NOS. 13-3334 & 14-3023

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DIANE PETRELLA, *et al.*

Plaintiffs - Appellants

v.

SAM BROWNBACK,
Governor of Kansas, in His Official Capacity, *et al.*,

Defendants - Appellees

On Appeal from the
United States District Court for the District of Kansas
Case No. 2:10-cv-02661-JWL-KGG
The Honorable John W. Lungstrum, Presiding

APPELLANTS' BRIEF

ORAL ARGUMENT REQUESTED

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STATEMENT OF RELATED CASES

Appellants, Plaintiffs below (hereinafter "Plaintiffs"), previously appealed this case to this Court. No. 11-3098, *Petrella v. Brownback*, 697 F.3d 1285 (10th Cir. 2012).

JURISDICTIONAL STATEMENT

Section 1292(a) creates appellate jurisdiction for "[i]nterlocutory orders … refusing … injunctions …." 28 U.S.C. § 1292(a)(1).

The District Court's October 29, 2013 Order triggers Section 1292(a) because it denied Plaintiffs' request for a preliminary injunction. *See Tri-State Generation & Transmission Assoc. v. Shoshone River Power, Inc.*, 874 F.2d 1346, 1351 (10th Cir. 1989).

The District Court's January 28, 2014 Order denying Plaintiffs' Motion for Reconsideration also constitutes an order "refusing" an injunction under Section 1292(a). App. 3694. Moreover, that Order "reaffirm[ed]" the reasoning behind the District Court's denial of a preliminary injunction. App. 3694.

Alternatively, the doctrine of pendent jurisdiction confers jurisdiction over the January 28, 2014 Order. *See Crumpacker v. Kan. Dep't of Human Res.*, 338 F.3d 1163, 1168 (10th Cir. 2003) (exercising pendent jurisdiction when the issues were "inextricably intertwined"); *DeAnzona v. City & Cnty. of Denver*, 222 F.3d 1229, 1234 (10th Cir. 2000). The two Orders provide overlapping justifications for denying the same

preliminary injunction. Thus, they are "inextricably intertwined," and review of the second Order is necessary to a review of the first.[1]

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does the Kansas Education Spending Cap violate the First Amendment's Free Speech Clause?

2. Does the Education Spending Cap implicate Plaintiffs' fundamental rights, such that any discrimination against Plaintiffs would trigger heightened scrutiny under the Equal Protection Clause?

3. Did the District Court abuse its discretion in denying a preliminary injunction against the Education Spending Cap?

STATEMENT OF THE CASE

This action presents a federal constitutional challenge to the unequal school funding mandated by the Kansas School District Finance and Quality Performance Act ("SDFQPA"), K.S.A. 72-6405 *et seq.*, coupled with the SDFQPA's spending cap on local education. The Kansas Supreme Court's recent decision in *Gannon v. State*, No. 109,335, 2014 WL 895194 (Kan. Mar. 7, 2014), does not directly involve any of the issues presented in this case. Indeed, the *Gannon* proceeding makes it all the more imperative that this Court make clear the federal constitutional limits on school financing schemes.

[1] To exercise pendent jurisdiction, the Court may need to fully consolidate these two appeals. Plaintiffs thus renew their Unopposed Motion to Consolidate Related Appeals (dated February 6, 2014), which the Court previously granted for procedural purposes only. *See* Order, Case Nos. 13-3334 & 14-3023 (Feb. 7, 2014).

Plaintiffs are students and parents in Shawnee Mission Unified School District No. 512 ("SMSD"). Defendants/Appellees are the Governor of Kansas, the State's Attorney General, its Treasurer, and various State officers who are responsible for enforcing the SDFQPA.

On December 10, 2010, Plaintiffs brought suit in the District Court for the District of Kansas pursuant to 42 U.S.C. § 1983, claiming the SDFQPA violates their constitutional rights under the First and Fourteenth Amendments. App. 23.

On January 13, 2011, Plaintiffs filed a Motion for Preliminary Injunction. App. 49. On February 14 and 18, 2011, the District Court held an evidentiary hearing on the Motion. App. 2095, 2355. On March 11, 2011, the Court dismissed Plaintiffs' claims for lack of standing. Plaintiffs appealed. This Court reversed and remanded. *Petrella v. Brownback*, 697 F.3d 1285 (10th Cir. 2012).

On October 29, 2013, the District Court dismissed, again under Rule 12, all of Plaintiffs' claims that were based on violations of Plaintiffs' fundamental rights or that would otherwise require subjecting the SDFQPA to heightened scrutiny. App. 3569. It also denied Plaintiffs' Motion for Preliminary Injunction, as well as a Motion for Summary Judgment by Plaintiffs. App. 3569. On January 28, 2014, the District Court denied reconsideration. App. 3687.

Plaintiffs now appeal these Orders.

I. The State's Unequal Per-Pupil Funding of Public Education.

The SDFQPA employs a complex formula to fund Kansas schools. Under that formula, not all school districts receive the same amount of funds per pupil from the State. SMSD receives some of the lowest total per-pupil funding.

Kansas school districts receive "State Financial Aid," which consists of two parts: (1) Local Effort and (2) General State Aid. App. 2712. The State Financial Aid is, essentially, a district's base funding level. It is set by multiplying the "Base State Aid Per Pupil" (a specified dollar value per pupil) by the district's "Adjusted Enrollment." *See* K.S.A. 72-6410(a), (b)(1).

The "Local Effort" is determined separately. The SDFQPA requires each school district to levy a property tax. *See* K.S.A. 72-6431. This revenue counts toward the district's "Local Effort." K.S.A. 72-6410(c). If the revenue is insufficient to satisfy the State Financial Aid, the State makes up the difference with "General State Aid." K.S.A. 72-6416(b). Conversely, if the revenue exceeds the district's State Financial Aid, the excess funds are redistributed to other school districts. K.S.A. 72-6431(c), (d).

SMSD receives General State Aid. But under the SDFQPA, SMSD has received substantially less General State Aid per pupil than most other districts, including the Intervenor Defendants' school districts:

	General State Aid Per Pupil, by year			
	2009-10	2010-11	2011-12	**2011-12 inequality:**
SMSD (#512)	$2,810.98	$2,785.81	$2,878.12	--

Kansas City (#500)	$5,465.82	$5,464.17	$5,585.98	**$2,707.86 per pupil *more* than SMSD (194%)**
Dodge City (#443)	$5,722.41	$5,570.91	$5,672.95	**$2,794.83 per pupil *more* than SMSD (197%)**
Hutchinson (#308)	$4,570.01	$4,620.10	$4,704.10	**$1,825.98 per pupil *more* than SMSD (163%)**
Wichita (#259)	$4,757.71	$4,715.73	$4,849.86	**$1,971.74 per pupil *more* than SMSD (169%)**

App. 2657, 2665.

SMSD is at the bottom, statewide, in terms of General State Aid per pupil:

	SMSD ranking by General State Aid Per Pupil		
Year	2009-10	2010-11	2011-12
Rank out of all districts receiving General State Aid	278th out of 288	277th out of 288	272nd out of 284
Percentage	Bottom 4%	Bottom 5%	Bottom 5%

App. 2657, 2665.

Total State Aid[2] is even less equal, putting SMSD well behind the state average and the Intervenor Defendants' school districts:

	Total State Aid Per Pupil, by year				
	2008-09	2009-10	2010-11	2011-12	**2011-2012 inequality:**
SMSD (#512)	$4,701	$4,046	$3,993	$4,393	--
Statewide Average	$7,344	$6,326	$6,511	$6,983	**$2,590 per pupil *more* than SMSD**

[2] The Kansas State Department of Education official statistics identify the many sources of total "state aid," including the Supplemental General fund, where LOB funds are deposited and deemed "state aid." App. 2498.

					(159%)
Kansas City (#500)	$9,102	$7,937	$8,339	$8,852	**$4,459 per pupil *more* than SMSD (202%)**
Dodge City (#443)	$9,865	$8,405	$8,617	$9,093	**$4,700 per pupil *more* than SMSD (207%)**
Hutchinson (#308)	$7,818	$6,918	$7,275	$7,560	**$3,167 per pupil *more* than SMSD (172%)**
Wichita (#259)	$7,918	$6,933	$7,092	$7,501	**$3,108 per pupil *more* than SMSD (171%)**

App. 2498, 2502-06. Thus, the SDFQPA funds some districts more than others.

After other sources of funding are taken into consideration, the total expenditure per pupil in SMSD is below the State average and, in all but one recent instance, below that of the Intervenor-Defendants' school districts:

	Total Expenditures Per Pupil, by year		
	2008-09	2010-11	2011-12
SMSD (#512)	$12,174	$11,817	$12,374
Statewide Average	$12,660	$12,282	$12,647
Kansas City (#500)	$16,265	$15,553	$14,706
Dodge City (#443)	$12,867	$12,026	$13,320
Hutchinson (#308)	$12,350	$12,133	$11,654
Wichita (#259)	$12,370	$13,069	$12,734

App. 2476, 2483.

