.

Petitioners seek simply to exercise their fundamental right to direct the education and upbringing of their children by committing local funds to obtain *equality* in local education *spending*. The Cap manifestly abridges these rights, automatically lowering the spending ceiling for districts like SMSD that already receive less state aid than comparable districts. Thus, SMSD is prohibited from spending the same amount of money on educational services for its students as other districts are allowed to spend, and the Cap prevents SMSD residents from overcoming the difference. The Cap deliberately – and unequally – penalizes families in districts like SMSD and thereby guarantees and institutionalizes significant unequal funding.

This case squarely presents the equal protection claim that Justice White anticipated 42 years ago in his *Rodriguez* dissent. It does so based on an undisputed and compact factual record. It frames the challenge exactly as the *Rodriguez* Court framed it: (1) undisputed underfunding by the state, (2) undisputed willingness by a district's citizenry to increase local spending to offset the state's underfunding, (3) undisputed ability of the district's citizens to do just that, *but for* the State's imposition of the Cap. This Court should grant plenary review to address the constitutional questions anticipated by Justice White, which have overriding importance for the entire nation.

B. This case presents the opportunity to address this equal protection challenge in an education rights case not seeking to enforce "*affirmative rights*" to state funding beyond what the state has chosen to appropriate.

In *Rodriguez*, the Court upheld Texas' school finance system against a constitutional challenge by plaintiffs making an *affirmative* demand for more money *from the State*. Here, Petitioners make no such claim. Instead, they assert a classic *negative* rights claim. They do not ask the Court to order the State to provide additional funding for its public schools. They instead ask only that the State not *interfere* with their own efforts to support their schools with funds raised locally in accord with tax mechanisms fully authorized by state law.

Review in this case would permit the Court to underscore the important distinction between negative and positive rights. While the *Rodriguez* Court found the claim for positive rights (*i.e.*, a demand for additional state monies) "particularly inappropriate" for the application of strict scrutiny, the Court reaffirmed the settled principle that strict scrutiny traditionally applies to claims for negative rights – those involving "legislation which 'deprived,' 'infringed,' or 'interfered' with the free exercise of some such fundamental personal right or liberty." *Rodriguez*, 411 U.S. at 37-38.

Accordingly, this Court's reasoning in *Rodriguez* squarely supports Petitioners' claims here. *Rodriguez*

recognized the importance of judicial protection of negative rights, including rights to resist "governmental interference" with education:

> The Court has long afforded zealous protection against unjustifiable *governmental interference* with the individual's rights to speak and to vote. Yet we have never presumed to possess either the ability or the authority to *guarantee* to the citizenry the most effective speech or the most informed electoral choice. . . . These are indeed goals to be pursued *by a people* whose thoughts and beliefs *are freed* from *governmental interference*.

Id. at 35-36 (emphasis added). Here, but for the Cap, Petitioners and their district could spend more of their own local money to make their educational speech more effective. The Cap is thus an unwarranted "governmental interference" from which Petitioners seek to be "freed."

Accordingly, this case is analogous to *Missouri v. Jenkins*[3] and *Parents Involved in Community Schools v. Seattle School District*.[4] In *Jenkins*, the Court held that a district court had abused its discretion in

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[3] *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990) (striking local education spending cap to protect citizens, who "are ready, willing – and but for the operation of state law curtailing their powers – able to remedy the deprivation of constitutional rights themselves.").

[4] *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007).

fashioning a remedy to end *de facto* segregation in the Kansas City, Missouri School District, because the district court had ordered the direct imposition of a tax increase, rather than enjoining the state's cap on local taxation for public education. The Court of Appeals reasoned that lifting the Cap, and allowing the local district to raise local taxes and spend more, was more consistent with democratic values and that "permitting the school board to set the levy itself would minimize disruption of state laws . . . and would ensure maximum consideration of the views of state and local officials." 495 U.S. at 43. This Court affirmed and stressed the importance of "a proper respect for the integrity and function of local government institutions. Especially is this true where, as here, those institutions are ready, willing, and – *but for the operation of state law curtailing their spending* – able to remedy the deprivation of constitutional rights themselves." *Id*. at 51 (emphasis added). So here, too, Petitioners are ready, willing, and able to exercise their rights to act collectively with other citizens within the district, to propose and pay a tax increase above and beyond the Education Spending Cap to achieve parity with other school districts that enjoy higher per-pupil funding.

