No. _____

In The Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING

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

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

PARTIES TO THE PROCEEDING – Continued

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

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

PARTIES TO THE PROCEEDING – Continued

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

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

PARTIES TO THE PROCEEDING – Continued

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

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PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I

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

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

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

Section 12 of Kansas S.B. 7 provides:

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

Kan. Reg. 274, § 12(a).

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

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

. . .

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

INTRODUCTION

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

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

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

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

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

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

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

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

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

caps on education. In the 42 years since *Rodriguez*, the Court has addressed spending caps on political speech, and has held that such caps violate the First Amendment, and cannot be justified by any "leveling" theory – either a theory as perverse as that adopted by Kansas (where the local spending that the state seeks to prohibit is itself designed to offset a gap in the state's own provision of state funding) or a theory that simply seeks to limit the spending of some citizens in order to prevent them from enlarging their expressive opportunities as compared with those of others. But this Court has not had the opportunity to consider whether spending caps on education, a particularly valuable form of speech (*see Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools")), similarly offend the First Amendment.[1]

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

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

STATEMENT OF THE CASE

I. The School District Finance and Quality Performance Act.

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

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

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

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

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

A. State Financial Aid.

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

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

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

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

B. Local Option Budgets and Supplemental Funding.

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

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

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

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

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

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

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

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

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

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

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

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

III. The Procedural History of the Case.

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

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

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

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

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

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

REASONS FOR GRANTING THE PETITION

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

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

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

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

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

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

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

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

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

This case plainly satisfies all three requirements:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> discount important principles of our government as mere platitudes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DIANE PETRELLA, next friend and guardian of minor N.P., minor C.P.; NICK PETRELLA, next friend and guardian of minor N.P.; minor C.P., MICHELLE TROUVE', next friend and guardian of minor J.T., minor Z.T., minor N.T.; MARC TROUVE', next friend and guardian of minor J.T., minor Z.T., minor N.T.; MEREDITH BIHUNIAK, next friend and guardian of minor S.B., minor O.B., minor A.B., minor E.B.; CHRIS BIHUNIAK, next friend and guardian of minor S.B., minor O.B., minor A.B., minor E.B.; MIKE WASHBURN, next friend and guardian of minor A.W., minor R.W.; LAURENCE FLORENS, next friend and guardian of minor A.W., minor R.W.; PAUL ERDNER, next friend and guardian of minor M.E., minor A.E.; JULIE ERDNER, next friend and guardian of minor M.E., minor A.E.; CHRISTOPHE	Nos. 13-3334 & 14-3023

SAILLY, next friend and guardian of minor E.S., minor N.S.; CATALINA SAILLY, next friend and guardian of minor E.S., minor N.S.; JOHN WEBB ROBERTS, next friend and guardian of minor M.C.R., minor W.C.R.; TERRE MANNE, next friend and guardian of minor C.J.M.; ALISON BARNES MARTIN, next friend and guardian of minor C.O.M., minor C.E.M.; KURT KUHNKE, next friend and guardian of minor A.K.; LISA KUHNKE, next friend and guardian of minor A.K.,

Plaintiffs-Appellants,

v.

SAM BROWNBACK, Governor of Kansas, in his official capacity; DEREK SCHMIDT, Kansas Attorney General, in his official capacity; RON ESTES, Kansas State Treasurer, in his official capacity, DR. DIANE DEBACKER, in her official capacity as Kansas Commissioner of Education; JANET WAUGH, in her official capacity as Chair of the Kansas State Board of Education; KATHY MARTIN, in her official capacity as a member of the State Board of Education;

SUE STORM, in her official capacity as a member of the Kansas State Board of Education; KENNETH WILLARD, in his official capacity as a member of the Kansas State Board of Education; JOHN W. BACON, in his official capacity as a member of the Kansas State Board of Education; DR. WALT CHAPPELL, in his official capacity as a member of the Kansas State Board of Education; CAROLYN L. WIMS-CAMPBELL, in her official capacity as a member of the Kansas State Board of Education; JANA SHAVER, in her official capacity as Vice-Chair of the Kansas State Board of Education; SALLY CAUBLE, in her official capacity as a member of the Kansas State Board of Education; DAVID T. DENNIS, in his official capacity as a member of the Kansas State Board of Education;

Defendants-Appellees,

and

EVETTE HAWTHORNE-CROSBY, next friend and guardian of minor B.C.; JOY HOLMES, next friend and guardian of minor J.H.;

JIM HOLMES, next friend and guardian of minor J.H.; JENNIFER KENNEDY, next friend and guardian of minor O.K.; GEORGE MENDEZ, next friend and guardian of minor G.M.; EVA HERRERA, next friend and guardian of minor D.H., minor G.H., minor K.H.; MONICA MENDEZ, next friend and guardian of minor G.M.; RAMON MURGUIA, next friend and guardian of minor A.M.; SALLY MURGUIA, next friend and guardian of minor A.M.; IVY NEWTON, next friend and guardian of minor L.N.; MATT NEWTON, next friend and guardian of minor L.N.; SCHELENA OAKMAN, next friend and guardian of minor C.O.; CLARA OSBORNE, next friend and guardian of minor N.W.; MISTY SEEBER, next friend and guardian of minor A.S., minor B.S.; DAVID SEEBER, next friend and guardian of minor A.S., minor B.S.; JOHN CAIN, next friend and guardian of minor L.C.; BECKY CAIN, next friend and guardian of minor L.C.; MEREDITH GANNON, next friend and guardian of minor L.G., minor A.G., minor G.G.;

JEFF GANNON, next friend and guardian of minor L.G., minor A.G., minor G.G.; ANDREA BURGESS, next friend and guardian of minor J.B.; MARTHA PINT, next friend and guardian of minor C.P.; DARRIN COX, next friend and guardian of minor J.C.; LOIS COX, next friend and guardian of minor J.C.; DANIE ELDREDGE, next friend and guardian of minor A.E.; JOSH ELDREDGE, next friend and guardian of minor A.E.; GLENN OWEN, next friend and guardian of minor A.O.; RYAN RANK, next friend and guardian of minor M.R.; BEULAH WALKER, next friend and guardian of minor Q.W.; BIANCA ALVAREZ, next friend and guardian of minor M.A.; NORMA DEL REAL, next friend and guardian of minor P.D., minor V.D.; ADRIANA FIGUEROA, next friend and guardian of minor T.F.; REBECCA FRALICK, next friend and guardian of M.S.; CONSUELO TRETO, next friend and guardian of minor A.T.; MELISSA BYNUM, next friend and guardian of minor T.B.;

BRYANT CROSBY, next friend and guardian of minor B.C.,

Defendant Intervenors-Appellees.

BLUE VALLEY UNIFIED SCHOOL DISTRICT NO. 229; SHAWNEE MISSION UNIFIED SCHOOL DISTRICT NO. 512,

Amici Curiae.

Appeal from the United States District Court for the District of Kansas (D.C. No. 2:10-CV-02661-JWL-KGG)

(Filed Jun. 1, 2015)

Tristan L. Duncan, Shook, Hardy & Bacon, Kansas City, Missouri, (Zach Chaffee-McClure, William F. Northrip, Manuel Lopez and Scott E. Dupree, Shook, Hardy & Bacon, Kansas City, Missouri; Jonathan S. Massey, Massey & Gail, Washington, D.C.; Laurence H. Tribe, Cambridge, Massachusetts, with her on the briefs), for Plaintiffs-Appellants.

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Kansas, Cheryl L. Whelan, Kansas State Department of Education, Topeka, Kansas, with him on the brief), for Defendants-Appellees.

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Charles W. German and Daniel B. Hodes, Rouse Hendricks German May, Kansas City, Missouri, with him on the brief, for Amici Curiae.

Before **KELLY**, **LUCERO**, and **HARTZ**, Circuit Judges.

LUCERO, Circuit Judge.

More than six decades ago, the Supreme Court declared school segregation in Topeka, Kansas unconstitutional. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Since then, Kansas state courts have adjudicated numerous challenges to the state's school financing system, seeking to effectuate *Brown*'s ideals and the Kansas Constitution's mandate that school financing be "suitable." Kan. Const. art. 6, § 6(b). Through this history of litigation and remarkably direct communication between the state's three branches of government, Kansas has developed a school financing scheme that seeks to avoid "mak[ing]

the quality of a child's education a function of his or her parent's or neighbors' wealth." *Montoy v. State*, 138 P.3d 755, 769 (Kan. 2006) (Rosen, J., concurring). Just last year, the Kansas Supreme Court reaffirmed that "[e]ducation in Kansas is not restricted to that upper stratum of society able to afford it." *Gannon v. State*, 319 P.3d 1196, 1239 (Kan. 2014) (per curiam).

Displeased with the outcome of school finance litigation in state court, plaintiffs, parents of students in the relatively wealthy Shawnee Mission School District ("SMSD"), seek federal intervention to upend decades of effort toward establishing an equitable school finance system in Kansas. Adopting a kitchen-sink approach, they claim that aspects of the state's school financing regime violate their rights to free speech, to petition the government, to associate, to vote, to education, to equal protection of the laws, to direct the upbringing of their children, and to dispose of their property. Stripped to its pith, plaintiffs' position is that the U.S. Constitution requires the state of Kansas to grant its political subdivisions unlimited taxing and budget authority. We discern no support for their novel and expansive claims. Exercising jurisdiction under 28 U.S.C. § 1292(a)(1), we affirm the district court's orders denying plaintiffs' motion for a preliminary injunction, granting in part defendants' motions to dismiss, and denying reconsideration.

I

A

Since it was admitted into the Union, "Kansas has financed public schools through taxes and other mechanisms provided for by the legislature, not by local districts." *Unified Sch. Dist. No. 229 v. State*, 885 P.2d 1170, 1175 (Kan. 1994) ("*USD 229*"). Through most of Kansas history, public schools were funded principally through local taxes, with school districts operating "pursuant to the powers and limitations granted by the legislature," including "minimum ad valorem tax levies or floors as well as maximum levies or caps." *Id.* at 1175-76. In 1937, Kansas began providing supplemental funding to school districts. *See id.* at 1176.

In 1966, the people of Kansas ratified amendments to the Kansas Constitution concerning education finance. *Id.* As amended, it provides that "[t]he legislature shall make suitable provision for finance of the educational interests of the state." Kan. Const. art. 6, § 6(b). Not long afterwards, a Kansas state court held the existing state education-financing statute unconstitutional. *See USD 229*, 885 P.2d at 1177 (citing *Caldwell v. State*, No. 50616 (Johnson Cnty. Kan. D. Ct., Aug. 30, 1972)). It concluded that the statute relied too heavily on local financing, "thereby making the educational system of the child essentially the function of, and dependent on, the wealth of the district in which the child resides." *Id.* (quoting *Caldwell*). In response, the Kansas legislature

enacted a new statute that diminished the effect of differential local financing by distributing state funds to poorer districts. *Id.*

Reacting to further legal challenges, the Kansas legislature passed the School District Finance and Quality Performance Act ("SDFQPA") in 1992. *Id.* at 1177-78. Under the SDFQPA, Kansas distributes State Financial Aid to school districts under a formula that accounts for differences in the cost of educating each district's student population. State Financial Aid consists of Base State Aid Per Pupil ("BSAPP"), a fixed dollar amount, multiplied by adjusted enrollment. The term "adjusted enrollment" refers to the number of students who attend school in a district, modified to take into account various factors that indicate certain students are more expensive to educate. For example, each English-Language-Learning ("ELL") student enrolled in a bilingual education program counts as 1.395 students for adjusted enrollment purposes. The same weighting formula is applied uniformly to all Kansas school districts. As a general matter, poorer districts, because their students are more costly to educate, receive more State Financial Aid than wealthier districts with students that are less costly to educate.

State Financial Aid represents the amount of money to which districts are entitled, but the state does not directly provide that full amount. Under Kansas law, school districts have only those powers delegated to them by the state legislature. *See Wichita Pub. Sch. Emps. Union, Local No. 513 v. Smith*,

397 P.2d 357, 359 (Kan. 1964). Like its predecessor statutes, the SDFQPA delegates limited taxing authority to local school districts. It requires all districts to levy a local property tax of 20 mills. Kan. Stat. § 72-6431(b). That amount, when combined with revenue from a few other local taxes, is known as the "local effort." If a district's local effort is less than the State Financial Aid to which it is entitled, the state provides "General State Aid" to make up the difference. If a district raises more than its State Financial Aid total through local effort, it must remit the excess funds to the state.

The SDFQPA also permits, but does not require, school districts to impose an additional local property tax to fund a "Local Option Budget" ("LOB"). *See* Kan. Stat. § 72-6435. A district's LOB is capped at a certain percent of its State Financial Aid entitlement, *see* Kan. Stat. § 72-6433, a limit known as the "LOB cap." At the time the SDFQPA was enacted, the LOB cap was 25%.

Objecting to the SDFQPA's need-based formula and its restrictions on local funding, several school districts, including amicus Blue Valley School District ("BVSD"), challenged the SDFQPA on equal protection grounds. *USD 229*, 885 P.2d at 1187. The Kansas Supreme Court held that the SDFQPA should not be reviewed under any form of heightened scrutiny because no suspect classes or fundamental rights were implicated, and upheld the statute after concluding that the Kansas legislature had a rational basis for its enactment. *Id.* at 1187-92. The court

reasoned that "[r]eliance solely on local property tax levies would be disastrous for the smaller and/or poorer districts which have depended on state aid for many years." *Id.* at 1191.