These total expenditure levels again leave SMSD unequally funded compared to most other districts:

	SMSD ranking by Total Expenditures Per Pupil	
Year	2010-2011	2011-2012
Rank	191st out of 286	187th out of 286
Percentage	bottom 33%	bottom 34%

App. 2483.

II. The Spending Cap's Prohibition on Citizens "Even Attempting to Level the Playing Field."

The State's unequal funding is exacerbated by the Cap, which prevents an underfunded district like SMSD from using its own funds to alleviate the underfunding.

A. The Local Option Budget.

Additional Spending Above the Funding Floor. The SDFQPA anticipates that districts will supplement the base funding levels from additional local property taxes by enacting Local Option Budgets ("LOBs"). K.S.A. 72-6433(a)(2), (c).

"Equalization Aid" for Naturally-Occurring Assessed Property Value Differences. If a district adopts an LOB, it might also receive matching funds from the State called "Supplemental General State Aid" – depending on the district's assessed property value. *See* K.S.A. 72-6434. Districts with the lowest property values receive the most Supplemental General State Aid while districts with the highest values do not receive any. *Id*. Supplemental General State Aid is given only to those school districts below the 81.2 percentile of assessed property valuation per pupil. K.S.A. 72-6434(a)(1)-(5); App. 2706. SMSD routinely receives no Supplemental General State Aid. App. 2664, 2671, 2677, 2706. Thus, the State provides "Equalization Aid" for naturally-

occurring property wealth disparities but no "Equalization Aid" for state-created revenue disparities.

B. Statutory Voting Rights—And the Cap Conditioning Exercise of those Rights.

Local school boards may adopt an LOB and levy a property tax to fund it. K.S.A. 72-6435(a). The SDFQPA places limits on a school board's ability to adopt an LOB. *See* K.S.A. 72-6433(c). But voters within a district may overcome those limits by authorizing additional local spending. K.S.A. 72-6433(e) ("a majority of the qualified electors of the school district voting at an election" may approve a local option budget above "30% of the state financial aid of the district").

It was undisputed below, based on a long voting history in support of increased local funding, that the voters in SMSD would approve increased funding. App. 3563. The school district residents' voting rights, however, are capped at 31% (the "Education Spending Cap"). *See* K.S.A. 72-6433(a)(1) ("'State prescribed percentage' means 31% of state financial aid …."); K.S.A. 72-6433(b) ("[T]he board of any district may adopt a local option budget which does not exceed the state prescribed percentage.").

Moreover, Kansas punishes any school district that exceeds this Cap. *See* K.S.A. 72-6432 ("Exceeding general fund budget; ***penalty***. (a) 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.") (emphasis added); App. 2679,

Letter from Dept. of Education ("[A] district will be ***penalized*** state aid equal to the amount expended in excess of the computed statutory limitation.") (emphasis added).

C. The People's Initiative and Referendum Power Provisions.

There are also other Kansas statutes that authorize voters to increase funding for their local public schools. Kansas law authorizes voter initiatives for local tax increases:

> The governing body of any city shall be required to submit to a **referendum** the question of **levying any tax** or other revenue measure … upon the receipt of a **petition** signed by a number of **electors** ….

K.S.A. 12-138a (emphasis added). This permits voters to initiate a petition for a local tax levy for any purpose, including supplemental funding for schools in a city. A similar initiative and referendum power exists for counties as well. K.S.A. 19-117(c).

D. Unlimited Local Tax Levy Provision.

Moreover, Kansas has suspended limitations on taxing authority. K.S.A. 79-5040 ("[A]ll existing statutory fund mill levy rate and aggregate levy rate limitations on taxing subdivisions are hereby suspended."). Thus, *but for the Education Spending Cap*, the voters could utilize their unlimited authority to raise local taxes to improve their local schools.

E. The Donation Provision.

Further, via the so-called donation statute, citizens have the power to donate unlimited funds to their school district, however those funds are raised. K.S.A. 72–8210 ("Any … donation may be placed in a separate fund … [and] the same shall be exempt from budget law requirements….") This provision can be used to fund schools with tax

revenue. *See Bonner Springs USD v. Blue Valley USD*, 95 P.3d 655, 662-63 (Kan. Ct. App. 2004).

III. The Harm From the State's Unequal Treatment.

The SDFQPA's underfunding results in a significant loss of teachers and foreign language programs, larger class sizes, closure of neighborhood schools, and loss of property values. App. 3136-38; 3141-43; 3170-244; 3263; 3248-58; 2510; 2513; 2517; 2526; 2402-03; 3482; 2020; 2082-83 (documenting over $20 million in budget reductions and corresponding teacher lay-offs, school closures, and increased class sizes).

The level of school funding is causally linked to educational quality and student achievement. App. 2785 ("A 1.0% increase in district performance outcomes was associated with a 0.83% increase in spending – almost a one-to-one relationship … districts that spent more had better student performance …."); *see also Gannon v. Kansas*, 2013 WL 146092 ¶199 (Kan. Dist. Ct., Jan. 10, 2013) ("Studies in Kansas have shown that money does make a difference.").[3]

[3] There were no genuinely disputed material facts upon which Plaintiffs sought summary judgment. App. 3494-95; 3537.

SUMMARY OF THE ARGUMENT

> *[The Education Spending Cap is] as preposterous to me as any lampoon I ever wrote. My story mocks the idea of legally eliminating envy by outlawing excellence, which is precisely what the legislature means to do in the public schools, by putting a cap on local spending on them. Should it prevail it will be possible for me to say there are no longer any truly excellent public schools in all of Kansas. Talk about a level playing field!*

Kurt Vonnegut, Unpublished Letter to the Editor of the *Lawrence-Journal World* (May 12, 2005) (App. 3565).

In several recent high-profile decisions, including *Citizens United*, the Supreme Court has struck down spending caps on political speech. This holding follows from the plain language of the Constitution. The First Amendment commands that "Congress *shall make no law … abridging* the freedom of speech …." A spending cap directly abridges speech – literally capping the amount of speech allowed.

Just three months ago, this Court enforced these spending cap cases in an appeal from a preliminary injunction, *Republican Party of New Mexico v. King*, 741 F.3d 1089 (10th Cir. 2013). Citing the landmark 1976 *Buckley* decision, *King* confirmed that money is speech, whenever it is spent in order to speak. Thus, the First Amendment demands heightened scrutiny to justify spending caps. As a result, the Tenth Circuit affirmed the grant of a preliminary injunction.

Here, Plaintiffs – schoolchildren, parents, voters, and taxpayers – bring a constitutional challenge to just such a spending cap. The Education Spending Cap limits the amount of money by which citizens may supplement the State's educational funding.

The District Court dismissed all of Plaintiffs' claims that would have subjected the Cap to heightened scrutiny – then denied a preliminary injunction, concluding that Plaintiffs had not shown a likelihood of success on the merits.

Because education constitutes speech in the purest sense, however, the Cap runs afoul of *Citizens United* and that entire line of cases. Specifically, Supreme Court cases like *Barnette* (1943), *Shelton* (1960), and *Keyishian* (1967) treat limits on education as restrictions on speech. In fact, the Supreme Court has held that *disseminating knowledge* constitutes speech. That is exactly what Plaintiffs propose to do by providing more and better education. Moreover, cases like *Meyer* (1923) and *Pierce* (1925) establish that parents have a fundamental liberty right to direct the education of their children.

There is another reason that the *Buckley* and *Citizens United* line of cases applies to this case. This case involves not only educational speech but also political speech. That is, the Cap makes meaningless Plaintiffs' right to vote and to petition the government to increase school funding. Any additional local education taxes approved by voters may not be spent on the speech those taxes were approved to support.

Had the District Court followed this First Amendment authority, strict scrutiny would have applied, supercharging Plaintiffs' likelihood of success on the merits. A preliminary injunction would have almost certainly followed. In fact, since *Buckley*, the Supreme Court has flatly prohibited handicapping the speech of some to equalize their speech with that of others. The rationale that such "equalization" is but censorship with another name applies with special force when the State is attempting to handicap the education of *children*. Nevertheless, the District Court virtually ignored Plaintiffs' Free

Speech arguments and thus did not answer the critical question in this appeal: why are spending caps for political speech prohibited, while spending caps on speech to support the education of our children freely permitted? They are not. There is no legitimate basis for distinction, and both spending caps are equally subject to the highest scrutiny.

In addition, the SDFQPA deprives Plaintiffs of equal protection. It intentionally provides lower funding to Plaintiffs' schools. Then it freezes the unequal funding in place – barring any community self-help to overcome the state-imposed inequality. Plaintiffs reside in an area that contributes the largest amount of tax revenue to the State, which Kansas redistributes throughout the State. Thus, it is a system that robs Peter to pay Paul – and then adds insult to injury by preventing Peter from spending his *own* money to achieve equality with Paul.

Thus, Kurt Vonnegut's comparison of Kansas' Education Spending Cap to his dystopian short story, "Harrison Bergeron," was apt. In it, some future society physically handicaps citizens to achieve equality. Here, in the name of "equity," Kansas impoverishes the schools of the purportedly wealthy and then utilizes the Cap to freeze that discrimination in place.