In *Seattle Schools*, the Court struck down a school district's race-conscious integration plan as an unconstitutional state imposed form of reverse-discrimination. Here, SMSD is experiencing voluntary integration, with 116% increase in its minority and English language learner student populations.

The community has welcomed this ongoing voluntary integration and is seeking to increase spending on local education to ensure that the district can meet the needs of all of its students. This case presents an even more compelling case than *Jenkins* and *Seattle Schools* because, unlike *Jenkins* (which involved a federal court's use of its remedial power to stem "white flight" by curing inter-district educational funding disparities) and *Seattle Schools* (which involved districts' use of racial classifications in student assignments to further voluntary integration plans), this case involves a community that both historically values education and welcomes the diverse student population that it can encourage without classifying any student by race. Here, the enhanced educational initiatives originate with the people themselves, not with the state or judiciary. The Cap, however, holds the community back from achieving this voluntary social progress with race-neutral means that respect the dignity of every individual student.

Moreover, *Rodriguez* suggests that strict scrutiny, not rationality review, applies to a case such as this for two additional reasons. First, the challengers to the school funding scheme of Texas in *Rodriguez* never proffered a *textual* constitutional analysis to undergird their fundamental rights claim or even argued that any *intrinsic* rights of the students involved was being abridged. Instead, they relied exclusively upon a *nontextual* and *instrumental* analysis, arguing that public education was a fundamental right because it indirectly served to preserve

other rights. *See Rodriguez*, 411 U.S. at 35-37 (discussing education as having a "nexus" with other First Amendment rights like enumerated right to freedom of speech and the unenumerated right to vote). The petitioners here make the straightforward claim that spending on the education of one's children is in itself spending on speech, and that capping such spending is in itself an abridgment of the Freedom of Speech.

Second, the *Rodriguez* decision was driven by practical and institutional concerns that have no place here. The *Rodriguez* plurality repeatedly stated that, if the Court were to rule for the schoolchildren challenging the way Texas chose to finance public education, it would effectively declare unconstitutional the education finance schemes of all fifty (50) states. *See Rodriguez*, 411 U.S. at 42-44. Precisely the opposite situation exists here. The record before the district court below established that comparable Education Spending Caps existed in a minority of states. *See* D. Ct. Dkt. No. 94-30 (Howard Wial, The Keystone Research Center "Limiting Learning: How School Funding Caps Erode the Quality of Education" (May, 2004)) (evaluating proposed education spending cap legislation against comparable laws in other states and citing only six states with comparable spending cap laws). In fact, Respondents never identified another state in the nation with a similar scheme. Kansas is thus a conspicuous outlier. Compare *Honda Motor Co. v. Oberg*, 512 U.S. 415, 426-30

(1994) (unconstitutional state law was an outlier and therefore constitutionally suspect).

Finally, the judicial relief sought in this case is strikingly narrow. The relief sought differs from the sweeping remedy at issue in *Rodriguez*, where the challengers sought an affirmative increase in funding, redistribution of state money and restructuring of the entire taxation system for the Texas public schools. In contrast, here, the relief sought is surgical and aimed only at removing the State's statutory barriers to educational excellence – a declaration that the Education Spending Cap is unconstitutional and an injunction against its enforcement. No affirmative restructuring of the state's school finance system is required.

II. The Tenth Circuit Opinion Conflicts With This Court's Longstanding Jurisprudence on Expressive, Educational, and Political Speech.

The Tenth Circuit's opinion is also contrary to foundational First Amendment principles set forth in this Court's decisions involving expressive, educational, and political speech. The Education Spending Cap implicates fundamental expressive and educational rights at the heart of the First Amendment. To construe the Cap as nothing more than ordinary economic and social welfare legislation – as suggested by the Tenth Circuit's invocation of rationality review

– fails to give appropriate meaning and adequate weight to the constitutional liberties at issue.