The legislature subsequently amended the SDFQPA, loosening the LOB cap in various ways that allowed school districts to raise additional funds at the local level. A coalition of poorer students and school districts challenged these amendments. The Kansas Supreme Court reversed a dismissal of that action, ruling that the trial court failed to adequately consider the performance gap between wealthy and poor students. *Montoy v. State*, 62 P.3d 228, 235 (Kan. 2003) ("*Montoy I*"). On remand, the trial court declared that the revised SDFQPA violated both the U.S. and Kansas Constitutions, in part because "LOBs, as their use has evolved, create wealth-based disparities in per pupil revenues for Kansas schools." *Montoy v. State*, No. 99-C-1738, 2003 WL 22902963, at *33 (Kan. Dist. Ct. Shawnee Cnty. Dec. 2, 2003) (unpublished) ("*Montoy II*"). The Kansas Supreme Court affirmed, concluding that the SDFQPA did not fulfill the Kansas Constitution's mandate that the state make "suitable" provision for the finance of public education. *Montoy v. State*, 120 P.3d 306, 310 (Kan. 2005) ("*Montoy III*"). It required the legislature to take corrective action, specifically noting that "[t]he equity with which [education] funds are distributed . . . [is a] critical factor[ ] for the legislature to consider in achieving a suitable formula for financing education." *Id.*

After *Montoy III*, the Kansas legislature made additional changes, including an increase to the LOB cap. Dissatisfied with this response, the Kansas Supreme Court held that the amended SDFQPA remained unconstitutional, partly because "the legislation's increase in the LOB cap exacerbates the wealth-based disparities between districts." *Montoy v. State*, 112 P.3d 923, 934 (Kan. 2005) ("*Montoy IV*").[1] The court explained that

> [d]istricts with high assessed property values can reach the maximum LOB revenues . . . with far less tax effort than those districts with lower assessed property values and lower median family incomes. Thus, the wealthier districts will be able to generate more funds for elements of a constitutionally adequate education that the State has failed to fund.

Id.

The Kansas legislature again amended the SDFQPA, strengthening a provision that allows poorer districts to receive Supplemental General State Aid ("SGSA") if they are unable to raise as much LOB revenue as wealthier districts. This time, the Kansas Supreme Court upheld the revised statute. *Montoy v. State*, 138 P.3d 755, 765-66 (Kan. 2006) ("*Montoy V*"). It held that

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[1] SMSD, which is an amicus in this case, was also an amicus in *Montoy III* and *Montoy IV*.

> [t]he legislature . . . responded to our concerns about the equitable distribution of funding. Equity does not require the legislature to provide equal funding for each student or school district. . . . What is required is an equitable and fair distribution of the funding to provide an opportunity for every student to obtain a suitable education.

Id. at 764.

In the wake of the 2008 financial crisis and ensuing recession, the Kansas legislature reduced the amount of SGSA it provided to poorer districts. A coalition of plaintiffs, intervenors in this case, once again sued. In March 2014, the Kansas Supreme Court held that reducing SGSA payments to poorer districts violated the equity mandate of Article 6 of the Kansas Constitution. *Gannon v. State*, 319 P.3d 1196, 1243-47 (Kan. 2014). The court reaffirmed its prior holdings that "[e]ducation in Kansas is not restricted to that upper stratum of society able to afford it," and that, under the Kansas Constitution, "[s]chool districts must have reasonably equal access to substantially similar educational opportunity through similar tax effort." *Id.* at 1239. By reducing SGSA payments, the legislature unreasonably exacerbated the "level of wealth-based disparity inherent in the LOB. . . ." *Id.* at 1246. The legislature responded by yet again amending the SDFQPA. Among other changes, the legislature raised the LOB cap to 33% of State Financial Aid.

After briefing was completed in this appeal, the Kansas legislature replaced the SDFQPA with the Classroom Learning Assuring Student Success Act ("CLASS Act"). *See* 34 Kan. Reg. 272, § 4(a) (April 2, 2015).[2] The CLASS Act provides block grants to school districts for the 2015-16 and 2016-17 school years. *Id.*, § 4(b)(3). The block grant amounts are determined by taking the amount of General State Aid to which districts were entitled under the SDFQPA for the 2014-15 school year, and making certain adjustments. *Id.*, § 6. The CLASS Act also contains a LOB cap, authorizing school districts to levy an ad valorem tax to fund a LOB "which does not exceed the greater of: (1) The local option budget adopted by such school district for school year 2014-2015 pursuant to [Kan. Stat. §] 72-6433, prior to its repeal; or (2) the local option budget such school district would have adopted for school year 2015-2016 pursuant to [Kan. Stat. §] 72-6433, prior to its repeal." 34 Kan. Reg. 274, § 12(a); *see also id.*, § 13(a) (authorizing tax levy).[3]

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[2] We sua sponte take judicial notice of this statute, and admonish the parties for failing to apprise the court of this development. *See United States v. Coffman*, 638 F.2d 192, 194 (10th Cir. 1980) ("That the courts are allowed to take judicial notice of statutes is unquestionable.").

[3] Because the CLASS Act has not yet been codified, we cite to the prior versions of the Kansas Statutes throughout this opinion.

B

SMSD, where plaintiffs' children attend school, is located in Johnson County, in the Kansas City suburbs. It is the third largest school district in Kansas by population, and among the wealthiest districts in the state. SMSD has the highest total assessed property value of any district in the state. It is also one of the top-performing school districts in Kansas. SMSD's ACT and SAT scores substantially exceed state and national averages, over 84% of its teachers hold master's degrees or higher, and it was the only Kansas school district to place on the College Board's Advanced Placement Achievement List in 2011. In 2014, SMSD announced that it was providing all high school students a MacBook Air and all middle school students an iPad Air.

In recent years, the student population throughout Kansas has become less affluent and more diverse. SMSD is no exception. Its percentage of low-income and ELL students has increased more rapidly than in the state as a whole. As a result, SMSD received more State Financial Aid per pupil in recent years than it had in the past, because its weighted enrollment accounts for the influx of students who are more expensive to educate. SMSD nevertheless remains much more affluent than most other large school districts in Kansas. In the 2012-13 school year, 36.84% of SMSD students received free or reduced-price lunches, compared to 88.65% of students in the neighboring Kansas City School District, 76.51% in

the Wichita School District, and 75.77% in the Topeka Public Schools.

Although the percentage of low-income and ELL students enrolled in SMSD has recently increased, overall enrollment in SMSD has declined. The district's enrollment peaked in 1971 at 45,702 students, and declined to 27,437 students in 2013. Enrollment declined by nearly 10% between 2000 and 2009 alone, and SMSD predicts that its student population will continue dropping. As enrollment declined and school buildings aged, SMSD regularly closed under-capacity schools, including 21 elementary schools and three junior high schools. In 2010, the district proposed closing five under-capacity schools and adjusting attendance areas in order to account for declining enrollment. Many parents of children who attended the schools slated for closure, including some plaintiffs in this case, attributed the closures to a lack of funding.

Around the same time, SMSD, like school districts nationwide, faced budget cuts due to the recession. Partly as a result, many teaching positions were eliminated. None of these cuts were a direct result of the 2010 school closures. SMSD faced difficult choices in addressing its declining enrollment and reduced budget, influenced by many variables. Its decision to cut positions and close schools reflected a choice to continue paying its staff high wages as compared to other districts. SMSD pays its teachers more than any other district in Kansas, and it ranks second to amicus BVSD in principal and superintendent

salaries. Partially as a result of SMSD continuing to pay high teacher salaries while cutting positions, in the 2011-2012 school year, SMSD had a pupil-teacher ratio of 17.2, which is somewhat higher than other large Kansas school districts. The pupil-teacher ratio that year was 17.1 in BVSD, 15.9 in Kansas City, 15.9 in Wichita, and 15.3 in Topeka.

Because SMSD contains fewer low-income students, it costs less on average to educate students in SMSD than in many other Kansas school districts. Additionally, because SMSD has the highest total assessed property value of any district in the state, and one of the highest assessed property values per pupil, it raises most of its State Financial Aid entitlement through local effort. Thus, as plaintiffs note, SMSD receives less General State Aid per pupil than less-affluent districts, which raise less of their State Financial Aid entitlement locally and have higher weighted enrollments because their students tend to be more expensive to educate.

However, looking to the amount of General State Aid SMSD receives would ignore relevant differences between it and other districts. For example, before the district court, plaintiffs highlighted two districts, Greensburg and Chapman, which receive more General State Aid per pupil than SMSD does. Those districts received additional funding to rebuild after their school buildings were destroyed by tornadoes. Similarly, on appeal, plaintiffs note that the Kansas City, Dodge City, Hutchinson, and Wichita school districts, where intervenors' children attend school,

receive substantially more General State Aid per pupil than SMSD. But all four of these districts have relatively high weighted enrollments because their students are more expensive to educate. And because those districts have smaller tax bases than SMSD, they raise less of their State Financial Aid entitlement locally.

None of the methods of measuring a school district's per-pupil budget include money donated by parents, foundations, and other sources, unless that money is spent to pay teacher salaries. Parents and other interested parties in Kansas are free to donate money to school districts in a variety of ways. For example, SMSD benefactors have formed the Shawnee Mission Education Foundation, which has contributed over $3.5 million in grants and gifts to the district. Additionally, Johnson County voters previously approved a countywide sales tax, which was projected to raise $42 million in revenue, a portion of which is to be distributed among several Johnson County school districts. This approval reflects a broader trend of Johnson County voters, and specifically SMSD voters, being inclined to approve education taxes. Since 1992, they have voted to approve every tax increase for education put before them.

Plaintiffs hope to use the pro-tax sentiment in SMSD to raise their LOB, but are prevented from doing so by the LOB cap. In 2010 plaintiffs sued various Kansas state officials, seeking to enjoin enforcement of the LOB cap. The district court dismissed their suit for lack of standing. We reversed, in

an opinion limited solely to the issue of standing. *Petrella v. Brownback*, 697 F.3d 1285, 1292 (10th Cir. 2012) ("*Petrella I*"). On October 29, 2013, the district court denied plaintiffs' motion for a preliminary injunction and their motion for summary judgment, and granted defendants' motions to dismiss in part. *Petrella v. Brownback*, 980 F. Supp. 2d 1293, 1296-97 (D. Kan. 2013) ("*Petrella II*"). The district court dismissed the claims that were based on a theory that the LOB cap is subject to heightened scrutiny, but allowed plaintiffs' claims under rational basis review to proceed. *Id.* at 1310. Plaintiffs filed a motion for reconsideration, and a notice of appeal. After the district court denied their motion for reconsideration, plaintiffs filed a second notice of appeal. We consolidated the appeals.

II

Before considering the merits, we address two jurisdictional issues. Although neither was fully briefed by the parties, we must address jurisdictional issues sua sponte. *McClendon v. City of Albuquerque*, 100 F.3d 863, 867 (10th Cir. 1996).

A

Plaintiffs seek to appeal four rulings by the district court: (1) its denial of plaintiffs' motion for a preliminary injunction; (2) its denial of plaintiffs' motion for summary judgment; (3) its partial grant of defendants' motions to dismiss; and (4) its denial of

plaintiffs' motion for reconsideration. We conclude that we have jurisdiction to review all but the denial of plaintiffs' motion for summary judgment.

Although we generally possess jurisdiction only over final orders, it is well established that we have jurisdiction to review interlocutory orders expressly denying injunctive relief pursuant to 28 U.S.C. § 1292(a)(1). *Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 874 F.2d 1346, 1351 (10th Cir. 1989). The district court expressly denied injunctive relief in its October 29, 2013, order, and in its order denying reconsideration. We may accordingly review those rulings.

We would not ordinarily have jurisdiction to review the partial grant of defendants' motions to dismiss and denial of plaintiffs' motion for summary judgment, neither of which is a type of interlocutory order covered by § 1292. However, in certain narrow circumstances, we may exercise pendent appellate jurisdiction over rulings that would not otherwise be subject to interlocutory review. *Crumpacker v. Kan. Dep't of Human Res.*, 338 F.3d 1163, 1168 (10th Cir. 2003). "[T]he exercise of our pendent appellate jurisdiction is *only* appropriate when the otherwise nonappealable decision is inextricably intertwined with the appealable decision, or where review of the nonappealable decision is necessary to ensure meaningful review of the appealable one." *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1148 (10th Cir. 2011) (quotation omitted). A ruling is "inextricably intertwined" with an appealable issue only if "the

pendent claim is coterminous with, or subsumed in, the claim before the court on interlocutory appeal – that is, when the appellate resolution of the collateral appeal *necessarily* resolves the pendent claim as well." *United Transp. Union Local 1745 v. City of Albuquerque*, 178 F.3d 1109, 1114 (10th Cir. 1999).

As discussed below, we agree with the district court that plaintiffs are unlikely to prevail on the merits – and are thus not entitled to a preliminary injunction – in part because their claims do not present a valid basis for heightened scrutiny. That holding necessarily resolves plaintiffs' pendent challenge to the partial grant of defendants' motions to dismiss. Because our legal conclusion that heightened scrutiny does not apply is necessary to a determination of the injunction issue and resolves the dismissal issue, the dismissal order is reviewable in this interlocutory appeal. *See Moore v. City of Wynnewood*, 57 F.3d 924, 930 (10th Cir. 1995) (pendent appellate jurisdiction is appropriate when ruling on legal question resolves appealable issue and necessarily disposes of otherwise non-appealable issue).