The District Court freely acknowledged this discrimination. Yet it found that "a state *may* … discriminate against wealthier districts if the measure is rationally related to a legitimate purpose." App. 3592 (emphasis in original). The Court's reasoning? It held, as a matter of law, that *no fundamental rights* were involved. But Kansas is not merely providing subsidies to poor school districts. It has created a system of wealth classifications that selectively denies citizens the ability to vote to *fund the education of*

their own children in their local schools. The notion that Americans can be forbidden to spend their own money on their childrens' education is startling, to say the least. As Chief Justice Roberts recently wrote in another context, "That is not the country the Framers of our Constitution envisioned." *NFIB v. Sebelius*, 132 S. Ct. 2566, 2589 (2012).

In addition to Free Speech, this prohibition infringes on five other fundamental rights: Liberty Rights, Property Rights, Right of Association, Right to Petition, and Voting Rights.

To a surprising degree, the District Court rejected these constitutional claims based on linguistics, *i.e.*, by recharacterizing the alleged rights at issue: "this Court will not create a hitherto unrecognized unlimited fundamental right to spend one's money on education without restriction." App. 3582. Two years ago, however, this Court rejected that description of Plaintiffs' claims:

> The injury Appellants claim to suffer ***is not* '*the inability of the district to raise unlimited funds*** through a local tax,' Dist. Ct. op. at 1, ***but the deprivation of equal protection***, suffered personally by Appellants, by virtue of the alleged "intentional underfunding" of their school district, coupled with the LOB cap's statutory prohibition on *even attempting to raise more money to compensate for this alleged underfunding*.

Petrella, 697 F.3d at 1294 (emphasis added).

Upon remand, ignoring this Court's direction, the District Court repeated its "inaccurate characterization of [Plaintiffs'] injury." *Id*. The District Court then applied the wrong line of precedent. Instead of applying the First Amendment and Due Process education cases, the District Court applied the Supreme Court's 1973 *Rodriguez* decision.

Rodriguez, however, did not overrule or renounce the Free Speech and Due Process rights in education at issue here.

So which line of precedent applies? *Rodriguez* itself provides the answer. First, *Rodriguez* rejected the plaintiffs' constitutional claims because they were demanding more educational funding from the State – rather than seeking the freedom to pay for more education themselves. The plaintiffs were making a "positive rights" claim, literally demanding *money* from the State. This, however, is a classic "negative rights" case, in which Plaintiffs merely seek to defend their freedoms from State encroachment. Moreover, *Rodriguez* distinguished itself from this case. It acknowledged the constitutional issues created by a spending cap but declined to rule on them, reserving them for another day. That day has come.

It is hard to overstate the importance of the District Court's mischaracterization of Plaintiffs' claims. The District Court ignored the uncontroverted fact that Kansas provides unequal funding to Plaintiffs' schools – which is what makes the Cap unconstitutional "as applied." That is, no matter how much parents may desire to make up for the unequal funding, the Cap stops them cold. The Cap also fails a facial challenge. The First Amendment does not tolerate a ban on *any* type of speech, much less educational speech. Any such ban on speech, if not *per se* unconstitutional, should at least trigger the highest level of scrutiny.

Furthermore, the Cap also violates the Unconstitutional Conditions Doctrine. Under this line of cases, a state may not impose an unconstitutional condition on the exercise of pre-existing statutory rights. Here, by statute, Kansas gives Plaintiffs the right

to vote on educational funding. But then the Spending Cap takes with the left hand what Kansas law gave with the right – by imposing unduly burdensome and discriminatory conditions on the right to vote for *more educational spending*. Those conditions are subject to strict scrutiny because they impinge on core freedoms.

The District Court erred by failing to apply heightened scrutiny. Although this Court must correct that legal error, it has the discretion to choose how best to do so – whether by remanding for the District Court's application of the correct level of scrutiny or, alternatively, by directing the entry of a preliminary injunction.

A preliminary injunction is especially appropriate because no harm comes from allowing Plaintiffs to provide more and better public education. More education does not involve obscene, defamatory, or seditious activity. It is not the kind of speech that even permits a balancing test to ban it. Such a ban is categorically off limits under the First Amendment. Given the well-settled irreparable harm that flows from deprivation of First Amendment liberties, a preliminary injunction should have issued.

STANDARD OF REVIEW

This appeal triggers plenary review of the constitutional issues: "all reasons underlying the district court's denial of the injunction are reviewable … as a matter of law." *Tri-State*, 874 F.2d at 1351; *see also Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 755-57 (1986), *overruled on other grounds*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

This means that this interlocutory appeal squarely presents the propriety of the District Court's dismissal and summary judgment rulings. *See Law v. NCAA*, 134 F.3d

1010, 1015 (10th Cir. 1998). Indeed, to consider the denial of a preliminary injunction adequately, this Court *must* examine those decisions and do so *de novo*. *See Tri-State*, 874 F.2d at 1351; *Law*, 134 F.3d at 1016.

This Court reviews a district court's denial of a preliminary injunction for abuse of discretion. *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1255 (10th Cir. 2003). "A district court abuses its discretion by denying a preliminary injunction based on an error of law." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1128 (10th Cir. 2013). If this Court overturns the legal premises behind the denial of an injunction, it can vacate and remand for further consideration. *See*, *e.g.*, *Tri-State*, 874 F.2d at 1353-54, 1361-63; *Greater Yellowstone*, 321 F.3d at 1261-62.

Alternatively, this Court can evaluate on its merits the denial of the preliminary injunction. *See*, *e.g.*, *Hobby Lobby*, 723 F.3d at 1145. To do so, the Court considers whether the movants have shown "(1) a likelihood of success on the merits; (2) a likely threat of irreparable harm to the movant; (3) the harm alleged by the movant outweighs any harm to the non-moving party; and (4) an injunction is in the public interest." *Id*. at 1128.

"[I]n First Amendment cases, the likelihood of success on the merits will often be the determinative factor." *Id*. at 1145 (citations omitted). Recently, this Court affirmed the grant of a preliminary injunction, focusing exclusively on plaintiffs' likelihood of success on the merits. *See King*, 741 F.3d at 1092; *see also N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) (reversing denial of preliminary injunction in

a campaign finance contribution cap case, also focusing on likelihood of success on the merits).

Conversely, the Tenth Circuit recognizes that a party "can meet its burden for a preliminary injunction by showing the second, third, and fourth factors 'tip strongly in [its] favor,' and then satisfy the first factor 'by showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.'" *Hobby Lobby*, 723 F.3d at 1128 (citations omitted).

ARGUMENT

I. Plaintiffs Are Likely to Succeed on the Merits Because the Education Spending Cap Violates the First Amendment.

Because the heart of the educational enterprise involves the communication of ideas and information, it receives full First Amendment protection. *See, e.g.*, *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) ("The classroom is peculiarly the 'marketplace of ideas.'"); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("Teachers and students must always remain free to inquire ...") (plurality opinion); *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.").

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 the communication of ideas and knowledge between teachers *and students*. In

1943, the Supreme Court struck down a mandatory salute by students to the American flag in West Virginia schools to protect the students' Free Speech rights:

> 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).

These First Amendment protections do not apply to teachers and students alone. *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*").

In particular, when the Supreme Court retraced the history of First Amendment rights in 1965, it emphasized that the First Amendment protects *anyone* who attempts to provide or receive more and 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 willing to fund "contract[s] the spectrum of available knowledge" and thereby implicates the values at the heart of the First Amendment. The Education Spending Cap does exactly that.

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).

Decades before these landmark First Amendment opinions, the Supreme Court had protected parents' liberty rights in education for these 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 District Court briefly addressed *Meyer*, *Pierce*, and *Wisconsin* but ignored the Free Speech principles that animated those rulings. App. 3580, 3592. That was egregious error, for the infringement on Free Speech here is overwhelming.

A. The Cap Constitutes a Direct Restraint on Speech.

This appeal squarely presents the question of whether Kansas may prevent Plaintiffs from increasing the quantity (and quality) of knowledge that they can provide to their community's children. The Spending Cap operates as a "direct restraint" on the volume of knowledge and information that may be communicated to schoolchildren. "[L]imits on expenditures operate as a direct restraint on freedom of expression …." *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 299 (1981).

In *Buckley*, this was the very reason the Supreme Court found that campaign spending caps violate the First Amendment:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.

Buckley v. Valeo, 424 U.S. 1, 19 (1976). To illustrate the point, the *Buckley* Court provided a memorable analogy:

> Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.

Id. at 19 n.18.

Following *Buckley*, it is now settled that, in this basic sense, money is speech. *See King*, 741 F.3d at 1092 ("restrictions on money spent on speech are the equivalent of

restrictions on speech itself") (citing *Buckley*). Thus, spending caps infringe the First Amendment. *See id*.

The Education Spending Cap limits the *quantity* of education. In both the campaign finance and education contexts, the First Amendment prohibits that 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. There is no principled basis for distinction. It is not the role of the government to limit education that the people themselves are willing to pay for, just as it is not the role of the government to limit political speech.

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.