A. In conflicting with this Court's settled understanding of the First Amendment's *text*, the Tenth Circuit's decision wrongly grants deferential review to a *spending cap* that directly burdens expressive and educational liberties.

The heart of the educational enterprise manifestly and directly involves the communication of ideas and information. Put simply, education *is* speech. Hence, the First Amendment's Free Speech clause directly applies to an education spending cap. "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders through wide exposure to [a] robust exchange of ideas." So said this Court in *Keyishian v. Board of Regents*, a decision that certainly cannot be limited to colleges and universities even though that was its immediate context. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). The vital importance of developing, communicating, and disseminating knowledge, instruction, and ideas in public schools at the elementary and secondary school levels cannot reasonably be disputed. "Teachers and students," this Court has previously explained, "must always remain free to inquire," *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957), and therefore "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools," *Shelton v. Tucker*, 364 U.S.

479, 487 (1960) (emphasis added); *Bd. of Educ. Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 866-67 (1982) (plurality decision recognizing students' "right to receive ideas" as "a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press and political freedom"). *See also Arce v. Douglas*, 793 F.3d 968, 983 (9th Cir. 2015) (evaluating state decision to restrict classroom instruction "in light of a student's right to receive information and ideas"). Elementary and secondary school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

By definition, education is expressive activity. *See* Merriam Webster's Collegiate Dictionary (11th Ed.) (defining "educate" as "to develop mentally . . . esp., by instruction . . . to provide with information: inform . . . to persuade . . . believe; syn., see teach."). It involves nothing if not the communication of ideas and knowledge *between* teachers and students. In 1943, this Court struck down a mandatory salute by students to the American flag in West Virginia schools to protect the students' rights of free speech, free inquiry, and free thought:

> That [Boards of Education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to

> discount important principles of our government as mere platitudes.

W. Va. State Bd. of Ed. v. Barnette, 319 U.S. 624, 637 (1943).

As *Tinker* and *Barnette* plainly demonstrate, these First Amendment protections are not limited to teachers and other adults. *Cf. Keyishian*, 385 U.S. at 603 ("[A]cademic freedom . . . is of transcendent value to all of us. . . ."). The Free Speech Clause also protects "the public's right to read and hear." *See United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 470 (1995) ("*NTEU*"). It protects *anyone* who attempts to provide or receive a better education:

> By *Pierce v. Society of Sisters*, *supra*, the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer v. State of Nebraska*, *supra*, the same dignity is given the right to study the German language in a private school. ***In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge***.

Griswold v. Conn., 381 U.S. 479, 482 (1965) (emphasis added). A state law that prohibits the *quantity* of education that citizens are permitted to fund "contract[s] the spectrum of available knowledge" and thereby implicates core First Amendment values. The education spending cap does just that. It "contracts the spectrum of available knowledge." It matters not

that the prohibition operates across the board and not in a content-based or viewpoint-based way. A flat abridgment of speech is not saved from strict scrutiny by its across-the-board application. *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 967 n. 16 (1984) ("a direct restriction on the amount of money a charity can spend on fundraising activity" is "a direct restriction on protected First Amendment activity"); *see also Riley v. National Federation for the Blind of N.C.*, 487 U.S. 781, 789 (1988) (noting that the statute in *Munson* was subjected to "exacting First Amendment scrutiny").

At bottom, the First Amendment protects the *dissemination* of knowledge. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667 (2011) ("[T]he creation and dissemination of information are speech within the meaning of the First Amendment."); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) (The First Amendment affords "the public access to discussion, debate, and the dissemination of information and ideas."); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (recognizing that "the Constitution protects the right to receive information and ideas" and that "this right is nowhere more vital than in our schools and universities") (quotation marks and citations omitted). Thus, the First Amendment necessarily protects local efforts to increase the quantity and quality of education provided by local schools.