The same is not true of the denial of plaintiffs' motion for summary judgment. Our holding as to heightened scrutiny will serve as law of the case upon remand. *See United States v. Rodriguez-Aguirre*, 414 F.3d 1177, 1185 n.9 (10th Cir. 2005). But it does not *necessarily* resolve the summary judgment question. The district court permitted plaintiffs to proceed under rational basis review, concluding that the existing record was insufficient to resolve those

claims. And although we hold that plaintiffs are not likely to prevail under rational basis review, *see infra* Part III.E, "a decision as to the likelihood of success is tentative in nature." *Homans v. City of Albuquerque*, 366 F.3d 900, 904 (10th Cir. 2004). Accordingly, our disposition of the preliminary injunction issue does not necessarily resolve the plaintiffs' summary judgment motion, nor is review of the latter necessary to ensure meaningful review of the former. Exercising pendent appellate jurisdiction over the plaintiffs' motion for summary judgment would therefore be improper. *See United Transp. Union Local 1745*, 178 F.3d at 1114.

B

We must also consider whether plaintiffs' claims are now moot. "A case is moot when it is impossible for the court to grant any effectual relief whatever to a prevailing party." *Office of Thrift Supervision v. Overland Park Fin. Corp. (In re Overland Park Fin. Corp.)*, 236 F.3d 1246, 1254 (10th Cir. 2001) (quotation omitted). "The crucial question is whether granting a *present* determination of the issues offered will have some effect in the real world." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1110 (10th Cir. 2010) (quotation omitted).

In response to the Kansas Supreme Court's decision in *Gannon*, the Kansas legislature substantially amended the state's school financing system. Pursuant to the Senate Substitute for House Bill

2506, which was signed into law on April 21, 2014, the LOB cap was increased from 31% to 33% of a district's State Financial Aid. The SMSD school board approved a resolution to increase the LOB to 33% for the 2014-15 school year.[4] After briefing in this case was complete, the Kansas Legislature replaced the SDFQPA with the CLASS Act. *See* 34 Kan. Reg. 272, § 4(a) (April 2, 2015). Although the CLASS Act substantially alters the state's school financing system, the funds to which a district is entitled under it "will be based in part on, and be at least equal to, the total state financial support as determined for school year 2014-2015 under the [SDFQPA] prior to its repeal." *Id.*, § 4(b)(3). And the CLASS Act continues to impose a LOB cap, which is now determined by the cap that would have been applicable under the SDFQPA. *Id.* at 274, §§ 12(a), 13(a).

Despite the changes to Kansas' system of school financing, the core elements challenged by plaintiffs remain. Although the SDFQPA formula has been

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[4] Because these events occurred after the district court issued its order in this case, defendants moved to supplement the record with them, arguing that they render the case partially moot. We grant defendants' motion to supplement the record. *See Morganroth & Morganroth v. DeLorean*, 213 F.3d 1301, 1309 (10th Cir. 2000), *overruled on other grounds by TW Telecom Holdings, Inc. v. Carolina Internet, Ltd.*, 661 F.3d 495, 496-97 & n.2 (10th Cir. 2011) ("Of course it is proper for a party to provide additional facts when that party has an objectively reasonable, good faith argument that subsequent events have rendered the controversy moot. Indeed, we depend on the parties for such information. . . .").

replaced by block grants for the next two years, those grants are calculated primarily using the now-repealed SDFQPA formula. *Id.* at 272, § 4(b)(3). Perhaps most importantly, the LOB cap remains in place, though it has been slightly increased. *Id.* at 274, §§ 12(a), 13(a). In their response to defendants' motion to supplement the record, plaintiffs argue that the slight increase in the cap is insufficient and that the higher cap continues to burden their constitutional rights. As outlined in our prior opinion in this case, the forms of relief potentially available to the plaintiffs should they prevail, including enjoining the LOB cap, *see Petrella I*, 697 F.3d at 1294-95, remain available. Because a ruling in favor of plaintiffs could provide them effectual relief, the case is not moot. *See Rio Grande Silvery Minnow*, 601 F.3d at 1110.

III

We review the denial of a preliminary injunction for abuse of discretion. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1128 (10th Cir. 2013) (en banc), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). "A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). "[B]ecause a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal." *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009) (quotation omitted). To obtain a preliminary injunction, plaintiffs must show: (1) a

likelihood of success on the merits; (2) that they will suffer irreparable harm; (3) that the balance of equities tips in their favor; and (4) that the injunction is in the public interest. *Att'y Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009).

The district court concluded that plaintiffs were unlikely to succeed on the merits of their claims that the LOB cap: (1) violates their First Amendment rights; (2) burdens their fundamental rights; (3) imposes an unconstitutional condition; and (4) denies them equal protection. Because we agree with the district court that plaintiffs are unlikely to prevail on the merits, we need not address the remaining preliminary injunction factors. *See Soskin v. Reinertson*, 353 F.3d 1242, 1257, 1262 (10th Cir. 2004).

A

Plaintiffs allege that the LOB cap violates their First Amendment rights to free speech, to association, and to petition the government.

1

In their primary argument that the LOB cap is unconstitutional, plaintiffs urge a simple syllogism: Education is speech; the LOB cap burdens education; therefore, the LOB cap burdens speech. Each of these premises is seriously flawed, and they do not support the conclusion that plaintiffs ask us to draw.

No court has ever recognized that a limit on public funding of education constitutes a limit on

speech. The education-related speech cases upon which plaintiffs rely are far afield. In *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), the Supreme Court held that a state law requiring university faculty to certify that they were not Communists was unconstitutional, because it risked chilling academic freedom to communicate ideas in the classroom. *Id.* at 592, 603-04; *accord Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion). Similarly, in *Shelton v. Tucker*, 364 U.S. 479 (1960), the Supreme Court recognized that teachers have a First Amendment right to associate with whomever they choose outside the classroom, because "[t]eachers and students must always remain free to inquire, to study and to evaluate." *Id.* at 487 (citing *Sweezy*, 354 U.S. at 250). Each of these cases recognizes that the First Amendment protects speech in the education context. *See also Kleindienst v. Mandel*, 408 U.S. 753, 763-65, 770 (1972) (recognizing First Amendment interest of professors in hearing ideas of a visa applicant, but holding that these interests do not outweigh the plenary power of Congress over immigration); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638, 642 (1943) (holding state statute requiring students to salute the flag unconstitutional as an invasion of the "sphere of intellect and spirit" underlying the First Amendment).[5] But the LOB cap does not restrict the

[5] Of course, the First Amendment does not protect *all* student speech. *See Morse v. Frederick*, 551 U.S. 393, 408-10 (2007) (holding that it does not violate the First Amendment for

(Continued on following page)

speech of plaintiffs (or their children in the classroom) in any way; it simply limits the authority of SMSD to raise revenue. None of the foregoing cases suggest that a state is compelled by the First Amendment to organize its political subdivisions in a manner that maximizes education funding.[6]

Plaintiffs also rely on campaign finance cases to argue that the LOB cap is unconstitutional because it is a direct restraint on education expenditures. *See Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290 (1981); *Buckley v. Valeo*,

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schools to restrict student expression that is reasonably understood as promoting illegal drug use).

[6] Many of the other cases cited by plaintiffs in support of their free speech claim do not involve education at all. *See Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2667 (2011) (holding that state law restricting disclosure of pharmacy records violated First Amendment); *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 470 (1995) (holding that prohibition on receipt of honoraria by government employees violates the First Amendment); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 795 (1978) (holding that campaign finance law prohibiting certain corporate donations violated the First Amendment); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (holding that state law forbidding use of contraceptives violates fundamental right to privacy, and referencing in dicta *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925)).

Plaintiffs also claim support from dicta in a dissenting opinion suggesting that *Meyer* and *Pierce* might have been better decided under the First Amendment. *See Troxel v. Granville*, 530 U.S. 57, 95 (2000) (Kennedy, J., dissenting). Regardless of the merits of this theory, dicta in a dissenting opinion does not make plaintiffs likely to succeed on the merits of their claim.

424 U.S. 1 (1976) (per curiam); *Republican Party of N.M. v. King*, 741 F.3d 1089 (10th Cir. 2013). The Supreme Court has made clear that campaign finance laws regulate a form of "political expression" that implicate "the broadest protection" under the First Amendment because they involve "[d]iscussion of public issues and debate on the qualifications of candidates [that is] integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14. Plaintiffs advance no authority to support the novel proposition that campaign finance cases involving restrictions on political expression through electoral debate compel the invalidation of laws that do not concern political expression, but merely allocate limited taxation and budget authority to local governments. *See McCutcheon v. FEC*, 134 S. Ct. 1434, 1448 (2014) ("As relevant here, the First Amendment safeguards an individual's right to participate in the public debate through political expression.").

Further, the LOB cap does not restrict expenditures by plaintiffs. It limits property tax levies by school districts. Under Kansas law, plaintiffs may donate as much money as they wish to SMSD. *See Bonner Springs Unified Sch. Dist. No. 204 v. Blue Valley Unified Sch. Dist. No. 229*, 95 P.3d 655, 662-63 (Kan. App. 2004) (explaining that Kan. Stat. § 72-8210 allows school districts to receive unlimited donations). Local governments can levy sales taxes which they may donate to school districts. *Id.* Johnson County, where SMSD is located, has done so in

the past. *Id.* at 658. And SMSD benefactors have donated $3.5 million to the district through the Shawnee Mission Education Foundation alone. Despite plaintiffs' stubborn insistence in mischaracterizing the LOB cap, it does not prevent anyone from contributing their own money. It simply limits the ability of residents to enact property taxes at the school district level that would compel their neighbors to make expenditures. The First Amendment neither recognizes nor protects any such right.

In addition to their speech-suppression claims, plaintiffs contend that the LOB cap impermissibly discriminates against their speech because they are wealthy. The First Amendment disfavors suppression of political speech based on the speaker's identity, including their wealth. *See Citizens United v. FEC*, 558 U.S. 310, 350 (2010). Laws that restrict speech based on a speaker's identity are subject to some form of heightened scrutiny. *See Riddle v. Hickenlooper*, 742 F.3d 922, 927-28 (10th Cir. 2014). But the LOB cap does not restrict speech, rendering these cases inapposite. Further, the LOB cap applies equally to all school districts regardless of their relative wealth.

Plaintiffs claim that the LOB cap is facially unconstitutional because spending on education is never harmful, and there is thus no legitimate reason to ever restrict education expenditures. *See United States v. Stevens*, 559 U.S. 460, 473 (2010) (stating that a statute is facially unconstitutional under the First Amendment if "a substantial number of its applications are unconstitutional, judged in relation

to the statute's plainly legitimate sweep" (quotation omitted)). However, as discussed in Part III.E, *infra*, there are several reasons that a state might seek to limit the taxing and spending authority of local school districts. As the Kansas Supreme Court has repeatedly recognized, the LOB cap maintains a reasonably equitable distribution of education funding throughout the state. *See, e.g.*, *Montoy IV*, 112 P.3d at 934 ("[T]he legislation's increase in the LOB cap exacerbates the wealth-based disparities between districts."); *Montoy II*, 2003 WL 22902963, at *33 ("LOBs, as their use has evolved, create wealth-based disparities in per pupil revenues for Kansas schools."). And "[t]he equity with which [education] funds are distributed . . . [is a] critical factor[ ] for the legislature to consider in achieving a suitable formula for financing education" as required by the Kansas Constitution. *Montoy III*, 120 P.3d at 310. By restricting the authority of local districts to raise funds, Kansas channels education funding decisions to the state level such that additional money will benefit all Kansans. *See USD 229*, 885 P.2d at 1182 ("Article 6, § 1 places the responsibility of establishing and maintaining a public school system on the State. Kansas school districts have no inherent power of taxation and never have had.").[7] We see nothing irrational in the goal of equity.

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[7] In their reply brief, plaintiffs argue that the Kansas legislature granted school districts home rule authority, providing unlimited power to levy taxes. This argument is clearly

(Continued on following page)

2

Plaintiffs also contend that the LOB cap infringes on their First Amendment association rights because it prevents them from coming together as a community to vote to raise property taxes to fund education at the district level. But we have repeatedly held that there is no First Amendment right to propose a voter initiative. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099 (10th Cir. 2006) (en banc) ("Although the First Amendment protects political speech incident to an initiative campaign, it does not protect the right to make law, by initiative or otherwise."); *Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210-11 (10th Cir. 2002) ("[T]he right to free speech . . . [is] not implicated by the state's creation of an initiative procedure, but only by the state's attempts to regulate speech associated with an initiative procedure."). When states choose to establish initiative procedures, they are free to limit the subject matter of those initiatives as they see fit. *Save Palisade*, 279 F.3d at 1210-11. Kansas specifically granted school district residents the ability to vote on limited LOB taxes, and no more. §§ 72-6433(e), 72-6435. It is not the province of the federal judiciary to second-guess that choice. *See Save Palisade*, 279 F.3d at 1211-12.