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 …, 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. Just as in *NTEU*, so here too private persons (*i.e.*, Plaintiffs) want to spend their own money to pay for the expressive activity of public employees (*i.e.*, teaching by public employees).

The Cap is a categorical ban on expressive activity that exceeds a certain point: it treats such activity beyond that point as subject to being cut off not because it harms anyone or even threatens imminently to do so but just because there is "too much" of it. The Cap therefore falls within well-settled precedent that treats such prohibitions as highly suspect and presumptively unconstitutional. *Citizens Against Rent Control*, 454 U.S. at 299; *Buckley*, 424 U.S. at 39. That should be dispositive. The Second Circuit, for example, recently reversed the denial of a preliminary injunction in a case involving caps on expressive activity. *See Walsh*, 733 F.3d at 487-89. In *King*, this Court cited *Walsh* to affirm a preliminary injunction against New Mexico's campaign finance laws based on the First Amendment's prohibitions on spending caps. *See King*, 741 F.3d at 1096.

B. The Cap Impermissibly Discriminates on the Basis of Purported Wealth.

The First Amendment also presumptively prohibits discrimination among speakers. And that presumption becomes conclusive when the discrimination is justified only in terms of a desire to *level* the degree to which various groups may contribute to or draw from the fund of information and ideas. That is, of course, exactly what the State does when it discriminates against the purportedly wealthy in order to equalize access to speech by those with purportedly less resources. *See Buckley*, 424 U.S. at 48-49 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment ….") (citations and quotation marks omitted). This directly contradicts the District Court's holding that "a state *may* … discriminate …." App. 3592.

In *Buckley*, the Court considered the constitutionality of campaign finance reform that undertook to achieve equality by suppressing speech:

> [T]he governmental interests … involve "***suppressing communication***." The interests served by the Act include ***restricting*** the voices of people and interest groups who have money to spend and ***reducing*** the overall scope of federal election campaigns.

Buckley, 424 U.S. at 17 (emphasis added). This effort to suppress the speech of the purportedly wealthy was blatantly unconstitutional. *Id*. at 16-17, 39, 44-51.

The District Court admitted that this is *exactly* what the Cap seeks to do – suppress Plaintiffs' educational speech in order "to achieve equity":

> Plaintiffs argue that one may not seek to achieve equity … by discriminating against … wealthier school districts.... [However] a state *may*, under the Equal Protection Clause, discriminate against wealthier districts ….

App. 3592 (emphasis in original). This analysis ignores the First Amendment's prohibition on discrimination based on speaker identity designed to level the playing field of speech.

Buckley vividly explained that a cap on campaign expenditures "might serve … to handicap a candidate who lacked substantial name recognition …." *Buckley*, 424 U.S. at 56-57. That is what the Education Spending Cap does. Echoing "Harrison Bergeron," it literally "handicaps" the education of some children. That is constitutionally offensive. Because education is speech, there is no principled basis to distinguish what *Buckley* prohibited from what the Education Spending Cap restricts. *See Bellotti*, 435 U.S. at 791 n.30.

The *Buckley* rule has been unanimously reaffirmed. *See Meyer v. Grant*, 486 U.S. 414, 426 n.7 (1998); *see also Davis v. FEC*, 554 U.S. 724, 743-44 (2008). Moreover, the rule is little more than an expression of the well-settled rule disapproving discrimination based on speaker identity. *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.").

The *Buckley* rule also mirrors the traditional application of the Equal Protection Clause to Free Speech rights. In those cases, the Supreme Court has consistently prohibited discrimination among speakers in allocating speech rights. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 94-99 (1972) (applying heightened scrutiny to equal protection claim implicating First Amendment rights); *Niemotko v. Maryland*, 340 U.S. 268, 272-73 (1951) (same); *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953) (same). In fact, the Tenth Circuit just applied this principle to campaign finance laws that created unequal contribution limits for minor party candidates. *Riddle v. Hickenlooper*, 742 F.3d 922, 925 (10th Cir. 2014).

The *Buckley* rule firmly prohibits First Amendment discrimination, *see Buckley*, 424 U.S. at 49, and the traditional cases addressing discrimination in the context of First Amendment rights all apply strict scrutiny. *See Mosley*, 408 U.S. at 99. Either way – whether under an equal protection analysis involving First Amendment rights or under a First Amendment analysis involving its own anti-discrimination principle – the District Court erred. Strict scrutiny applies. *Cf. Colo. Christian Univ. v. Weaver*, 534 F.3d 1245,

1257-58 (10th Cir. 2008) (explaining that the Establishment Clause and the Equal Protection Clause "proceed along similar lines" and both required heightened scrutiny to justify state discrimination).

These First Amendment prohibitions against discrimination apply for a second reason. Kansas permits unlimited voluntary spending on *private* and *religious* education – yet it limits voluntary spending on *public* education. Because education constitutes speech, this discrimination is likewise subject to the strictest scrutiny. *See Citizens Against Rent Control*, 454 U.S. at 294 ("[R]egulation of First Amendment rights is always subject to exacting judicial review."); *Weaver*, 534 F.3d at 1254 n.2 (recognizing that heightened scrutiny applies to any attempt to abridge "a specific, enumerated right, be it the freedom of speech … or the right to keep and bear arms") (quoting *Dist. of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008)).

C. The Cap Would Even Fail a Facial Review.

Even though the pleadings and summary judgment record are sufficient to present an "as applied" challenge to the Cap under Rules 12 and 56, and although Plaintiffs continue to press that challenge here, Plaintiffs urge the Court to hold that the Cap does not even survive a *facial* review. *See, e.g.*, *Citizens United*, 558 U.S. at 333 (rejecting campaign spending limits as facially unconstitutional).

A statute is invalid on its face under the First Amendment if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (internal quotation marks omitted). The Cap does not survive a facial review because there are no

conceivable situations in which a cap on educational spending would be justifiable. Education as such is *never* harmful. A premise of the First Amendment is that knowledge itself always helps, even when what some may *do* with it is anything but beneficial. *Meyer*, 262 U.S. at 400 ("Mere knowledge of the German language cannot reasonably be regarded as harmful."); *Pierce*, 268 U.S. at 534 ("[Education is] not inherently harmful, but long regarded as useful and meritorious."). It does not come even close to fitting within the categories of speech a state may ban. Any state limit on such harmless speech is *per se* impermissible. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124 (1991) ("Here, a law is directed to speech alone where the speech in question is not obscene, not defamatory …. No further inquiry is necessary to reject the State's argument ….") (Kennedy, J., concurring).

Even if the State could articulate some justification to cap educational speech, the State could not articulate a justification capable of surviving strict – or even somewhat heightened – scrutiny. *See, e.g.*, *Riddle*, 742 F.3d at 927-30 (striking down unequal contribution limits under heightened scrutiny). To meet any such standard, the State must not only provide a compelling justification for the Cap – it must also show that the Cap is narrowly tailored to achieve that end.

The State Defendants certainly did not meet that burden here. Nor *could* they. The reason, quite simply, is that their handicapping justification, far from being compelling, is patently invalid. The District Court relied on the State's alleged interest in equalizing access to assessed property valuation for public schools – which was based on

a Kansas Supreme Court opinion from a different lawsuit, which did not challenge the Spending Cap:

> [T]he Kansas Supreme Court's dictates to the Kansas Legislature to consider *equity* with respect to LOB cap in order to ensure compliance with the Kansas Constitution would provide a rational basis for the Legislature's subsequent legislation.

App. 3593 (emphasis added).

After the District Court's opinion, the Kansas Supreme Court confirmed that the state constitution requires the legislature to provide "suitable" finance for public education and construed "suitable" to include an "equity" requirement. *Gannon*, 2014 WL 895194 at *32.

The term "equity," of course, is a vague term that allows courts to import their own sense of fairness into the Kansas Constitution. The Kansas Supreme Court defined "equity" to mean: "School districts must have reasonably equal access to substantially similar educational opportunity through similar tax effort." *Gannon*, 2014 WL 895194 at *49. The phrase "similar tax effort" leaves considerable room for interpretation. However, if the Kansas Constitution requires handicapping the education of some in order to ensure what the state constitution deems "equal access" to others – as the District Court appears to conclude – then the Kansas Constitution is on a collision course with the First Amendment.

The First Amendment prohibits any law, including a state constitutional provision, from handicapping some speech to enhance the voice of others. It therefore prevents a state from impeding educational attainment by some children to achieve equal

educational outcomes by other children. *Davis*, 554 U.S. at 741. The United States Constitution flatly prohibits a State from using notions of "equity" or fairness to abridge Free Speech: "[W]hen it comes to such speech, the guiding principle is freedom … not whatever the State may view as ***fair***." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826 (2011) (emphasis added).

In other words, the State's handicapping interest is illegitimate:

> [D]iscriminatory contribution limits meant to "level electoral opportunities for candidates of different personal wealth" did not serve "a legitimate government objective," let alone a compelling one.

Bennett, 131 S. Ct. at 2825-26. Thus, a discriminatory spending limit meant to "level" *educational opportunities* for children is not a legitimate interest.