Significantly, even where a law merely *interferes materially* with Free Speech, it triggers scrutiny

under the First Amendment. *See NTEU*, 513 U.S. at 468 ("Although § 501(b) neither prohibits any speech nor discriminates among speakers based on the content or viewpoint of their messages, its prohibition on compensation unquestionably imposes a significant burden on expressive activity."). In *NTEU*, the Supreme Court struck down a content-neutral limit on honoraria for government employees, even though the law merely decreased the "incentive" to speak. *Id*. at 466-70. While the plaintiffs in *NTEU* were seeking to be paid for their speech and Petitioners here want to spend their own money to pay for the expressive activity of public employees (*i.e.*, teaching by public employees), both cases involve government-imposed burdens on speech that warrant heightened scrutiny.

The Kansas Education Spending Cap actually goes further. It not only interferes with speech – it actively *penalizes* speech by imposing a dollar-for-dollar penalty on any spending above the Cap. In this respect, it resembles the provision that this Court held unconstitutional in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011). *Bennett* involved a public finance scheme designed to provide public money for political campaigns. The scheme included a matching fund provision, which was triggered whenever the opponent of a publicly funded candidate chose to spend above a certain level. The matching fund provision was held to violate the First Amendment because it functioned much like a penalty, chilling speech by the unfunded

speaker beyond the Spending Cap. *Id.* at 2816. This Court categorically condemned such a "beggar thy neighbor" approach to public finance of campaign speech. *Bennett*, 131 S. Ct. at 2821. The Kansas statute goes much further to burden speech than did the statute condemned in *Bennett*: Unlike the Arizona statute, which merely *added* state funds to subsidize the speech of a candidate whose opponent opted to spend more of his or her own funds, the Kansas statute *subtracts* state funds from those who, like Petitioners, obtain voter approval for greater spending on speech (in the form of education), penalizing them if they attempt to do so.

The Education Spending Cap is a categorical ban on expressive activity that exceeds the amount deemed suitable by the state: it limits speech beyond that point not because the speech itself harms anyone, or even *threatens imminently* to do so, but just because the State assumes that there is "too much" of it within a particular locality. The Education Spending Cap therefore falls within well-settled precedent that treats such prohibitions as highly suspect and presumptively unconstitutional. *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 299 (1981); *Buckley v. Valeo*, 424 U.S. 1 (1976).

B. The Tenth Circuit's decision conflicts with this Court's *Meyer v. Nebraska* and *Pierce v. Society of Sisters* line of precedent, which dictate applying strict scrutiny for such direct infringements of educational and expressive rights.

Additionally, decades before these landmark First Amendment decisions, this Court accorded special protection to the liberty of parents with respect to the education of their children and did so for much the same reasons. *See Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (prohibition on teaching a foreign language materially interfered "with the opportunities of pupils to acquire knowledge"); *see also Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (describing "the liberty of parents and guardians to direct the . . . education of children"); *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972) (same).

In fact, Justice Kennedy has explained that "*Pierce* and *Meyer*, had they been decided in recent times, may well have been grounded upon First Amendment principles. . . ." *Troxel v. Granville*, 530 U.S. 57, 95-96 (2000) (Kennedy, J., dissenting). The Tenth Circuit mentioned *Meyer* and *Pierce* in passing but ignored the Free Speech principles that animated those rulings.

The *Meyer* and *Pierce* line of cases applies with full force here. As to *Meyer*, the Cap directly infringes the right of parents to provide more "knowledge" to their children than the State is willing to allow. As to *Pierce*, if parents already have the constitutional

freedom to choose private, religious, or secular schools for their children, then it stands to reason that parents must also have even greater freedom to choose to support and enhance public education for their children.[5]

Just this past Term, this Court reaffirmed the importance of *Meyer* and *Pierce*. In *Obergefell v. Hodges*, this Court relied on *Meyer* and *Pierce* to support the right to marry. "A third basis for protecting the right to marry," the Court explained, "is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, *and education*." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015) (emphasis added) (citing *Meyer* and *Pierce*). That logic applies with even greater force here since local support for local schools is an enduring American tradition.