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foreclosed by the Kansas Supreme Court's 2014 *Gannon* decision, which reaffirms that school districts have "the power to assess taxes locally only to the extent that authority is clearly granted by the legislature." 319 P.3d at 1213.

Perhaps recognizing the dispositive authority of these cases, plaintiffs suggest that the Supreme Court's recent decision in *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014), overturns *Save Palisade* and *Walker*. In *Schuette*, Justice Kennedy's plurality opinion stated that "[t]here is no authority in the Constitution of the United States or in this Court's precedents for the Judiciary to set aside Michigan laws that commit [affirmative action] policy determination[s] to the voters." *Id.* at 1638. But *Schuette* creates neither a new fundamental right for citizens to pursue voter initiatives generally, nor initiatives regarding education specifically. It merely states that the Constitution does not *forbid* states from allowing voter initiatives. Nothing in *Schuette* makes it unconstitutional for Kansas to limit the initiative rights it grants to school districts.

Plaintiffs also rely on *Citizens Against Rent Control*, which referenced the historical practice of "persons sharing common views banding together to achieve a common end." 454 U.S. at 294. But as the district court recognized, that case struck down a statutory limit on campaign contributions to ballot issue committees. *Id.* at 299-300. In contrast, the LOB cap concerns the subject matter of initiatives; it places no restriction on contributions to initiatives. As discussed above, the LOB cap does not obstruct plaintiffs' desire to come together to achieve a common end. They may lobby the Kansas legislature to change school financing policy, an activity in which

SMSD itself already engages. They may propose a voter initiative for a city or county government to levy a sales tax that will be transmitted to SMSD. *See Bonner Springs*, 95 P.3d at 662-63. They may collectively donate money to SMSD, or solicit their neighbors to do so. But plaintiffs' associational rights do not require the State of Kansas to grant unlimited taxing authority to the political subdivision in which they reside.

3

In a conclusory argument, plaintiffs assert that the LOB cap violates their First Amendment right to petition the government. When issues are not adequately briefed, they are deemed waived. *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1175 (10th Cir. 2002); *see also In re C.W. Mining Co.*, 740 F.3d 548, 564 (10th Cir. 2014) ("Arguments raised in a perfunctory manner . . . are waived."). Plaintiffs fail to cite a single case supporting their right to petition claim. We accordingly decline to consider it.

B

Plaintiffs go on to argue that the LOB cap violates several fundamental liberties. "[A]ll fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992) (quotation omitted). The doctrine of substantive due process extends

protections to fundamental rights "in addition to the specific freedoms protected by the Bill of Rights." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). To qualify as "fundamental," a right must be "objectively, deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed." *Id.* at 720-21 (quotations omitted). When a plaintiff demonstrates that a challenged law burdens a fundamental right, courts apply strict scrutiny in assessing the validity of the law. *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982).

Nothing in the history and tradition of the U.S. Constitution indicates that there is a fundamental right to tax one's neighbors without limitation at the local government level to fund education. Public education was virtually nonexistent at the time the Constitution was ratified. *Morse*, 551 U.S. at 411 (Thomas, J., concurring); *see also Brown*, 347 U.S. at 489-90 (explaining "it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education" given that at the time the Fourteenth Amendment was ratified, "[i]n the South, the movement toward free common schools, supported by general taxation, had not yet taken hold" and "in the North . . . compulsory school attendance was virtually unknown"). Nevertheless, plaintiffs contend that the LOB cap should be reviewed under strict scrutiny because it violates their fundamental rights to: (1) education; (2) liberty; (3) property; and (4) vote.

1

Various cases have addressed the question of whether there is a "fundamental" right to education in constitutional terms. *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 458 (1988); *Plyler*, 457 U.S at 221; *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973). In *Rodriguez*, a Texas statute that relied in part on local property taxation to fund education was at issue. 411 U.S. at 9-10. The Supreme Court concluded that it would not review the statute under heightened scrutiny because state decisions about raising and disbursing state and local tax revenue are matters in which the Court traditionally defers to state legislatures. *Id.* at 40. "In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause." *Id.* at 41. We have previously declined to decide important issues of state law regarding educational policy for the same reason. *See Villanueva v. Carere*, 85 F.3d 481, 487 (10th Cir. 1996) ("[C]ourts pay particular deference to states in decisions involving the most persistent and difficult questions of educational policy because our lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels." (quotations omitted)).

As in *Rodriguez*, we are loathe to disturb a matter better left to the states, and we discern "no basis for finding an interference with fundamental

rights where only relative differences in spending levels are involved." 411 U.S. at 37. Plaintiffs allege that their district is underfunded compared to other districts. But these relative differences in spending levels are, even after passage of the CLASS Act, *see* 34 Kan. Reg. 272, § 4(b)(3), based on a formula carefully crafted by the Kansas legislature, under the watchful eye of the Kansas Supreme Court, to ensure that Kansas allocates education funds equitably. *See Montoy V*, 138 P.3d at 764 ("The legislature . . . responded to our concerns about the equitable distribution of funding."). Relative differences in spending levels between districts, grounded in the Kansas Constitution's lofty mandate that education be equitably funded, do not subject the LOB cap to heightened scrutiny.

Plaintiffs rely heavily on *Papasan v. Allain*, 478 U.S. 265 (1986), which built upon the recognition in *Rodriguez* that heightened scrutiny might be appropriate for a school finance scheme that funded some schools so poorly that it constituted a "radical denial of educational opportunity." *Id.* at 284 (citing *Rodriguez*, 411 U.S. at 44). To exemplify such a "radical denial," the Court referenced a system in which children were not taught to read or write and did not receive instruction on even the educational basics. *Id.* at 286. However, the Court concluded that no such claim was presented in that case. *Id.* Similarly, plaintiffs have not claimed the LOB cap creates such a "radical denial of educational opportunity." *Id.* To the

contrary, the record shows that SMSD provides one of the best public education programs in Kansas.

The *Papasan* Court also distinguished *Rodriguez* on the ground that the latter "held merely that . . . variations [in school funding] that resulted from allowing local control over local property tax funding of the public schools were constitutionally permissible in that case." 478 U.S. at 287. By contrast, *Papasan* involved a narrow dispute about whether the state of Mississippi irrationally distributed a particular set of funds flowing from assets granted to the state by the federal government. *Id.* at 289. This case is far more similar to *Rodriguez* than to *Papasan*. Plaintiffs challenge a key aspect of the state funding system calibrated to balance concerns of equity and local control. Unlike the potentially groundless allocation of funds in *Papasan*, Kansas allocates State Financial Aid to school districts based on a formula, which the parties have stipulated applies equally to all districts. Disparities in the per-pupil funding that SMSD and other districts receive are not based on an irrational choice, but rather on a carefully-calibrated formula that allocates more funding to those students who are costlier to educate. And plaintiffs have expressly waived any challenge to the elements of that formula.

Plaintiffs advance a convoluted argument that neither *Rodriguez* nor *Papasan* applies. Justice White's dissent in *Rodriguez* noted that for a poor school district in San Antonio to raise equal tax revenue to a neighboring, affluent district, it would

have to levy a property tax well above Texas' statutory property tax cap. 411 U.S. at 67 (White, J., dissenting). The majority opinion, in a footnote, responded that the poorer district's tax rate was well below the cap, and that "the constitutionality of that statutory provision is not before us and must await litigation in a case in which it is properly presented." *Id.* at 50 n.107. It cited *Hargrave v. Kirk*, 313 F. Supp. 944, 946 (M.D. Fla. 1970), *vacated on other grounds sub nom. Askew v. Hargrave*, 401 U.S. 476 (1971) (per curiam), which involved a Florida law that limited the quantity of state funding that counties levying local property taxes above a certain amount could receive. The district court invalidated the law because the limit was based on the amount of property in the county, not the county's educational needs.[8] Based on this exchange, plaintiffs argue that *Rodriguez* left open the question of whether a cap on local tax revenue is constitutional. Regardless of whether *Rodriguez* left open the possibility that a tax cap might be unconstitutional under some theory, there is nothing in *Rodriguez* that disturbs the remainder of the Supreme Court jurisprudence on point.

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[8] *Hargrave*, a vacated district court decision from another circuit, is at best potentially persuasive authority. As discussed in Part III.E, *infra*, we are not persuaded that plaintiffs are likely to succeed on the merits of their claim that the LOB cap lacks a rational basis, the rationale for striking the tax cap at issue in *Hargrave.* 313 F. Supp. at 948.

Plaintiffs further attempt to distinguish *Rodriguez* by claiming that they are intentionally discriminated against on the basis of their wealth. This argument is also foreclosed by *Rodriguez*, which held that a school district's relative wealth is not grounds for heightened scrutiny. 411 U.S. at 27-28; *see also Kadrmas*, 487 U.S. at 458 ("We have previously rejected the suggestion that statutes having different effects on the wealthy and the poor should on that account alone be subjected to strict equal protection scrutiny.").

2

In their second fundamental rights challenge, plaintiffs argue that the LOB cap undermines their right to direct the education of their children. They cite a litany of cases recognizing the fundamental right of parents to make decisions about the care, custody, and education of their children. *See Troxel*, 530 U.S. at 65 (interference with parental custody choices allowed only to prevent harm to child); *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (states cannot compel parents to keep children in school after age 16); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (hearing required to terminate parental rights); *Pierce*, 268 U.S. at 530, 535 (states cannot mandate public education); *Meyer*, 262 U.S. at 397, 403 (states cannot ban the teaching of foreign languages).

But none of these cases recognize [sic] a fundamental liberty interest in setting policy for public

education funding. All focus on the content of education or school attendance. Further, we have previously held that "parents simply do not have a constitutional right to control each and every aspect of their children's education and oust the state's authority over that subject." *Swanson ex rel. Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 699 (10th Cir. 1998). The LOB cap only prevents plaintiffs from compelling their neighbors to vote on an education-related tax increase at the district level. This is not a fundamental right the Supreme Court has previously recognized, and such recognition is foreclosed by *Swanson*'s admonition that parents lack constitutional rights to control "each and every aspect of their children's education." *Id.*

In their reply brief, plaintiffs claim that our decision in *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014), expands the fundamental liberty interest in childrearing. They emphasize a quote referencing a "cluster of constitutionally protected choices" that includes childrearing and some educational decisions. *Id.* at 1210 (quoting *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977)). But *Kitchen* does not expand the universe of fundamental rights; it merely recognizes that an established fundamental right, the right to marry, extends to same-sex couples. *Id.* at 1199. And it certainly does not create a fundamental right to force one's neighbors to pay taxes related to education. Neither *Kitchen* nor any of the Supreme Court cases plaintiffs cite suggest that the LOB cap is subject to

heightened scrutiny based on plaintiffs' liberty interests in raising their children.

3

Plaintiffs also contend that the LOB cap violates their fundamental property right to spend their own money as they wish. They cite Justice Stevens' concurrence in *Moore v. City of East Cleveland*, 431 U.S. 494, 513-20 (1977) (Stevens, J., concurring in the judgment), in which he concluded that a law placing occupancy limits on private dwellings interfered with a homeowner's choice to use her property as she saw fit. However, Justice Stevens would have invalidated the law at issue on the basis that it "cuts so deeply into a fundamental right normally associated with the ownership of residential property[,] that of an owner to decide who may reside on his or her property." *Id.* at 520. This can hardly be described as creating a fundamental right to spend one's money as one wishes. Even assuming *arguendo* that *Moore* creates such a right, the LOB cap, as explained above, does not prevent plaintiffs from spending their own money on education. *See Bonner Springs*, 95 P.3d at 662-63 (discussing Kan. Stat. § 72-8210, which allows donations to school districts).

Plaintiffs argue that other Kansas laws would penalize a district that accepts donations and that this penalty violates the First Amendment. *See Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2822 (2011). But *Arizona Free Enterprise*

is a campaign finance case which held unconstitutional "a subsidy given in direct response to the political speech of another, to allow the recipient to counter that speech." *Id.* In the case at bar, no such speech, counterspeech, or subsidy is at issue. Further, § 72-8210 is explicit that donations to school districts, if placed in a separate fund, "shall be exempt from budget law requirements and shall be used in compliance with the wishes of the donor as nearly as may be." *Id.* Plaintiffs do not cite any Kansas law to the contrary, indicating that the LOB cap would penalize districts for accepting donations.

4

The right to vote is fundamental. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). Plaintiffs argue that the LOB cap burdens their fundamental voting rights based on *Kramer v. Union Free School District Number 15*, 395 U.S. 621 (1969). In that case, the Supreme Court applied heightened scrutiny to a New York law that forbade some residents from voting in school board elections and on school budget issues. *Id.* at 622. But *Kramer* only subjects restrictions on *who* may vote to heightened scrutiny; it does not demand heightened scrutiny for limitations on *what* topics may be the subject of initiatives.

As we have previously recognized, this is a critical distinction. In *Save Palisade*, we considered a challenge to a Colorado law allowing citizens in home

rule counties, but not statutory counties, the power of initiative. *See* 279 F.3d at 1207-08. We held that the law was not subject to heightened scrutiny because it did not dilute or debase the votes of any group. *Id.* at 1212-13 (discussing *Helleburst v. Brownback*, 42 F.3d 1331, 1333 (10th Cir. 1994)). "[A]lleging a violation of free speech or voting rights does not transform what is essentially an initiative case into a voting rights case, and thereby trigger strict scrutiny." *Id.* at 1211 n.4. The LOB cap functions like the Colorado law in *Save Palisade*, not like the New York law in *Kramer*. It does not forbid the voters in SMSD from voting on statewide education issues, nor does it dilute their votes relative to those of others. Instead, as in *Save Palisade*, it simply limits the ability of local voters to make law directly. *See id.* at 1210-11 ("[N]othing in the language of the Constitution commands direct democracy, and we are aware of no authority supporting this argument.").