In addition, the Cap fails a facial review because it represents a true *ban* on more educational speech. The First Amendment does not permit censorship as to the *quantity* of speech any more than it permits censorship as to the *content* of speech. *See NTEU*, 513 U.S. at 467 n.11.

D. Recognizing Plaintiffs' Free Speech Rights Is Not Inconsistent with *Rodriguez*.

Despite this, the District Court ignored Plaintiffs' speech rights, at first denying that Free Speech was even at issue. App. 3592. Ultimately, the District Court rejected Plaintiffs' arguments for a circular reason – because it would require the Court to impose a level of scrutiny that it believed did not apply:

> Under plaintiffs' argument, any restriction on education would be subject to strict scrutiny, but such a result would be inconsistent with the Supreme Court's rejection of that

> standard in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), and *Papasan v. Allain*, 478 U.S. 265 (1986).

App. 3692. The Court, therefore, prejudged the outcome without first explaining why (1) the Education-as-Speech cases and Spending Cap cases were inapplicable and (2) *Rodriguez* applied instead.

Moreover, this overstates both Plaintiffs' position and the applicability of *Rodriguez* and *Papasan*. First, Plaintiffs have never contended that public education issues always trigger strict scrutiny. Instead, their claim rests on the fact that an educational *spending cap* uniquely implicates core fundamental rights. The level of scrutiny depends on the nature of the infringement. Where the challenged state action constitutes a *statutory prohibition* on expressive activity, strict scrutiny applies. *Rodriguez* and *Papasan* are inapplicable.

1. *Rodriguez* Is Distinguishable and Telegraphed Strict Scrutiny for a Negative Rights and Spending Cap Case Like This.

The overriding difference between this case and *Rodriguez* is that the *Rodriguez* plaintiffs were demanding more money from the State. Here, Plaintiffs are seeking the freedom to provide their *own* money for local education. This is a classic "negative rights" case, in which Plaintiffs merely seek to defend their rights from State encroachment.

The difference between "negative rights" and "positive rights" originates in the Constitution itself. For example, the plain language of the First Amendment creates a

negative right: "Congress ***shall make no law*** … abridging the freedom of speech …." CONST. Amend. I (emphasis added).

Rodriguez turned on this distinction. In *Rodriguez*, the Supreme Court considered a claim for positive rights, *i.e.*, a demand for additional state monies. *See Rodriguez*, 411 U.S. at 37-38. The Court found such a claim to be "particularly inappropriate" for the application of strict scrutiny. *See id*. In contrast, the *Rodriguez* Court held that strict scrutiny traditionally applies to those claims involving "legislation which 'deprived,' 'infringed,' or 'interfered' with the free exercise of some such fundamental personal right or liberty." *Id*.

In fact, *Rodriguez* telegraphed that the Court would vigorously protect 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, Plaintiffs would be able to spend more of their own money to make their educational speech more effective. The Cap is an unwarranted "governmental interference" from which plaintiffs seek to be "freed." This is not an education "adequacy" suit, like *Rodriguez* or *Gannon*, where the plaintiffs sought a guarantee of a minimal funding *floor* from the State without voter approval. It is an

education rights suit, like *Meyer* and *Pierce*, where all that is sought is the removal of an unwarranted *ceiling* on what they could do but for the State's intrusion.

Papasan is distinguishable for the same reason. In *Papasan*, the Supreme Court again faced a challenge to how a state apportions education funds. *See Papasan*, 478 U.S. at 287-88. The plaintiffs in *Papasan* were *not* seeking to vindicate their own freedom to provide more and better education to their community's children. *See id.*

2. *Rodriguez* Did Not Involve Intentional Discrimination.

Rodriguez is also distinguishable for a simpler reason. It did not grapple with intentional discrimination. Specifically, the *Rodriguez* Court upheld the Texas educational plan after noting that "[i]t certainly is not the product of purposeful discrimination against any group or class." *Rodriguez*, 411 U.S. at 55. Here, in contrast, the Kansas plan stigmatizes Plaintiffs as "wealthy" – based on the property wealth of their district – and then deliberately discriminates against them on that basis. That is constitutionally improper. *See Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966) ("Lines drawn on the basis of wealth or property, like those of race … are traditionally disfavored.").

Worse, the statute discriminates against Plaintiffs regardless of whether they or their schools are, in fact, wealthy. To the contrary, Kansas has succeeded in making these schools poor – yet the Cap still discriminates against them. To discriminate against those who in fact have greater wealth is bad enough; to discriminate against a group because they are easy to stigmatize as wealthy is even worse.

E. Plaintiffs Are Not Seeking to Create New Rights.

The District Court discussed *Rodriguez* but failed to apply it properly. In fact, the Court acknowledged that *Rodriguez* does not "require[] application of the rational basis standard," but concluded that "it would not declare a new fundamental right in the absence of such authority." App. 3692-93. The District Court even noted that the "plaintiffs [in *Rodriguez*] sought more money from the State for public education, while in the present case, plaintiffs challenge their inability to provide additional local funds" and that "*Rodriguez* does not necessarily control here." App. 3693. Nevertheless, the Court inexplicably employed the rational basis standard because that was the "applicable standard in *Rodriguez*." *Id*.

The District Court's reasoning was indefensible. First, it failed to appreciate how *Rodriguez* expressly anticipated – and carefully distinguished – the situation that this case presents. Specifically, the Court in *Rodriguez* noted that Texas had adopted a spending cap, but it explicitly reserved judgment as to the cap's constitutionality. *See Rodriguez*, 411 U.S. 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)). Justice White, writing in dissent, pointedly argued that the cap contributed to a violation of equal protection by eliminating the plaintiffs' ability to obtain equal funding for their schools. *See id*. at 67, 69-70 (White, J., dissenting). The majority did not disagree with Justice White's analysis – it merely held the issue was not ripe in that case. *Id*. at 50 n.107.

The Supreme Court's citation of *Hargrave* plainly signaled that a cap on local spending would raise serious constitutional questions were it to be squarely presented. In

Hargrave, a three-judge court held that a state law capping local education funding was unconstitutional. *Hargrave*, 313 F. Supp. at 945. *Hargrave* did not address whether strict scrutiny applied because the cap did not survive even the rational basis test. *Id*. at 948.

The District Court further erred in opining that Plaintiffs sought recognition of a "new" fundamental right. The rights of Free Speech, voting, parental control, and association are anything but new. They are, to put it mildly, well-known. Plaintiffs merely asked the District Court to apply existing precedent to a factually analogous situation, which the Supreme Court has already indicated raises constitutional questions.

To the contrary, the unconstitutional discrimination against Plaintiffs demands a remedy. *Cf. Citizens United*, 558 U.S. at 375 ("There is a difference between judicial restraint and judicial abdication. When constitutional questions are 'indispensably necessary' to resolving the case at hand, 'the court must meet and decide them.'") (citations omitted). Indeed, if the District Court's approach were correct, the federal courts would never apply settled legal principles to new situations.

Given the new *Gannon* decision, it becomes all the more imperative that any legislative re-adjustment of the Kansas school financing scheme be required to take place within constitutionally defined boundaries. The District Court should have applied strict scrutiny to define those boundaries. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.)

("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

F. The Fact that the Cap Involves a Public Finance and Taxation Scheme Does Not Change the Analysis.

Instead of wrestling with the First Amendment, the District Court suggested it should defer to the state legislature because this case involves matters of finance. App. 3580-81. However, the Supreme Court rejected deference to the state on matters of finance involving Free Speech in *Speiser v. Randall*, 357 U.S. 513, 520 (1958), as did this Court in *Weaver*, 534 F.3d at 1254-57.

Moreover, the District Court's formalistic rule of deference to fiscal schemes has no obvious limiting principle. According to its logic, any taxation and fiscal scheme may trample fundamental freedoms, and federal courts would be required to do nothing about it. This is backwards. The level of scrutiny does not turn on whether financial issues are involved but on whether fundamental rights are involved.

In any event, the Kansas Legislature already creates statutory initiative and voting rights on taxation and financial matters. *See* K.S.A. 72-6433(e); K.S.A. 12-138a. The Education Spending Cap restricts this otherwise unlimited taxing authority only in the realm of education. K.S.A. 72-6433(a)(1), (b). The Cap thus perversely limits money for education – *i.e.*, money for *speech* – but not money for roads, prisons, or trash disposal. This decision to single out education for approbation turns constitutional values on their head and deserves no deference. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) ("[E]ducation is perhaps the most important function of state and local governments.").

II. Plaintiffs Are Likely to Succeed on the Merits Because the Education Spending Cap Violates Equal Protection.

In addition to violating Plaintiffs' Free Speech rights, the State discriminates against Plaintiffs in violation of the Equal Protection Clause. There is discrimination, first, because the clear purpose and unmistakable effect of the Education Spending Cap is to prevent school districts with the capacity to increase funding from doing so. But, in addition, the funding formulas are facially discriminatory: (1) the State provides unequal "General State Aid," unequal "Supplemental General State Aid" and unequal total "State Aid," irrespective of the source, and (2) the Spending Cap is variable because it is lower for schools like SMSD that receive less "State Financial Aid" per pupil. So the Cap is a double-whammy: it is not set equally itself, and it also freezes disproportional spending in place, with no meaningful way to overcome it.