The infringement on fundamental liberties here is palpable. As just one example, the Kansas school finance formula compels distribution of additional funding to school districts on the basis of enrollment of non-English-speaking students. 34 Kan. Reg. 272 § 4(b)(3), § 6; *Gannon*, 319 P.3d at 1205. But for school districts facing their spending cap but wishing

[5] Moreover, state money may be constitutionally directed from the state treasury to private or parochial schools according to a parental freedom of choice principle, *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002), but the converse is not true in Kansas. The Cap deprives citizens of the freedom to choose to support public schools and thereby violates Due Process.

to spend additional money on the converse – teaching Spanish to native English speakers, for example – the state prevents such a result. Indeed, this case arose as a result of local citizens' desire to raise local funds to save foreign language programs from being cut drastically or eliminated altogether at their elementary schools as a result of the State's budget cuts.

This Nation was founded on the assumption that the people have the inherent political liberty to band together and institute reforms to improve their lives. Nowhere is this foundational principle more clearly applicable than in the context of improved public education for children. The education spending cap is inconsistent with American political traditions, obstructs these foundational freedoms, and upends what this country represents.

C. The Tenth Circuit's decision conflicts with this Court's First Amendment jurisprudence regarding the liberty to spend money to achieve political ends.

The Court of Appeals' decision upholding the Education Spending Cap is also inconsistent with this Court's precedent invalidating spending caps on political speech. A spending cap directly abridges speech, literally capping the amount of speech allowed. Thus, the First Amendment demands heightened scrutiny to justify spending caps.

In *Buckley*, this Court opined that a "restriction on the amount of money a person or group can spend

on . . . communication . . . necessarily reduces the quantity of expression. . . .” *Buckley*, 424 U.S. at 19. Following *Buckley*, it is now settled that, in this fundamental sense, money is speech.

Education Spending Caps fly in the face of this simple principle. They restrict the money available to fund education and thereby infringe the First Amendment. Kansas's Education Spending Cap directly limits the *quantity* of education. Under both the campaign finance and education finance line of cases, the First Amendment prohibits this result. *See Buckley*, 424 U.S. at 19-23, 39, 44-51; *Griswold*, 381 U.S. at 482 (“contract[ing] spectrum of available knowledge” prohibited); *see also Keyishian*, 385 U.S. at 603; *Sweezy*, 354 U.S. at 250; *Barnett*, 319 U.S. at 637; *Meyer*, 262 U.S. at 401. Indeed, if the First Amendment prohibits spending caps in campaign finance, then, *a fortiori*, it prohibits them in education, where “[t]he vigilant protection of constitutional freedoms is nowhere more vital. . . .” *Shelton*, 364 U.S. at 487. To limit this Court's dedication to freedom of spending on speech to the campaign finance context would teach the wrong lesson to the nation, seeming to vindicate the misguided belief that this Court's campaign finance decisions are driven less by neutral First Amendment principles than by an unprincipled determination to enhance the political clout of the wealthy.

Heightened scrutiny is necessary to maintain doctrinal coherence between the Court's campaign spending jurisprudence and education spending

jurisprudence. As the Court held in *Citizens United*, "[w]hen 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." *See Citizens United v. FEC*, 558 U.S. 310, 356 (2010). Here, the Kansas government seeks to control *how much* information students receive from their public schools and refuses to allow SMSD and their taxpayers and parents to increase and enhance that information. This suppression violates the First Amendment. It is therefore akin to campaign spending caps, which this Court has struck down. This Court's reasoning in the campaign finance context applies with even greater force in education finance because there is no even arguable risk of "corruption" in any sense, and no one is even arguably harmed by more education. Whatever might be said of non-quid-pro-quo corruption in the campaign finance context, it is plain that an education spending cap cannot, by any stretch of the imagination, deter "corruption" or the "appearance" of such corruption.

In short, if campaign spending caps are unconstitutional, then education spending caps must be *a fortiori*. The Tenth Circuit's contrary decision warrants this Court's plenary review.

III. The Question Whether a Judicially-Created Concept of Equity in the Form of Eliminating Differences Can Justify the Imposition of Under-Funding on Public Schools is of National Scope and Transcending Importance. This Case Presents an Opportunity for the Court to Bring Coherence to an Important Area of Constitutional and Educational Law for the Nation.