Similarly, in *Walker*, we explained that a Utah law requiring supermajority approval of initiatives involving wildlife issues was not subject to strict scrutiny because it involved the process through which laws are enacted, not the communicative conduct of people who support a political position. 450 F.3d at 1099-1100. The LOB cap similarly governs the process through which a tax increase can be voted on; it does not restrict political speech about the merits of such an increase.

Additionally, Plaintiffs argue that the LOB cap is unconstitutional because it impermissibly restricts

voting based on economic status. *See Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983). But again, the LOB cap does not discriminate on the basis of wealth. As the parties stipulated, it applies to all districts equally.[9]

C

In a related argument, plaintiffs contend that the LOB cap places an unconstitutional condition on their fundamental right to education and to vote, and imply that it also places an unconstitutional condition on their First Amendment rights. The unconstitutional conditions doctrine forbids the government from denying or terminating a benefit because the beneficiary has engaged in constitutionally protected activity. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013). It "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Id.*

The doctrine only applies if the government places a condition on the exercise of a constitutionally

[9] Even if plaintiffs were correct that the LOB cap implicates a fundamental right, "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983). The LOB cap cannot be said to abridge any fundamental right because it does not forbid any activity, but rather limits the extent of a subsidy funded through local taxes.

protected right. *See Reedy v. Werholtz*, 660 F.3d 1270, 1277 (10th Cir. 2011) ("[I]f no constitutional rights have been jeopardized, no claim for unconstitutional conditions can be sustained."). Because the plaintiffs have not demonstrated that they are likely to succeed on the merits of their claims that the LOB cap infringes any of their constitutional rights, they are also unlikely to succeed on the merits of an argument premised on the existence of such rights.

Even if plaintiffs' claimed rights were recognized, their unconstitutional conditions arguments are unavailing. Plaintiffs rely on *Meyer v. Grant*, 486 U.S. 414 (1988), which overturned a Colorado law that criminalized paying petition circulators. *Id.* at 415-16. The Court rejected the state's argument that because it had no obligation to afford its citizenry the option of initiatives, it could impose unlimited conditions on their use. *Id.* at 420. It agreed with our conclusion that regardless of whether the initiative process is optional, states must run such elections "in a manner consistent with the Constitution." *Id.* As we recognized in *Save Palisade*, however, *Meyer* is a case dealing with "the state's attempts to regulate speech associated with an initiative procedure," not limits on the initiative process itself. 279 F.3d at 1211. That the Kansas legislature has granted limited initiative rights to raise school funding taxes up to a certain level does not mean that Kansas must allow initiatives to increase school-funding taxes beyond that level. Plaintiffs have not shown that any constitutional right has been impermissibly conditioned.

D

In addition to their fundamental rights arguments, plaintiffs argue that the LOB cap should be reviewed under heightened scrutiny because it denies them equal protection of the law based on a bare desire to harm them. They claim that, as residents of a relatively wealthy school district, they are part of a "politically unpopular group." *See United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013); *see also Romer v. Evans*, 517 U.S. 620, 633 (1996). But *Rodriguez* clearly held that wealth, or residence in a wealthy district, is not a suspect class that requires review under heightened scrutiny. *See* 411 U.S. at 18-28. And it strains credulity to assert that residents of wealthy communities are subject to the systematic ostracization faced by the gay people in *Windsor* and *Romer*. *See Windsor*, 133 S. Ct. at 2693; *Romer*, 517 U.S. at 634-35.[10]

E

In the alternative, plaintiffs claim that they are likely to succeed on the merits because the LOB cap cannot survive rational basis review. Under such review, a state statute "must be upheld . . . if there is

[10] Alternatively, we deem this argument forfeited. Although plaintiffs raised it before the district court and in their reply brief, it was never raised in their opening brief. *United States v. Benoit*, 713 F.3d 1, 12 n.2 (10th Cir. 2013) ("Arguments not raised in the opening brief are waived." (quotation and alteration omitted)).

any reasonably conceivable state of facts that could provide a rational basis for" it. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). "[T]his court will uphold a government classification if it is rationally related to a legitimate government purpose or end." *Teigen v. Renfrow*, 511 F.3d 1072, 1083 (10th Cir. 2007) (quotations omitted). Because a classification subject to rational basis review "is presumed constitutional, the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080-81 (2012) (quotation omitted).

The district court concluded, and defendants and intervenors now argue, that the Kansas legislature enacted the LOB cap to promote equity in education funding. This is obviously a legitimate government interest. The Supreme Court has explained that "the opportunity of an education . . . where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Brown*, 347 U.S. at 493. And as the district court astutely observed, "the pursuit of a claim under the Equal Protection Clause based on the argument that equity is not a legitimate governmental interest seems inherently unsupportable." *Petrella II*, 980 F. Supp. 2d at 1308.

Moreover, the Kansas Constitution requires equity in education funding. *Gannon*, 319 P.3d at 1238-39 (discussing Kan. Const. Art. 6 § 6(b)). The Kansas Supreme Court has repeatedly recognized

that equity in the education funding arena is not only a legitimate but also a requisite government interest. *See, e.g.*, *Montoy III*, 120 P.3d at 310 ("[T]he equity with which [education] funds are distributed . . . [is a] critical factor[ ] for the legislature to consider in achieving a suitable formula for financing education."). In *Gannon*, the Kansas Supreme Court reaffirmed the need to cap the LOB because, absent a cap, the LOB exacerbates inequities by allowing wealthier districts to generate more revenue at the local level than poorer districts exerting the same tax effort. 319 P.3d at 1238-39.

Plaintiffs suggest that SMSD receives an inequitable level of funding. But, as noted above, they expressly waived any challenge to the components of the formula under which total State Financial Aid is calculated. And the Kansas Supreme Court has upheld the need-based aspects of the state's financing system. *See Montoy V*, 138 P.3d at 764 ("Equity does not require the legislature to provide equal funding for each student or school district. . . . What is required is an equitable and fair distribution of the funding to provide an opportunity for every student to obtain a suitable education."). Promoting equity by allocating resources according to the differential cost of educating different students is clearly rational.

Even if equity is a rational goal, plaintiffs contend that capping the amount of money districts may raise and spend at the local level is not a legitimate means to achieve that goal. But plaintiffs, narrowly focusing on the interests of SMSD alone, fail to

recognize that districts compete with one another for educational resources, like high-quality teachers. By limiting the ability of individual districts to outspend their neighbors, Kansas rationally promotes an equitable distribution of resources throughout the state and seeks to prevent an inter-district arms race from raising the cost of education statewide. Further, by limiting local authority, Kansas channels the efforts of those seeking increased education spending for their own children towards the state level, where such efforts can benefit a broader class of students.

The plaintiffs, or even judges on this court, may well have chosen a different means of equitably funding education in Kansas. But rational basis review does not require that the means chosen by a state be the best available. *See Dandridge v. Williams*, 397 U.S. 471, 485 (1970). Plaintiffs have failed to show that capping the amount of revenue a district may raise is an illegitimate means of achieving the goal of equity. Accordingly, they have not demonstrated that they are likely to succeed on the merits of their rational basis argument.

IV

We review a district court's grant of a motion to dismiss de novo. *Albers v. Bd. of Cnty. Comm'rs*, 771 F.3d 697, 701 (10th Cir. 2014). In doing so, we accept all well-pled facts alleged in the complaint as true, and draw all reasonable inferences from those facts in favor of the plaintiff. *Tal v. Hogan*, 453 F.3d 1244,

1252 (10th Cir. 2006). To survive a motion to dismiss, a complaint must allege facts sufficient to make a claim for relief facially plausible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). If an issue of law precludes relief, dismissal is appropriate. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989).

The district dismissed plaintiffs' various claims that the LOB cap should be reviewed under heightened scrutiny. It allowed plaintiffs' claims that the LOB cap violated their equal protection rights to proceed further on rational basis review.[11] As discussed above, plaintiffs are unlikely to succeed on the merits of their claims because, as a matter of law, the LOB cap is not subject to heightened scrutiny. We accordingly affirm the grant of defendants' motion to dismiss as to plaintiff's claims that the LOB cap should be reviewed under heightened scrutiny.

V

Plaintiffs make much of the laboratory of democracy concept. But they fundamentally misapprehend its meaning. In *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), Justice Brandeis explained that within our federalist system, states are laboratories of democracy. *See id.* at 311 (Brandeis, J., dissenting).

[11] The defendants have not cross-appealed the partial denial of their motion to dismiss, and thus we have no occasion to rule on the aspects of plaintiffs' claim that the district court has permitted to proceed.

This metaphor may also aptly describe the relationship between state and local governments. *See, e.g.*, Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 Harv. L. Rev. 4, 23-24 (2010). But this case asks if the U.S. Constitution precludes a state from choosing its preferred statutory regime, not whether Kansas has allowed its local governments adequate room for experimentation.

Kansas' school funding system exemplifies how states can serve as laboratories of democracy. Citizens in many states no doubt desire an educational system that is both equitable and adequate. The people of Kansas desired such a system so strongly that they amended their Constitution to require it. Through decades of litigation and frank communication between the state's three branches of government, Kansas created a system that seeks to equitably distribute resources throughout the state, and does not make "the quality of a child's education a function of his or her parent's or neighbors' wealth." *Montoy V*, 138 P.3d at 769 (Rosen, J., concurring). Not every state would choose to alleviate inequity by limiting local authority to tax and spend. Kansas' solution might not be the best one. But it is manifestly not the province of a federal court to manufacture from whole cloth a novel set of rights that would upend a carefully crafted and comprehensive state funding scheme.

We **DISMISS** plaintiffs' challenge to the district court's denial of summary judgment. We otherwise **AFFIRM** and **REMAND** for further proceedings. Defendants' motion to supplement the record is **GRANTED**.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DIANE PETRELLA, et al., Plaintiffs, v. SAM BROWNBACK, Governor of Kansas, in his official capacity, et al., Defendants.	)	Case No. 10-2661-JWL (Filed Oct. 29, 2013)

MEMORANDUM AND ORDER

This matter presently comes before the Court on the following motions: the State defendants' motion to dismiss (Doc. # 36); the Board defendants' motions to dismiss (Doc. ## 38, 88); the motion to dismiss or stay filed by the Board defendants and intervenors (Doc. # 90); plaintiffs' motion for preliminary injunction (Doc. # 28); and plaintiffs' motion for summary judgment (Doc. # 93). As more fully set forth below, the Court rules as follows: plaintiffs' motions for preliminary injunction and for summary judgment are **denied**; defendants' motions for a stay are **denied**; and defendants' motions to dismiss are **granted in part and denied in part**. Plaintiffs' due process claim and their claims based on an application of strict scrutiny or a denial of fundamental rights are dismissed, and defendants' motions to dismiss are granted to that extent; defendants' motions are otherwise denied.

I. Background

Plaintiffs are students and parents of students in the Shawnee Mission Unified School District No. 512. On December 10, 2010, plaintiffs filed this action against the State defendants (the Governor, Attorney General, and Treasurer of the State of Kansas) and the Board defendants (the Kansas Commissioner of Education and the members of the Kansas State Board of Education). By their complaint, pursuant to 42 U.S.C. § 1983, plaintiffs claim that the Local Option Budget ("LOB") cap, found in K.S.A. § 72-6433(b), which limits the funds that a school district may raise by local tax, violates the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In addition to seeking declaratory relief, plaintiffs also seek to enjoin the enforcement of the LOB cap. Plaintiffs also filed a motion for a preliminary injunction to the same effect. The defendants filed motions to stay or to dismiss the action on various grounds.[1]

By Memorandum and Order of March 11, 2011, the Court dismissed this action on the basis that plaintiffs lacked Article III standing, for the particular reason that plaintiff's alleged injury – the inability of the school district to raise additional funds through a local tax – would not be redressed by a

[1] After a hearing on January 18, 2011, the Court allowed a group of students and parents of students from a few other school districts to intervene as defendants in this action.

favorable decision because the LOB cap is not severable from the state's statutory school funding scheme, striking down the cap would mean invalidating the entire scheme, and the school district would thus have no authority to impose a tax. *See Petrella v. Brownback*, 2011 WL 884455 (D. Kan. Mar. 11, 2011). On October 18, 2012, the Tenth Circuit reversed that decision and remanded the case. *See Petrella v. Brownback*, 697 F.3d 1285 (10th Cir. 2012). The Tenth Circuit agreed with plaintiffs' argument – asserted for the first time on appeal – that their alleged injury was not the inability to raise funds through a tax but rather unequal treatment generally, which could be redressed, for instance, by invalidation of the entire funding scheme. *See id.* at 1295-96.