According to the District Court, however, Kansas can openly discriminate against Plaintiffs (as long as it has a rational basis), because the Cap does not implicate fundamental rights. App. 3592. This is wrong. The Kansas scheme implicates fundamental rights and thus demands strict scrutiny.

A. The District Court Applied the Wrong Level of Scrutiny Because the Cap Burdens Due Process Rights.

1. The Cap Burdens Liberty Rights.

In 1923, the Supreme Court held that the Due Process Clause protects "the power of parents to control the education of their own." *Meyer*, 262 U.S. at 401. In 1925, the Court again recognized the "liberty of parents and guardians to direct the … education of children …." *Pierce*, 268 U.S. at 534-35. The Supreme Court reiterated the centrality of

parental rights in the World War II era and again in the 1970s. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)); *see also Wisconsin*, 406 U.S. at 232 ("This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring *American tradition*.") (emphasis added); *Employment Div. of Oregon v. Smith*, 494 U.S. 872, 881 (1990) (explaining that *Pierce* and *Wisconsin* hinged on parental rights, not on religious belief alone).

The District Court implied that Plaintiffs were seeking to create a new right. App. 3692-93. But as *Meyer* and *Pierce* demonstrate, "the interest of parents in the care, custody, and control of their children … is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel*, 530 U.S. at 65 (plurality opinion). In fact, it is when rights are "traditional" that the Supreme Court most readily recognizes them as fundamental. *See Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) ("[T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition' ….").

The *Meyer* and *Pierce* line of cases applies with even greater 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 provide. Even *Rodriguez* recognized the importance of parents' ability to fund the public education of their children: "In part, local control means … the freedom to devote more money to the education of one's children." *Rodriguez*, 411 U.S. at 49. 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 enhance public education for their children. Were that not so, a state would be free to prohibit private donations to public schools, which would be analytically indistinguishable from the spending cap here. That would overturn *Meyer* and *Pierce* and would be an anathema to the United States Constitution.[4]

Nor should *Meyer* and *Pierce* be construed narrowly, as the District Court did. In fact, the Supreme Court has cited *Meyer* and *Pierce* expansively – beyond the education context. *See Troxel*, 530 U.S. at 65.

The District Court mentioned these Liberty rights. App. 3580-81. But its analysis was deeply flawed. For starters, the District Court again recharacterized Plaintiffs' claims:

> In none of those cases did the Supreme Court recognize a parent's fundamental right to control *all* aspects of public education…. In particular, the Court has not recognized the right of parents to control how a State funds public education, including the right to attempt to compel a vote seeking to authorize a local tax to force others (as well as themselves) to use their money to fund public education.

Id. (emphasis in original). But, of course, Plaintiffs are claiming no right to control "all" aspects of public schooling. They do not challenge the authority of public officials, accountable to the community, to set school rules, curricula, and the like. Their claim is far more modest. It is a claim that challenges government's attempt to cap how much of

[4] 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.

the money they vote to raise and spend within the state's legal framework may be devoted to the First Amendment activity of educating their children.

Of course, parents cannot control all aspects of public education. *See Swanson ex rel. Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 699 (10th Cir. 1998). But this is not a case regarding the minutia of running a public school. *See id*. Here, the Cap ousts Plaintiffs from decisions regarding supplemental financing of their local public schools. Kansas must come forward with compelling reasons to justify such a drastic infringement on Appellants' *traditional* fundamental rights, which it fails to do.

The District Court also implied that somehow these are not fundamental rights in *this context*: "[P]laintiffs have not provided authority for the recognition of a fundamental right in this context of *seeking the ability to approve a tax* and this Court will not recognize such a right for the first time …." App. 3584-85 (emphasis added). But that makes no sense. Either parental control over their children's education is a fundamental right or it is not. If it is, then *discrimination* that singles out that right for a special burden is subject to strict scrutiny – certainly in this context, where Plaintiffs are merely seeking freedom from government interference to support their local public schools.

Nor does the District Court's effort to cast Plaintiffs' claim as a demand for tax revenue undermine Plaintiffs' claims. The Supreme Court has frequently recognized fundamental rights in a taxation context. *See Bennett*, 131 S. Ct. at 2818-21 (a matching fund provision in context of a voluntary public finance scheme violated Free Speech); *Sherbert v. Verner*, 374 U.S. 398, 402 (1963) (the government cannot "employ the taxing

power to inhibit … views"). That a taxing scheme is involved does not enable the State to burden fundamental liberties.

2. The Cap Burdens Property Rights.

All citizens also have the fundamental right to spend their own money as they see fit – not only for the lofty goal of elevating the education of their children but also for the more practical goal of protecting their homes from the economic and social impact of deteriorating neighborhood schools. For example, in *Moore v. City of East Cleveland*, the Supreme Court invalidated a local ordinance that placed occupancy limits on private dwellings, which prohibited a grandmother from housing those of her grandchildren with whom she wished to live. 431 U.S. 494, 499-500 (1977). While Justice Powell's plurality opinion found that the law infringed liberty interests arising out of the sanctity of the family, Justice Stevens separately opined that the law unduly interfered with property interests because it prohibited the grandmother from using her own property to house certain of her grandchildren. *Id*. at 513 (Stevens, J., concurring).

Here, the Cap similarly prohibits Plaintiffs from using their own money to provide for their own neighborhood children. They are free to spend unlimited sums of money on other threats to their children's best interests, like junk food and violent video games, but they are prohibited from spending their own money on the public education of their children or their neighbor's children. Such a scheme demands the application of strict scrutiny.

B. The District Court Applied the Wrong Level of Scrutiny Because the Cap Burdens Associational and Petitioning Rights.

1. The Cap Burdens the Freedom to Associate.

The Cap also impermissibly burdens Plaintiffs' First Amendment rights to associate and work together to promote the educational interests of their community's children. The Constitution protects "the practice of persons sharing common views banding together to achieve a common end." *Citizens Against Rent Control*, 454 U.S. at 294; *see also Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) ("[I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of … educational … ends.").

Here, the District Court smothered Plaintiffs' associational rights in the analysis that it used to reject Plaintiffs' Free Speech rights. Specifically, the District Court justified curtailing Plaintiffs' Free Speech rights by claiming that Plaintiffs could *individually* find other ways to fund education:

> Moreover, the LOB cap does not restrict the promulgation of education generally, but only concerns funding for *public* education. As the Court noted in its prior opinion, the LOB cap does not affect plaintiffs' ability to spend money on their education ….

App. 3692 (emphasis in original). For decades, however, the Supreme Court has not only protected speech, but also the right to make speech more effective. *See NAACP v. Alabama*, 357 U.S. 449, 460 (1958). And it is the ability to work with others that makes speech more effective. *See id*. ("Effective advocacy … is undeniably enhanced by group association ….").

The same is true for schools. Improving the schools for all neighborhood children is a community effort. *Cf. Buckley*, 424 U.S. at 65-66 ("The right to join together 'for the advancement of beliefs and ideas,' is diluted if it does not include the right to ***pool money*** ….") (emphasis added, citations omitted). Yet the District Court would have Plaintiffs go it alone – as if they were merely trying to improve education for their own children. Associational jurisprudence rejects such a narrow view of Plaintiffs' First Amendment rights. *See id*. at 25.

Finally, the Supreme Court has previously recognized the importance of protecting the Freedom of Association for *extended* family members. *See Moore*, 431 U.S. at 499. Justice Douglas recognized that the Freedom of Association protects *unrelated* persons within the same household, who pool their resources together to make ends meet. *Dep't of Agric. v. Moreno*, 413 U.S. 528, 541 (1973) ("[B]anding together is an expression of the right of freedom of association that is very deep in our traditions.") (Douglas, J., concurring). The Right of Association should likewise protect *neighbors* "banding together" to support their neighborhoods and neighborhood schools.

2. The District Court's Basis for Rejecting Plaintiffs' Right of Association Is Unpersuasive.

To defeat Plaintiffs' Right of Association, the District Court again recharacterized Plaintiffs' claims: "[P]laintiffs are essentially arguing in favor of a fundamental right to associate to pursue a particular voter initiative …." App. 3583. But this treats Plaintiffs as though they were claiming a right to have the state install an initiative process out of whole cloth. That is not Plaintiffs' claim. Theirs is a challenge to the Cap the State has

placed on how much of the money raised through a state-authorized initiative process could be spent by some districts on the education of their children, a challenge sounding in free speech and equal protection, not in an inherent right to a different voting structure. App. 3583.

Nor does it matter that Plaintiffs are pursuing the right to associate with other *voters* rather than with corporate or individual donors. App. 3581. The Supreme Court has recognized that the right of association includes the right of voters to associate with other voters. The State is stopping Plaintiffs "at the crucial juncture at which the appeal to common principles may be translated into concerted action …." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 216 (1986). The upshot of the District Court's analysis is that citizens are free to spend their own money on public education so long as they do so privately, in isolation, and ineffectively. But that analysis flies in the face of settled associational jurisprudence to the contrary.