The Tenth Circuit also erred in holding that Petitioners were unlikely to succeed on the merits. The Tenth Circuit focused on the state's interest in promoting something it denominated "equity" in education funding. App. 48-50. Specifically, the Tenth Circuit held that *unequal* treatment – holding back some so that others do not fall behind by comparison – is justified to achieve equal *results*. *Id.* at 49-50. But such a targeted, discriminatory burden designed to bring about an artificial equality of outcomes is the opposite of "equal protection of the laws." *See Plyler v. Doe*, 457 U.S. 202 (1982) (characteristics over which a child has no control cannot be the basis upon which the state shows preferential treatment to some children over others); *Brown v. Bd. of Ed.*, 347 U.S. 483, 493 (1954) ("where the state has undertaken to provide" education, it "is a right which must be made available to all on equal terms").

Moreover, the Tenth Circuit effectively equated "equity" with mandatory result-driven egalitarianism, *i.e.*, identical student outcomes, not equal treatment

under the law. The reasoning is that "equity" can be achieved only by stifling, for some students, the excellence that additional resources would enable them to achieve. That version of "equity" posits that districts that give students resources to learn "too much" have somehow injured students in other districts. The Court should reject that specious and intentionally discriminatory reasoning and the suffocating Procrustean vision it embodies.

The goal of "equity" upon which the Tenth Circuit justifies the Cap is a concept created from whole cloth by the Kansas Supreme Court. It appears nowhere in the text of the Education Clause. *See* Kan. Const., art. VI, § 6 ("The legislature shall make suitable provision for finance of the educational interests of the state."). Under compulsion of court order, the state legislature, in turn, for years has hailed this vague, judicially-manufactured "equity" concept to justify intentionally under-funding Petitioners' schools and purposefully disadvantaging their children. *Montoy v. Kansas*, 120 P.3d 306, 310 (Kan. 2005); *Gannon v. Kansas*, 319 P.3d 1196, 1203 (Kan. 2014).

The struggle to implement this ambiguous judicially-created constitutional requirement in practice has not been limited to Kansas. Legislatures and courts across the country have struggled to interpret the concept of "equity" for decades. *See William S. Koski & Rob Reich*, When "Adequate" Isn't: The Retreat from Equity in Educational Law and Policy and Why It Matters, 56 Emory L.J. 545, 594 (2006)

(describing competing definitions of "equity" in school finance).

To be sure, whether these state institutions have transgressed their state constitutions through this invention is not a question for this Court. But it is a pressing *federal* question whether any such notion of "equity" can justify a state scheme that intentionally under-funds a sector of the state's public schools, and then locks the resulting inequality in place by enforcing an oppressive spending cap to prevent aggrieved citizens from remedying the state-created inequality. That double-whammy poses a question of sweeping national scope and surpassing federal constitutional importance. Indeed, Petitioners' liberty *and* equality interests are directly at issue. Both hang in the balance.

States increasingly face educational crises of significant import. Kansas is no exception. There, the current litigation has resulted in a growing sense of powerlessness by the people and in resultant attacks on the judiciary. Communities like SMSD feel increasingly frustrated, angry and powerless as the state – at the behest of the state's courts – strips them of their ability, and indeed their freedom, to voluntarily provide for their children's unmet needs – all their children's unmet needs, including those of their increasingly diverse student population – through civic self-sacrifice.

This escalating assault and ever-growing restriction of federal constitutional rights make it

extraordinarily important for this Court to review these claims. While the Court need not decide what the concept of intrastate "equity" means in all cases, it should at least address whether the federal Constitution permits states to handicap and limit the education of some children in the name of that nebulous value. And this case presents a clear, simple, and undisputed factual record on which to do so.

CONCLUSION

For all the aforementioned reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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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

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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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November 16, 2015

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

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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

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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

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INTRODUCTION AND INTEREST OF AMICUS CURIAE[1]

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

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[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

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[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

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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.

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[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.

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,

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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

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CERTIFICATE OF COMPLIANCE

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

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Dated: April 7, 2014

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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

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