Upon remand, the Magistrate Judge conducted a scheduling conference and issued a scheduling order. The parties were ordered to file supplemental briefs in support of the pending motions to dismiss, motions to stay, and motion for preliminary injunction, and deadlines were set for those briefs and for any new motions. The Magistrate Judge also stayed discovery pending the resolution of a forthcoming motion for a stay of discovery. The Board defendants and intervenors subsequently filed additional motions to dismiss or to stay the case; the State defendants supplemented their motion to dismiss; and plaintiffs filed a motion for summary judgment. Plaintiffs did not supplement the briefing on their pending motion for preliminary injunction.

II. Dismissal and Summary Judgment Standards

The Court will dismiss a cause of action for failure to state a claim only when the factual allegations fail to "state a claim to relief that is plausible on its face," *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), or when an issue of law is dispositive, *see Neitzke v. Williams*, 490 U.S. 319, 326 (1989). The complaint need not contain detailed factual allegations, but a plaintiff's obligation to provide the grounds of entitlement to relief requires more than labels and conclusions; a formulaic recitation of the elements of a cause of action will not do. *See Bell Atlantic*, 550 U.S. at 555. The Court must accept the facts alleged in the complaint as true, even if doubtful in fact, *see id.*, and view all reasonable inferences from those facts in favor of the plaintiff, *see Tal v. Hogan*, 453 F.3d 1244, 1252 (10th Cir. 2006). Viewed as such, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic*, 550 U.S. at 555. The issue in resolving a motion such as this is "not whether [the] plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine dispute as to any material fact" and that it is "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). In applying this standard, the court views the evidence

and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Burke v. Utah Transit Auth. & Local 382*, 462 F.3d 1253, 1258 (10th Cir. 2006).

III. Motions to Stay the Litigation

A. Pullman *Abstention*

Defendants argue that this Court should abstain from deciding this action or issue a stay pursuant to *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), pending resolution of the *Gannon* case presently on appeal to the Kansas Supreme Court. "Under *Pullman* abstention, a district court should abstain if three conditions are satisfied: (1) an uncertain issue of state law underlies the federal constitutional claim; (2) the state issues are amenable to interpretation and such an interpretation obviates the need for or substantially narrows the scope of the constitutional claim; and (3) an incorrect decision of state law by the district court would hinder important state law policies." *See Lehman v. City of Louisville*, 967 F.2d 1474, 1478 (10th Cir. 1992). In *Gannon*, the Kansas Supreme Court will likely rule on the constitutionality of the Kansas statutory school funding scheme, and defendants argue that that ruling will affect and may obviate the need for a ruling on the constitutionality of the LOB cap.

The Court rejects this request for *Pullman* abstention. First, the Tenth Circuit has noted the Supreme Court's preference for certification of questions

over the use of *Pullman* abstention. *See Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1119 (10th Cir. 2008) (citing, *inter alia, Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997)). The doctrine is to be applied narrowly. *See Reetz v. Bozanich*, 397 U.S. 82, 86 (1970). In this case, there is no unsettled question of state law that should first be addressed by the state courts. Plaintiffs have disavowed any claim here that school funding is inadequate in violation of the Kansas Constitution, and they claim only that the LOB cap violates the federal Constitution. The fact that a ruling in *Gannon* could potentially affect the LOB cap or this suit does not provide a basis for *Pullman* abstention. Defendants' motions are denied with respect to this issue.

B. Colorado River *Abstention*

Similarly, the Court denies the Board defendants' motion for dismissal or a stay, in light of the pending *Gannon* case, based on *Colorado River* abstention. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). In *Colorado River*, the Supreme Court provided a basis for federal court abstention in deference to a parallel state court proceeding, based on factors such as the inconvenience of the federal forum, the desire to avoid piecemeal litigation, and the order in which jurisdiction was obtained by the concurrent forums. *See id.* at 818. The balance of these factors is heavily weighted in favor of the exercise of federal jurisdiction, and "only the clearest of justifications will warrant dismissal."

See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 16 (1983) (quoting *Colorado River*, 424 U.S. at 818-19). Although both this case and *Gannon* relate to the same statutory scheme, they are distinct, as the federal constitutionality of the specific statutory provision concerning the LOB cap – the narrow issue here – is not at issue in *Gannon*, and thus these cases are not actually parallel in the sense contemplated by this doctrine. Accordingly, the extraordinary circumstances needed for *Colorado River* abstention are not present here.

C. Inherent Power to Stay

The Board defendants also ask the Court to issue a stay pending resolution of *Gannon* pursuant to the Court's inherent power to control its docket, as recognized in *Landis v. North American Co.*, 299 U.S. 248, (1936). In *Landis*, however, the Supreme Court emphasized that the party requesting the stay "must make out a clear case of hardship or inequity in being required to go forward," *see id.* at 255, and the Tenth Circuit has noted that, under *Landis*, a plaintiff's right to proceed "should not be denied except under the most extreme circumstances." *See Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477, 1484 (10th Cir. 1983) (quoting *Klein v. Adams & Peck*, 436 F.2d 337, 339 (2d Cir. 1971)). For the same reasons cited above, the Court declines to exercise its discretion to impose a stay here.

D. Comity

The State defendants also argue that the Court should dismiss this action under principles of comity pursuant to *Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010). The Court rejects this argument as well. *Levin* is clearly distinguishable, as that case turned on the Supreme Court's disfavor of the federal courts' interference with state taxation schemes. *See id.* Although a particular tax is at issue in this case, it is only a part of the school funding scheme, and the Court is not being asked to review an entire scheme of taxation. Thus, the concerns present in *Levin* are not found here.

E. Ripeness

The Court also rejects the Board defendants' motion to dismiss this action for lack of ripeness. Defendants argue that because the status of the statutory school funding scheme is contingent on the outcome of the *Gannon* case, the operation of the LOB cap may not occur. As plaintiffs point out, however, the fact that the Kansas Supreme Court *may* declare the scheme unconstitutional as a whole does not make the present controversy unripe, and defendants have provided no authority to support its novel interpretation of the ripeness doctrine.

Defendants also suggest that, in light of the district court decision in *Gannon*, plaintiffs cannot show that any harm was caused by the LOB cap and not by inadequate funding generally. This is matter of

proof, however, and the Court is not persuaded that the case's ripeness turns on such an issue of proof.[2]

IV. Proper Parties

The Board defendants argue that they are not proper defendants in this suit because they are not involved in enforcement of the LOB cap. In their opinion in this case, however, the Tenth Circuit held that these defendants were proper defendants in this type of suit. *See Petrella*, 697 F.3d at 1293-94. In their supplemental briefing, the Board defendants do not address that holding by the Tenth Circuit, but argue that the complaint does not state sufficient facts concerning their involvement in enforcement of the cap. In light of the Tenth Circuit's holding, however, the Court concludes that these defendants are proper parties to this suit and that plaintiffs' allegations are sufficient in that regard. This portion of the Board defendants' motion to dismiss is therefore denied.

V. Merits-Based Motions

A. Law of the Case

Defendants argue that plaintiffs' allegations are not sufficient to state plausible claims. Plaintiffs

[2] The Board defendants have requested that discovery be stayed until resolution of defendants' motions to dismiss and to stay. As the Court is presently resolving those motions, the request for a stay of discovery is denied as moot.

argue that the Tenth Circuit implicitly rejected that argument in its opinion in this case and that this Court therefore should not consider defendants' arguments under the "law of the case" doctrine. *See Copart, Inc. v. Administrative Review Bd.*, 495 F.3d 1197, 1201-02 (10th Cir. 2007) (under law of the case doctrine, issue may have been implicitly resolved in a prior appeal). The Court rejects this argument by plaintiffs. The Tenth Circuit did not offer any opinions concerning the sufficiency or plausibility of plaintiff's allegations or otherwise concerning the merits of plaintiffs' claims. The Tenth Circuit's opinion was limited to the issue of Article III standing; thus, consideration of the sufficiency of plaintiffs' allegations was not a necessary step in resolving the appeal, and the Court's consideration of those allegations now would not abrogate the Tenth Circuit's decision concerning standing. *See id.* (listing possible grounds for the conclusion that an issue was implicitly resolved in a prior appeal). Similarly, the Court does not agree that the Tenth Circuit's remand of the case "for a consideration of the merits" was intended to foreclose valid challenges to the sufficiency of the complaint. Accordingly, the Court will consider defendants' assertions that plaintiffs have failed to state cognizable and plausible claims.

B. Infringement of a Fundamental Right

With respect to the merits of plaintiff's [sic] equal protection claim, the first question is to determine the applicable level of scrutiny. Plaintiffs assert that the

Court should apply a standard of strict scrutiny – that is, determining whether the statute is narrowly tailored to serve a compelling state interest – because the LOB cap operates as an infringement on their fundamental rights. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988) (classifications affecting fundamental rights are given strict scrutiny). Plaintiffs' substantive due process claim also depends on the abridgement of a fundamental right. *See Washington v. Glucksberg*, 521 U.S. 702, 719 (1997) (Due Process Clause protects against government interference with certain fundamental rights and liberty interests). Plaintiffs allege the abridgement of three fundamental rights or liberties: (1) the right of parents to direct and participate in the upbringing and education of their children; (2) the right of parents and others in the school district to spend their own money on improved public education; and (3) the right under the First Amendment to assemble, associate, and petition for the advancement of the educational interests of their children through a popular vote on increased local taxes.

The Court rejects application of the strict scrutiny standard in this case. First, plaintiffs have not provided any authority declaring one of these interests to be a fundamental right in this context of seeking the ability to conduct an election to approve the imposition of a tax. The Court will not declare a new fundamental right in the absence of such authority.

Moreover, the Supreme Court's discussion in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), concerning the proper level of scrutiny supports rejection of a strict scrutiny standard in this case. In *Rodriguez*, the Supreme Court rejected an equal protection challenge, under a rational basis review, to Texas's statutory school funding scheme that included reliance on local property taxation. *See id.* The Supreme Court concluded that although it had proclaimed the importance of public education in prior opinions, there is no fundamental right to public education under the United States Constitution. *See id.* at 29-39.

Plaintiffs suggest that *Rodriguez* does not necessarily control here because they have argued for slightly different fundamental rights. In *Rodriguez*, however, the Court also noted that a less-stringent test was appropriate because the attack was on the way in which Texas raised and disbursed state and local tax revenues, which meant that the Court was being asked to intrude in an area in which the Court has traditionally deferred to state legislatures. *See id.* at 40-44. The Court noted that it had "often admonished against such interferences with the State's fiscal policies under the Equal Protection Clause." *See id.* at 40. The Court further stated: "In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause." *See id.* at 41. Thus, the Supreme Court has counseled

against using strict scrutiny in this area of public school funding, in which the federal courts lack the expertise and familiarity with the issues possessed by the state legislature.

An examination of each of the particular interests asserted by plaintiffs also supports rejection of the strict scrutiny standard in favor of the rational basis test. First, plaintiffs claim that strict scrutiny is warranted here by the infringement of their fundamental right as parents to direct and participate in the upbringing and education of their children. In support of this argument, plaintiffs have cited various instances in which the Supreme Court has noted the fundamental right of parents concerning the care, custody, and control of their children. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 66 (2000). More specifically, the Supreme Court has noted its recognition of a fundamental liberty interest "to direct the education and upbringing of one's children." *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)). The cases cited by plaintiffs concerning education, however, are easily distinguished. *Meyer* concerned the violation of a statute forbidding the teaching of a foreign language prior to graduation from eighth grade. *See Meyer*, 262 U.S. 390. *Pierce* concerned the violation of a statute requiring education at public schools instead of private schools. *See Pierce*, 268 U.S. 510. *Wisconsin v. Yoder*, 406 U.S. 205 (1972), concerned a statutory requirement to attend school until age 16. *See id.* In

none of those cases did the Supreme Court recognize a parent's fundamental right to control *all* aspects of public education. *See Swanson ex rel. Swanson v. Guthrie Independent Sch. Dist. No. I-L*, 135 F.3d 694, 699 (10th Cir. 1998) ("parents simply do not have a constitutional right to control each and every aspect of their children's education and oust the state's authority over that subject"). 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. Such a broadly ranging right may not be inferred from a more specific fundamental right relating to parents' ability to have their children learn a particular subject or to choose to have them educated in a private school or at home.

In addition, this right to control one's child's education must be considered in the context of the Supreme Court's holding that there is no fundamental right to public education. Thus, in the present case, plaintiffs are not so much trying to retain the right to decide how to educate their children, as much as they are trying to assert a right to more and better-funded public education. That claim treads closer to *Rodriguez*, in which the strict scrutiny standard was rejected, than to the right to control education, and the Court therefore rejects this basis for application of strict scrutiny here.

Second, plaintiffs argue in favor of parents' fundamental right to spend their own money on their children's education. In support of such a right, plaintiffs cite only a statement in a concurring opinion in *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977), a case concerning a single-family zoning requirement, in which Justice Stevens noted the long-recognized common-law "basic right" of an owner "to decide best how to use his own property." *See id.* at 513 (Stevens, J., concurring). Justice Stevens, however, did not recognize or cite authority for a fundamental right, for purposes of a claim under the Equal Protection Clause or the Due Process Clause, to spend money however one wishes, without limits. Thus, this Court will not create a hitherto unrecognized unlimited fundamental right to spend one's money on education without restriction. Certainly, plaintiffs have not provided any authority recognizing a specific right to attempt to compel a vote seeking to authorize a local tax to fund public education. Moreover, plaintiffs seek to spend not only their own money, but that of their neighbors in the school district as well, and plaintiffs have not cited any support for a fundamental right to spend others' money on their children's education.