Moreover, although the District Court repeatedly referred to Plaintiffs' desire to use the local tax levy mechanism as "coercive," it is anything but. In a democracy, a vote on any issue is, by definition, consensual. To be sure, those who get outvoted are required to go along with majority will. But without a process of majority vote, the ideal of a government by "consent of the governed" would be impossible. The District Court cited to no authority that voter approval has ever been held to be coercive. On the contrary, the Supreme Court has held that removal of a spending cap was constitutionally proper to remedy racial discrimination in public schools. *Missouri v. Jenkins*, 495 U.S. 33, 68 (1990) ("[T]he power of taxation must be under the control of those who are taxed.

This truth animated all our colonial and revolutionary history.") (Kennedy, J., concurring). That logic applies with equal force here.

3. The Cap Burdens the Freedom to Petition.

The fundamental right of parents to act together through collective, democratic action to improve local public education is grounded not only in their due process rights as parents – but also in the First Amendment's Right to Petition. This is especially clear in Kansas, which has enacted mechanisms to allow Kansas citizens to petition the government with respect to the level of taxation they are willing to bear to improve public education. *See* K.S.A. 72-6433(e); K.S.A. 12-138a. But Kansas then bars Plaintiffs via the Spending Cap from deriving any benefit from utilizing these petitioning mechanisms – via discriminatory classifications based on wealth! As this Court previously concluded, the Cap prevents Appellants from "even attempting to raise more money to compensate for this alleged underfunding." *Petrella*, 697 F.3d at 1294; *NTEU*, 513 U.S. at 466-70 (invalidating honoraria bans as restrictions on speech because they eliminate the gains a speaker expects to receive from expression).

C. The District Court Applied the Wrong Level of Scrutiny Because the Cap Infringes on Voting Rights.

The next fundamental right at issue is the right to vote. *See Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969). Voting receives constitutional protection for many reasons, among them being its character as expressive conduct. *See Anderson v. Celebrezze*, 460 U.S. 780, 786-88, 794 & nn.7 & 8 (1983); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

Voting is also protected by the Petition Clause. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986). Finally, voting "is regarded as a fundamental political right" because it is "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). The Educational Spending Cap is thus subject to strict scrutiny if it infringes on the right to vote. *See Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) ("[A] more exacting test is required for any statute that 'place(s) a condition on the exercise of the right to vote.'") (citations omitted).

1. The Cap Violates the Supreme Court's Decision in *Kramer*.

The Supreme Court has applied these principles to voting rights pertaining to education. Specifically, *Kramer* is a schools case in which New York selectively extended the franchise to (1) property owners, (2) property renters, and (3) parents with children in public schools. *See Kramer*, 395 U.S. at 622-24. Plaintiff did not qualify. *See id*. at 624-25. Notably, the subject of the elections included not just electing school board members but also determining the school budgets – *i.e.*, funding the local public schools. *See id*. at 622-24. Thus *Kramer* involved the same type of "issue" elections as those at issue here.

Importantly, the Supreme Court applied heightened scrutiny to a case involving education (contradicting the District Court's notion that rationality review applies to educational issues). *Id*. at 626-27. Moreover, the Supreme Court emphasized that its analysis applied equally to the voter approval of the school budget. *See*, *e.g.*, *id*. at 627 n.7 & 629 n.11.

The discrimination here is different from that in *Kramer*, but just as blatant – and it likewise implicates voting rights related to education. The SDFQPA discriminates against Plaintiffs by unequally funding their schools. *See*, *e.g.*, K.S.A. 72-6434(a)(1)-(5). Then the Education Spending Cap restricts Plaintiffs' ability to use their voting rights to remedy that discrimination. *See* K.S.A. 72-6433(a)(1), (b). Kansas thus freezes that discrimination in place by burdening Plaintiffs' voting rights.

2. The Cap Fails the Supreme Court's Test for Legitimate Regulations of the Right to Vote.

Of course, a state has a right to regulate elections to ensure they are fair and efficient. *See Anderson*, 460 U.S. at 788; *Burdick*, 504 U.S. at 433-34. However, courts must ensure that these regulations do not discriminate:

> [I]t is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or ***economic status***.

Anderson, 460 U.S. at 793 (emphasis added). *Burdick* announced a more complex test—but it also reiterated the importance of preventing discrimination in voting rights. *Burdick*, 504 U.S. at 434.

The Cap does not pass scrutiny because it is discriminatory. *Anderson*, 460 U.S. at 793. Indeed, the entire *goal* of the system is to prevent property-wealthy (but revenue-poor) districts from obtaining what the state deems too much education. As the Supreme Court explained when it struck down poll taxes:

> [A] State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the *affluence* of the voter … an electoral standard.

Harper, 383 U.S. at 666 (emphasis added). Here, the Cap makes the property wealth of a group of voters an "electoral standard."

3. *Save Palisade* Does Not Permit the Discrimination at Issue.

The District Court rejected the above analysis on the basis of one case. App. 3691 (citing *Save Palisade FruitLands v. Todd*, 279 F.3d 1204 (10th Cir. 2002)). In *Save Palisade*, this Court upheld a Colorado voting scheme that gave some counties voter initiative rights but denied them to other counties. *Save Palisade*, 279 F.3d at 1210-14. The District Court cited *Save Palisade* for the proposition that voters do not have a fundamental right to instigate a voter initiative. App. 3583; 3688-91. This was dispositive, according to the District Court, because that was supposedly what Plaintiffs were actually asserting – the right to a voter initiative – as if Kansas had never provided those voting initiative rights to Plaintiffs. *See* App. 3583.

This is wrong. The Kansas statute *does* extend voter initiative rights to the residents of *all* school districts. *See* K.S.A. 72-6433(e). But for the Cap, Kansas law currently allows Plaintiffs to vote on these issues – and to cast votes that *count* toward the result they seek to advance through their exercise of the franchise thereby accorded them. In operation and effect, however, the Cap discriminatorily targets residents of school districts like SMSD to squelch their use of these *pre-existing* voting rights. *See*, *e.g.*, *Hargrave*, 313 F. Supp. at 948 (invalidating Florida's school funding caps because of the discrimination that was "inherent" in those caps).

Furthermore, *Save Palisade* does not justify allocating ***any*** type of voting rights on the basis of purported wealth. The Supreme Court's decision in *Harper* prohibits that

result: "a State violates the Equal Protection Clause … ***whenever*** it makes the affluence of the voter … an electoral standard." *Harper*, 383 U.S. at 666 (emphasis added); *see also Anderson*, 460 U.S. at 793. In contrast to *Harper*, the only "discrimination" in *Save Palisade* was one between political entities – *i.e.*, between "statutory" and "home rule" counties. *Save Palisade*, 279 F.3d at 1207-08. Further, unlike here, the "statutory" counties had no pre-existing statutory voting rights. Here, Plaintiffs do have pre-existing statutory voting rights, which are discriminatorily restricted in their operation. Therefore, *Save Palisade* is inapposite.

III. Plaintiffs Are Likely to Succeed on the Merits Because the Education Spending Cap Imposes "Unconstitutional Conditions."

Even if the Court disagrees with the above – and finds that fundamental rights are not at issue – that does not end the matter. Kansas has enacted statutes that give voting rights to parents and other citizens seeking to authorize local taxes to fund public education. *See* K.S.A. 72-6433(e); K.S.A. 12-138a. Accordingly, the Court must also address whether Kansas can impose unconstitutional conditions on those statutory voting rights. The answer to that question is emphatically no.

A. The Cap Imposes an Unconstitutional Condition on Pre-existing Statutory Voting Rights.

Federal courts have long prohibited the imposition of unconstitutional conditions on otherwise discretionary benefits. *See Sherbert*, 374 U.S. at 403-06; *Keyishian*, 385 U.S. at 605-06; *Hargrave*, 313 F. Supp. at 947. The classic case establishing that a State cannot impose unconstitutional conditions on pre-existing voter initiative rights is the Supreme Court's unanimous decision in *Meyer v. Grant*, 486 U.S. 414 (1988).

In *Meyer v. Grant*, Colorado allowed voter initiatives but prohibited parties from hiring "paid circulators" to obtain the signatures to put a proposition on the ballot. 486 U.S. at 416-18. Colorado argued that "because the power of the initiative is a state-created right, it is free to impose limitations on the exercise of that right." *Id*. at 424. The Supreme Court *unanimously* rejected this argument because voter initiatives implicated core political speech. *Id*. at 424-25. "For that reason the burden that Colorado must overcome to justify this criminal law is well-nigh insurmountable." *Id*. at 425.

Likewise, here, Kansas imposes unconstitutional conditions – conditions that conflict with freedoms of speech, petition, association, and equal protection – on the exercise of the initiative and voting process the State has created. Kansas restricts those initiative rights on the basis of the property wealth of the district. That discrimination functions precisely as a condition: citizens can vote only if their district meets the State's designated criteria.

In addition, the Cap thwarts the political speech that would have resulted from an election to raise support for local schools. In other words, voter initiative statutes, by their nature, invite the public to express political opinions. *See Meyer v. Grant*, 486 U.S. at 422-23. Yet that speech is either triggered or suppressed based on property wealth. That is impermissible: "The State, having 'cho[sen] to tap the energy and the legitimizing power of the democratic process, ... must accord the participants in that process the First Amendment rights that attach to their roles.'" *John Doe No. 1 v. Reed*, 130 S. Ct. 2811, 2817 (2010) (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002)).

Moreover, the Cap is coercive. It coerces voters to refrain from expressing approval of more local funds for education by penalizing the school districts if the voters do so: "In accordance with Kansas statutes, a district will be ***penalized state aid*** equal to the amount expended in excess of the computed statutory limitation." App. 2679 (emphasis added). K.S.A. 72-6432.

Because of the threat of this penalty, any attempt by Plaintiffs to meaningfully "level the playing field" by advocating for voter approval of higher local spending to achieve spending levels commensurate with better funded districts is futile. *See NTEU*, 513 U.S. at 469. This penalty thus constitutes a condition on the funding for Plaintiffs' schools that has been rejected as unconstitutional in analogous contexts. *See Hargrave*, 313 F. Supp. at 947; *Barnette*, 319 U.S. at 636.

The District Court refused to apply the Unconstitutional Conditions Doctrine for two overriding reasons. First, the District Court held that Plaintiffs are merely complaining about the fact that Kansas simply did not extend the voter initiative rights to them – which Plaintiffs addressed above. App. 3583, 3688-91.

Second, the Court held that *Meyer* merely protected speech incident to a voter initiative. App. 3689-90. This Court should reject such a narrow reading of *Meyer*. While *Meyer* protected Free Speech directly, it also emphasized that all conditions on voting rights are subject to significantly heightened scrutiny. *See Meyer v. Grant*, 486 U.S. at 423 ("[S]tatutes that limit the power of the people to initiate legislation are to be closely scrutinized and narrowly construed.") (quoting *Urevich v. Woodard*, 667 P.2d

760, 763 (1983)). Here, the condition – discrimination based on wealth – is particularly repugnant to the Constitution and should be subjected to close scrutiny.

B. The Cap Imposes an Unconstitutional Condition on Education Itself.

Moreover, *Meyer v. Grant* applies with special force here because these Kansas voting statutes relate to the activity of getting together with one's fellow citizens to provide more and better education to one's children and theirs – which is an inherently expressive activity protected by the First Amendment. *See generally* Section I, *supra*.

In other words, the Cap is not just illegally conditioning voting rights; it conditions access to more and better education, and it does so on a discriminatory basis.

IV. The District Court Misapplied the Other Preliminary Injunction Factors.

The other three factors for a preliminary injunction also are satisfied, and the District Court erred when it came to the opposite conclusion. The second factor is easily satisfied because there are real, irreversible, and irreparable human costs to the Cap. Children currently are going through school without the education that the community believes they need. Education is the stepping stone to better jobs, prosperity, and informed participation in our democracy. As the Supreme Court explained in *NTEU*: "[w]e have no way to measure the true cost of that burden, but we cannot ignore the risk that it might deprive us of the work of a future Melville or Hawthorne." *NTEU*, 513 U.S. at 470. Moreover, the harm to First Amendment interests is inherently irreparable. *See Hobby Lobby*, 723 F.3d at 1145 ("[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury").

The other two remaining factors also are satisfied, but the District Court was led astray by its incorrect evaluation of the Non-Severability Clause, as explained below.

A. The District Court Should Not Have Considered Non-Severability at This Stage.

The District Court's preliminary injunction analysis was heavily influenced by its previously vacated conclusion that the Cap was not severable. In doing so, it disregarded clear instructions from this Court that severability is a *post-merits* consideration. That this was error has been confirmed by the Kansas Supreme Court's recent decision in *Gannon v. State*, which directed that certain provisions of the SDFQPA be enjoined *without any consideration of severability*. *See Gannon*, 2014 WL 895194 at *65.

In its earlier opinion in this case, this Court made clear that severability should be addressed only *following* a determination on the merits: "Only if … the district court concludes that the LOB cap is unconstitutional, should it then determine whether the cap is severable …." *Petrella*, 697 F.3d at 1296. That is the law of the case, and nothing material to this issue has changed in the interim. Thus, addressing the severability issue remains premature.

The District Court attempted to side-step this directive by stating that "[t]he severability issue is relevant … to plaintiffs' pending motion for a preliminary injunction, as it bears on the potential harm … if enforcement of the LOB cap is enjoined." App. 3597. However, this Court's holding was not so limited.

B. In Any Event, The Cap Is Severable, and Even If It Is Non-Severable, Then the Non-Severability Provision Is Itself Unconstitutional.

Even if severability were a proper consideration, the District Court further erred when it concluded that the Cap was not severable. When evaluating whether a statutory provision is severable, the key questions are whether "the act would have been passed without the objectionable portion and if the statute would operate effectively to carry out the intention of the legislature with such portion stricken." *Thompson v. KFB Ins. Co.*, 252 Kan. 1010, 1023, 850 P.2d 773 (1993). "A severability clause is of no importance." *Id*.[5] Courts should consider whether the Legislature would have preferred no system at all over a system without the challenged provision. *See Quinly v. City of Prairie Village, Kan.*, 446 F. Supp. 2d 1233, 1246-47 (D. Kan. 2006).

Under this test, the Cap is obviously severable. Invalidating the Cap does not impair the operation of the SDFQPA. In contrast, the severability clause conflicts with the Kansas Constitution's clear command that the Legislature "shall make suitable provision for finance of the educational interests of the state." Ks. Const. Art 6 cl. 1; cl. 6(a). There is no conceivable basis to accept the proposition that the Kansas Legislature would have preferred to violate its constitutional obligations and provide *no school finance system at all*.

Moreover, there are further reasons not to apply the nonseverability provision in this case. Under Defendants' reasoning, the Cap could never be challenged in federal court, because any successful attack would eliminate local funding and frustrate any

[5] Despite this clear statement, the District Court's analysis gave the severability clause singular importance. *See* App. 2389.

possible judicial relief. But such a constitutional "black hole" would raise serious questions under Article III, because it would effectively insulate an unconstitutional state law from all federal judicial review.

The Supreme Court has reserved the question of whether the Constitution permits applying a non-severability clause in such a manner. *See Heckler v. Mathews*, 465 U.S. 728, 739 n.5 (1984) ("[W]e need not consider [the] claim that a legislative attempt to thwart a court's ability to remedy a constitutional violation [via a non-severability provision] would itself violate the Constitution."). This Court should similarly avoid the question here by construing the non-severability provision so that it does not apply. *See Crowell v. Benson*, 285 U.S. 22, 62 (1932).

C. The District Court Erred When It Failed to Tailor Relief as This Court Instructed.

This Court has explained that meaningful relief could take many forms. *Petrella*, 697 F.3d at 1294. The same is true for a preliminary injunction. The District Court could have taken action to fashion a preliminary injunction that would not trigger severability – action such as issuing an injunction, staying its decision, and giving the Legislature time to respond; or raising the Cap sufficiently to allow Plaintiffs to equalize funding but postponing complete lifting of the Cap pending a legislative fix. *Id*. at 1295. But it pursued none of those alternatives. Instead, it relied on the severability clause when it could instead have crafted a remedy that addressed the violation and avoided severability problems altogether. Indeed, at this very moment the Kansas Legislature is considering amendments to the SDFQPA to remedy violations of the State Constitution. Had the

District Court enjoined the Spending Cap on local funding, the Kansas Legislature could devise a funding scheme that comports with *both* the federal and state constitutions. Denial of a preliminary injunction was an abuse of discretion.

CONCLUSION

Based on its dismissal and summary judgment rulings, the District Court applied the wrong level of scrutiny to Plaintiffs' constitutional claims and denied a preliminary injunction as a result. Plaintiffs respectfully ask the Court to (1) reverse the dismissal of Plaintiffs' claims that were based on violations of Plaintiffs' fundamental rights or that would otherwise require subjecting the SDFQPA to heightened scrutiny, (2) direct the entry of summary judgment for Plaintiffs, (3) hold that strict scrutiny applies to Plaintiffs' constitutional claims, either facially or as applied, (4) reverse the denial of a preliminary injunction, and/or (5) either direct the entry of a permanent injunction or remand for further consideration.

ORAL ARGUMENT STATEMENT

Appellants respectfully request oral argument. Appellants believe oral argument will assist the Court in deciding this appeal because it presents novel issues of federal constitutional law, including questions regarding Freedom of Speech, Equal Protection, Due Process, Association, Petition, and Voting Rights, and involves matters of great public importance involving broad implications beyond this litigation.

Dated: March 31, 2014

Respectfully submitted,

By: /s/ Tristan L. Duncan

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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2014, I electronically filed the foregoing Appellants' Brief with the U.S. Court of Appeals Clerk's Office for the Tenth Circuit by using the Tenth Circuit's Electronic Case Filing (CM/ECF) System, which will send electronic notification to the following:

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,952 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 10th Cir. R. 32(a) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 13-point Times New Roman font. I relied on the word count of that software to obtain the word count above.

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

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