Further, even if such a fundamental right to spend one's own money on education did exist, the LOB cap does not abridge that right. Plaintiffs are not being prevented from using their money to fund their children's education, as they can send their children to private schools or donate their money to

the local school district. Plaintiffs respond that it is absurd to talk about private donations, which cannot possibly be expected to provide the needed revenue. The unlikelihood that plaintiffs will effect change by giving their own money, however, does not bear on the question of whether plaintiffs' right to spend their money (assuming there is such a right) is being abridged here. Plaintiffs are not being prevented from giving as much as they wish to their school district or otherwise in furtherance of their children's education; therefore, there is no abridgement of the right asserted by plaintiffs here.

Third, plaintiffs assert the abridgement of fundamental rights under the First Amendment, including the right to associate and to petition the government. Plaintiffs cite *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290 (1981). In that case, the Court held that a statute's limit on campaign contributions to committees concerning ballot measures, as opposed to contributions to individuals, limited speech and violated the First Amendment's right of association. *See id.* That case is clearly distinguishable, however, as the statute at issue limited the exercise of an existing ballot measure provision. In the present case, plaintiffs are essentially arguing in favor of a fundamental right to associate to pursue a particular voter initiative in a manner not presently authorized under Kansas law (i.e., approving a tax in excess of the statutory cap). The Tenth Circuit, however, has explicitly rejected the concept of a fundamental right

to pursue a voter initiative. *See Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210-11 (10th Cir. 2002) ("[N]othing in the language of the Constitution commands direct democracy, and we are aware of no authority supporting this argument. In fact, every decision of which we are aware has held that initiatives are state-created rights and are therefore not guaranteed by the U.S. Constitution."). Otherwise, plaintiffs' right to associate has not been abridged, as they are free to join together, for instance, to petition the Kansas Legislature to repeal the LOB cap. Thus, the *Citizens* case does not support heightened scrutiny here.

Plaintiffs also argue that the LOB cap infringes their right under the First Amendment to seek better education for their children. As noted above, however, the Supreme Court has concluded that there is no fundamental right to public education. Plaintiff [sic] cite *Papasan v. Allain*, 478 U.S. 265 (1986), in which the Supreme Court noted that *Rodriguez* had not completely foreclosed the possibility of applying strict scrutiny, based on an argument that some minimal amount of education is necessary to the meaningful exercise of the right to exercise free speech or to vote, in an instance of a "radical denial of educational opportunity." *See id.* at 284. In *Papasan*, as in *Rodriguez*, however, rational basis scrutiny was appropriate because there were no allegations that such a minimally adequate education had been denied, such that students could not read or write, or were not given basic instruction. *See id.* at 285-87. In attempting

to invoke this possible exception noted in *Rodriguez* and *Papasan*, plaintiffs argue that the Kansas Supreme Court has held in the past that previous school funding schemes did not provide for adequate public education, in violation of the Kansas Constitution. Plaintiff [sic] also cite to statistics placing the funding for their school district in the lower portion of rankings of districts in Kansas. Plaintiffs, however, have not made any showing – or even alleged in their complaint – that the statutory funding scheme in general and the LOB cap in particular cause children in Kansas or in their district to be so under-educated to constitute a "radical denial of educational opportunity" as necessary to the meaningful exercise of the right to free speech. In short, the Court is not persuaded that this case should be treated differently from *Rodriguez* and *Papasan*, in which rational basis review was deemed appropriate.

In summary, plaintiffs 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 in this case, particularly in light of the Supreme Court's application of a rational-basis standard in *Rodriguez* and *Papasan*. Accordingly, plaintiffs cannot maintain their claim for a violation of substantive due process, and defendants' motions to dismiss are granted to that extent. Similarly, because the Court concludes that plaintiffs' equal protection claim must be considered under a rational basis standard, defendants are entitled to dismissal of plaintiffs' equal

protection claim to the extent that it is asserted under the strict scrutiny standard. Correspondingly, plaintiffs' motion for summary judgment is denied with respect to those claims.

C. Equal Protection Claim – Rational Basis Review

Because heightened scrutiny is not appropriate, the Court reviews the LOB cap under the rational basis standard, which requires only that the means be rationally related to a conceivable and legitimate state end. *See, e.g.*, *Nguyen v. INS*, 533 U.S. 53, 77 (2001). "The fact that other means are better suited to the achievement of governmental ends therefore is of no moment under rational basis review." *Id.* The Supreme Court has described this inquiry as follows:

> Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. Where there are plausible reasons for Congress' action, our inquiry is at an end. This standard of review is a paradigm of judicial restraint. The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will

> eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.

See FCC v. Beach Communications, Inc., 508 U.S. 307, 313-14 (1993) (internal quotations and citations omitted).

Plaintiffs have moved for summary judgment in their favor on their equal protection claim. Because the Court concludes that plaintiffs have not established a violation of equal protection as a matter of law at this stage, as explained below, the Court denies their motion for summary judgment. At the same time, the Court declines the State defendants' invitation to award defendants summary judgment on this claim despite the absence of any motion by defendants pursuant to Fed. R. Civ. P. 56. In ruling on plaintiffs' motion, the Court is obliged to draw all inferences in defendants' favor, and thus it assumes for purposes of that motion that the Kansas Legislature enacted the LOB cap in furtherance of the interests asserted by defendants. That same inference may not be drawn in considering judgment in defendants' favor, however, and defendants have not yet provided record evidence establishing as a matter of uncontroverted fact that the Legislature in fact acted in furtherance of those interests (and not for some improper discriminatory purpose, for instance). For that reason, the Court will not enter judgment in defendants' favor at this time. Moreover, for that same reason, and because plaintiffs have adequately

pleaded a violation of the Equal Protection Clause by alleging that the Legislature acted without a rational basis, the Court denies defendants' motions to dismiss for failure to state a claim as they relate to this particular claim.

The Court first considers the most relevant Supreme Court cases, the import of which the parties dispute. In *Rodriguez*, as noted above, the Supreme Court rejected an equal protection challenge, under a rational basis review, to Texas's statutory school funding scheme that included reliance on local property taxation. *See Rodriguez*, 411 U.S. 1. In a footnote in that opinion, the Supreme Court noted the dissenting opinion's reference to the statutory funding scheme's cap on the local school district tax, and it concluded that the constitutionality of that cap was not before the Court "and must await litigation in a case in which it is properly presented." *See id.* at 50 n.107. The Court then included a "Cf." cite to the case of *Hargrave v. Kirk*, 313 F. Supp. 944 (M.D. Fla. 1970), *vacated sub nom. Askew v. Hargrave*, 401 U.S. 476 (1971). In *Hargrave*, the district court concluded that a cap similar to the LOB cap violated the Equal Protection Clause. Plaintiffs argue that the Supreme Court effectively endorsed the district court's ruling in *Hargrave* by its citation to that opinion. The Court flatly rejects that argument. In *Rodriguez*, the Supreme Court expressly refused to address the issue of a cap's constitutionality. Moreover, the Court also cited its vacating of the district court's opinion in

Hargrave. See Rodriguez, 411 U.S. at 50 n.107. Finally, in the course of vacating that opinion, the Supreme Court commented that the district court improperly decided the issue only on the basis of the pleadings and an affidavit that merely verified those pleadings. *See Askew*, 401 U.S. at 478-79. Thus, there is no basis to infer that the Supreme Court effectively endorsed the ruling of the *Hargrave* district court by its citation to that case in a footnote in *Rodriguez*.

In fact, consideration of the Supreme Court's opinion in *Rodriguez* seems to weigh against plaintiffs' claim here. In that case, the Supreme Court noted that the Texas system, like almost every state's, was intended to create a statewide system of funding public education while continuing an element of local participation and control. *See Rodriguez*, 411 U.S. at 47-49. The Court noted that some resulting disparity was not sufficient to make the scheme unconstitutional; nor should the scheme be condemned just because it was imperfect or other methods would have been better. *See id.* at 50-51. The Court stressed that the Texas system was not the result of hurried, ill-conceived legislation, and was not intended to discriminate against any particular class. *See id.* at 55. The Court stated:

> We are unwilling to assume for ourselves a level of wisdom superior to that of legislators, scholars, and educational authorities in 50 States, especially where the alternatives proposed are only recently conceived and nowhere yet tested. The constitutional

> standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest. We hold that the Texas plan abundantly satisfies this standard.

See id. (citation omitted). As a "cautionary postscript," the Court noted that a contrary result would have caused a great upheaval in public education, that there is nothing certain in trying to predict the outcome of employing a different scheme, and that such considerations highlight the "wisdom of the traditional limitations" on the Court's function. *See id.* at 56-58. Thus, in *Rodriguez* the Supreme Court stressed the importance of the federal courts' deference to the judgment of legislators regarding public school funding. The need for such deference undermines plaintiffs' claim seeking to invalidate as irrational one provision of the comprehensive statutory school funding scheme enacted by the Kansas Legislature.

After *Rodriguez*, the Supreme Court again considered the constitutionality of a school funding scheme in *Papasan*. In *Papasan*, the district court dismissed the claims at the pleading stage as barred by the Eleventh Amendment, and the Fifth Circuit agreed with that ruling and also ruled that dismissal was proper because the scheme was not unconstitutional under *Rodriguez*. *See Papasan*, 478 U.S. at 275. The Supreme Court reversed, holding that the equal protection claim was not barred by the Eleventh Amendment and that *Rodriguez* did not require

dismissal of that claim at the pleading stage. *See id.* at 276-92. The Court distinguished *Rodriguez* as follows:

> [A]s to this claim, we are unpersuaded that *Rodriguez* resolves the equal protection question in favor of the State. The allegations of the complaint are that the State is distributing the income from [certain lands] unequally among the school districts, to the detriment of [certain schools] and their students. . . . This case is therefore very different from *Rodriguez*, where the differential financing available to school districts was traceable to school district funds available from local real estate taxation, not to a state decision to divide state resources unequally among school districts. The rationality of the disparity in *Rodriguez*, therefore, which rested on the fact that funding disparities based on differing local wealth were a necessary adjunct of allowing meaningful local control over school funding, does not settle the constitutionality of disparities alleged in this case. . . .

See id. at 287-88. Based on that reasoning, plaintiffs argue that its claim is more like the one in *Papasan* than the one in *Rodriguez* because the disparity from which they allege harm resulted not from the differing local wealth but from the State's affirmative decision to limit additional local funding by imposition of the LOB cap.

Plaintiffs' comparison of this case to *Papasan*, however, is not completely apt, as the State has not decided in this case simply to allocate different amounts of money to different school districts. The challenged LOB cap does not represent a state-created disparity, as discussed in *Papasan*; rather, it represents an attempt to *limit* the disparity that may result from an unlimited ability of school districts to provide additional funding. Thus, the Court does not agree that this case is more akin to *Papasan* than to *Rodriguez*.

Moreover, even if this case were similar to *Papasan*, that case would not compel judgment in plaintiffs' favor at this stage. In *Papasan*, the Court did not hold that the statute was unconstitutional; rather, the Court, after distinguishing *Rodriguez*, remanded the case for litigation of the equal protection claim under the rational basis standard. *See id.* at 292. In the present case, then, if *Rodriguez* does not require a ruling in defendants' favor, it at least compels further litigation of the claim, as in *Papasan*. The Supreme Court's decision in *Papasan* certainly does not provide a basis for finding a constitutional violation as a matter of law at this stage.

Plaintiffs argue that equity – the attempt here to limit the amounts that richer school districts can raise from the LOB, and thus limit the resulting disparity among districts that could occur without a cap – is not a legitimate governmental interest. Plaintiffs argue that a disparity in favor of richer districts would be constitutionally permitted under

Rodriguez, and that therefore the State is not required to try to address that disparity by limiting the cap.

Plaintiffs also point to the Kansas Supreme Court's decisions in the *Montoy* case. In *Montoy II*, the supreme court held that the statutory school funding scheme in effect at that time failed to comply with the Kansas Constitution's requirement that the Legislature "make suitable provision for finance" of public schools. *See Montoy v. State (Montoy II)*, 278 Kan. 769 (2005). The court stated that the "equity with which the funds are distributed" was a critical factor for the Legislature to consider in providing suitable funding. *See id.* at 775. In *Montoy III*, the supreme court held that new legislation enacted in response to *Montoy II* was not sufficient. *See Montoy v. State (Montoy III)*, 279 Kan. 817 (2005). The court noted in that opinion that the Legislature's increase in the LOB cap exacerbated wealth-based disparities between school districts. *See id.* at 834. Finally, in *Montoy IV*, the supreme court held that new legislation was sufficient to satisfy the requirements of the Kansas Constitution. *See Montoy v. State (Montoy IV)*, 282 Kan. 9 (2006). In that opinion, the court noted that the Kansas Legislature had responded to its concerns about "wealth-based disparities inherent in the LOB" by adjusting a component of that provision. *See id.* at 23.

Plaintiffs argue that, in the *Montoy* cases, the supreme court did not necessarily require equity in all situations, but that any equity considerations

related only to the achievement of suitability under the Kansas Constitution. Thus, plaintiffs appear to argue that equity is not required if suitability is already achieved, and that therefore equity is not a legitimate interest here.

This analysis by plaintiffs is not sound. Even if plaintiffs were correct that the State was not *required* to seek equity among school districts in order to be constitutional, either under *Rodriguez* or the *Montoy* cases, that does not mean that pursuing equity is not a legitimate governmental interest as a matter of policy. Notably, plaintiffs have not cited any cases, or offered any persuasive reasoning, to support the argument that equity is not a legitimate governmental interest with respect to funding public education.[3] Plaintiffs argue that one may not seek to achieve equity at the sake of violating the Equal Protection Clause of the United States Constitution, or by discriminating against a class such as wealthier school districts. It is elemental, however, that the Equal Protection Clause does not forbid all discrimination or unequal treatment, but only forbids unequal treatment that does not pass the rational basis test

[3] Plaintiffs argue that the LOB cap serves only to disadvantage school districts that wish to spend more money on schools, and they state that the Supreme Court has repeatedly rejected such "disadvantaging" justifications as illegitimate. In support of that statement, however, plaintiffs cite only cases that involve the fundamental right of free speech under the First Amendment, which cases are therefore easily distinguished from the present case.

(in the absence of a fundamental right). Thus, a state *may*, under the Equal Protection Clause, discriminate against wealthier districts if the measure is rationally related to a legitimate purpose. Moreover, as defendants note, the pursuit of a claim under the Equal Protection Clause based on the argument that equity is not a legitimate governmental interest seems inherently unsupportable.

In addition, plaintiffs' argument concerning the *Montoy* cases appears at least a little disingenuous in light of the complaint's allegation that suitability has *not* been achieved in Kansas. Furthermore, at the time that the LOB cap was enacted in its present form, the Legislature was attempting to address the Kansas Supreme Court's holding that funding was not suitable. In *Montoy IV*, the supreme court noted the change in the LOB and cap provisions and held that the legislature had adequately addressed the problem of the local wealth disparity. Thus, the court effectively required the Kansas Legislature to consider equity with respect to the LOB cap in order to achieve compliance with the Kansas Constitution. In *Papasan*, the United States Supreme Court stated that if the state's action was dictated by a requirement of federal law – if the state effectively "had no choice in the matter" – that requirement would provide a rational reason for the funding disparity there. *See Papasan*, 478 U.S. at 289. Similarly here, the 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.

Plaintiffs also contend that the LOB cap fails the rational basis test because it does not serve equity but actually harms equity, in the sense that their school district receives lower funding than other districts and cannot supplement that funding through an unlimited LOB to catch up. Thus, plaintiffs argue that educational quality is harmed, based on their allegations that quality is tied to funding and that their school district has had to close schools and increase class sizes. Plaintiffs further argue that the LOB cap does not promote equity because there is no reason to believe that wealth-based disparities would occur without the cap. Plaintiffs argue that any such effect is pure speculation, particularly with respect to arguments that wealthier districts would be able to hire the best teachers by offering more money. Plaintiffs note defendants' statement that, if there were no cap and wealthier districts raised more money, the State would be required to pay out more supplemental aid to the other districts; thus, plaintiffs argue that no disparity would occur.

These arguments are not persuasive. First, any such factual disputes concerning plaintiffs' actual harms and the causes therefor preclude summary judgment in plaintiffs' favor. Moreover, defendants argue that the harm plaintiffs allege (less money, closing of schools) is not caused by the LOB cap, which is applied in the same manner to all school districts, but rather that any disparity in funding

results from the entire scheme – attacks on which plaintiffs have consistently disclaimed in this Court, in the course of its "surgical" attack on the LOB cap. Finally, these arguments by plaintiffs fail to address the governing principle of law, set forth above, that a measure may be reasonably related to achieving the legitimate interest even if it does not succeed or provide the best method for achieving it. Plaintiffs essentially argue that the State did not choose the best way to achieve equity, but that fact (even if true) does not mean that equal protection has been violated. In summary, plaintiffs have not shown that equity in school funding is not a legitimate state interest or that the LOB cap is not rationally related to that interest.

Defendants also point to the State's legitimate governmental interest in limiting property tax rates. *See Lynch v. State of Alabama*, No. 08-S-450-NE, 2011 U.S. Dist. LEXIS 155012, at *1184-85 (N.D.Ala. Nov. 7, 2011) (cap on property taxes for funding school districts rationally related to legitimate governmental interest in maintaining lower property tax rates). Plaintiffs distinguish *Lynch* on the basis that the present case involves a *desired* tax increase, which would be approved by the voters and thus would represent taxation *with* representation. Of course, any LOB tax is also imposed on those who have voted against the tax, and the Kansas Legislature – a representative body – would have a legitimate interest in limiting taxes imposed on its citizens for economic reasons. Plaintiffs have not shown that the

LOB cap could not be rationally related to such a legitimate interest.

Accordingly, plaintiffs have not established a violation of equal protection under the rational basis test as a matter of law. The Court therefore denies plaintiffs' motion for summary judgment.

VI. Preliminary Injunction

In the early stages of this action, plaintiffs filed a motion for a preliminary injunction barring enforcement of the LOB cap. Although the Court took evidence and conducted a hearing on that motion, its dismissal of the case for lack of standing prevented it from reaching the merits of the preliminary injunction motion. Upon remand from the Tenth Circuit, plaintiffs have not submitted supplemental briefing or otherwise sought to obtain a ruling on that motion. Nevertheless, because plaintiffs have not withdrawn the motion, it remains pending, and the Court will address it here.

"Under the traditional four-prong test for a preliminary injunction, the party moving for an injunction must show: (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." *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1128 (10th Cir. 2013). If a movant can show that the last three requirements "tip strongly" in its favor, the

movant may meet the first requirement regarding success on the merits "by showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation." *See Oklahoma ex rel. Okla. Tax Comm'n v. International Registration Plan, Inc.*, 455 F.3d 1107, 1113 (10th Cir. 2006).

The Court concludes that plaintiffs have failed to satisfy this test for a preliminary injunction. First, the Court concludes that plaintiffs have not shown a likelihood of success on the merits of their equal protection claim. For the reasons set forth by the Court in denying plaintiffs' motion for summary judgment, plaintiffs are not likely to succeed in showing that the LOB cap is not rationally related to the pursuit of a legitimate state interest in maintaining equity among school districts with respect to resources.

Moreover, plaintiffs are not entitled to a relaxed standard for showing likelihood of success on the merits because the other requirements for a preliminary injunction do not weigh strongly in plaintiffs' favor. Specifically, the Court concludes that plaintiffs cannot show that their alleged harm in being subject to the LOB cap outweighs the harm to the State and to the public from an injunction against enforcement of the cap. The Court has previously analyzed the issue and concluded that the LOB cap is not severable from the rest of the statutory school funding

scheme under Kansas law.[4] Thus, because the school funding scheme may not be applied without the LOB cap, the injunction sought by plaintiffs would also completely upend the entire system of public education in Kansas. Such a result would work a tremendous hardship on public-school students and the rest of the public throughout Kansas, and that potential hardship easily outweighs plaintiffs' alleged harm from continued enforcement of the LOB cap pending the outcome of this litigation. Accordingly, the Court denies plaintiffs' motion for a preliminary injunction.

IT IS THEREFORE ORDERED BY THE COURT THAT the State defendants' motion to dismiss (Doc. # 36) and the Board defendants' motions to dismiss (Doc. ## 38, 88) are **granted in part and denied in part**. Plaintiffs' due process claim and their claims based on an application of strict scrutiny or a denial of fundamental rights are dismissed, and defendants'

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[4] In reversing this Court's dismissal of the case for lack of standing, the Tenth Circuit stated that because plaintiffs' alleged injury went beyond the inability to hold an election to approve a local tax and included having to suffer discrimination in violation of the Constitution (an argument raised for the first time on appeal), this Court's consideration of the severability issue was premature. *See Petrella*, 697 F.3d at 1296. The severability issue *is* relevant, however, to plaintiffs' pending motion for a preliminary injunction, as it bears on the potential harm suffered by the State and the public if enforcement of the LOB cap is enjoined. Accordingly, the Court must resolve the issue at this time, and it reaffirms its prior ruling that the cap is not severable. *See Petrella*, 2011 WL 884455, at *3-6.

motions to dismiss are granted to that extent; defendants' motions are otherwise denied.

IT IS FURTHER ORDERED BY THE COURT THAT the motion to dismiss or stay filed by the Board defendants and intervenors (Doc. # 90) is **denied**.

IT IS FURTHER ORDERED BY THE COURT THAT plaintiffs' motion for summary judgment (Doc. # 93) is **denied**.

IT IS FURTHER ORDERED BY THE COURT THAT plaintiffs' motion for preliminary injunction (Doc. # 28) is **denied**.

IT IS SO ORDERED.

Dated this 29th day of October 31, 2013, in Kansas City, Kansas.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DIANE PETRELLA, et al., Plaintiffs, v. SAM BROWNBACK, Governor of Kansas, in his official capacity, et al., Defendants.	Case No. 10-2661-JWL (Filed Jan. 28, 2014)

MEMORANDUM AND ORDER

This matter presently comes before the Court on plaintiffs' motion for reconsideration of the Court's Memorandum and Order of October 29, 2013 (Doc. # 121). For the reasons set forth below, the Court **denies** the motion for reconsideration.

By its prior order, the Court ruled that plaintiffs have not stated a claim for a violation of a recognized fundamental right, and accordingly it dismissed plaintiffs' equal protection claim to the extent based on a strict scrutiny standard and their due process claim. *See* Memorandum and Order of Oct. 29, 2013 (Doc. # 119). The Court also denied plaintiffs' motion for summary judgment on their equal protection claim under a rational basis standard, denied plaintiffs' motion for a preliminary injunction, and denied defendants' remaining motions to dismiss or for a stay. *See id.*

Plaintiffs now seek reconsideration of the Court's ruling concerning plaintiffs' allegations of a violation of a fundamental right. Plaintiffs argue that the Court misapprehended its arguments and that reconsideration is necessary to correct clear error and prevent manifest injustice. *See* D. Kan. Rule 7.3(b) (standard for a motion for reconsideration). Whether to grant or deny a motion for reconsideration is committed to the district court's discretion. *See Wright ex rel. Trust Co. of Kan. v. Abbott Labs., Inc.*, 259 F.3d 1226, 1235 (10th Cir. 2001).

1. Plaintiffs' first argument is prompted by the Court's citation in its prior order to the Tenth Circuit's opinion in *Save Palisade FruitLands v. Todd*, 279 F.3d 1204 (10th Cir. 2002). Plaintiffs argue that they did not have the opportunity to address that case because it had not been cited in any of the parties' briefs. In its order, the Court addressed plaintiffs' argument pursuant to *Citizens Against Rent Control/ Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290 (1981), in which the Supreme Court held that a statutory limit on campaign contributions to committees concerning ballot measures limited speech and violated the First Amendment's right of association. *See id.* In rejecting plaintiffs' argument, this Court reasoned as follows:

> That case is clearly distinguishable, however, as the statute at issue limited the exercise of an existing ballot measure provision. In the present case, plaintiffs are essentially arguing in favor of a fundamental right to

> associate to pursue a particular voter initiative in a manner not presently authorized under Kansas law (i.e., approving a tax in excess of the statutory cap). The Tenth Circuit, however, has explicitly rejected the concept of a fundamental right to pursue a voter initiative. *See Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210-11 (10th Cir. 2002) ("[N]othing in the language of the Constitution commands direct democracy, and we are aware of no authority supporting this argument. In fact, every decision of which we are aware has held that initiatives are state-created rights and are therefore not guaranteed by the U.S. Constitution."). Otherwise, plaintiffs' right to associate has not been abridged, as they are free to join together, for instance, to petition the Kansas Legislature to repeal the LOB cap. Thus, the *Citizens* case does not support heightened scrutiny here.

In response to the Court's statement that there is no fundamental right to pursue a particular voter initiative, plaintiffs cite *Meyer v. Grant*, 486 U.S. 414 (1988), in which the Supreme Court struck down a statute that prohibited paying for petition circulation under a state's initiative process. *See id.* Specifically, plaintiffs argue that under the "unconstitutional conditions" doctrine, a statute may not impose an unconstitutional condition (in this case, the LOB cap) on a benefit conferred by the government (in this case, the general right to pursue voter initiatives in

Kansas), whether or not the receipt of that benefit is required by the Constitution.

The Court rejects this argument. In *Meyer*, the defendant argued that because initiatives were a state-created right, the state could also restrict initiatives, but the Court rejected that argument and applied "exacting scrutiny" because the statute restricted political speech concerning the subject of an initiative. *See id.* at 424-25. *Meyer* is thus easily distinguished, as the present case does not involve any restriction on speech relating to a voter initiative; rather, plaintiffs here complain about the prohibition against the particular initiative that they wish to pursue.

Indeed, in *Save Palisade*, the Tenth Circuit distinguished *Meyer* in the same way:

> [P]erhaps most important, all of these cases [cited by the plaintiffs] involve situations where a political subdivision had already been granted the power of initiative and the state attempted to regulate the speech associated with the initiative process. For example, in the primary First Amendment case cited by [the plaintiffs], *Meyer v. Grant*, the Court struck down a law banning payments to petition circulators. Unlike the instant case, however, *Meyer* involved a situation where the state had already granted electors the power of initiative. 486 U.S. at 424. Moreover, the *Meyer* Court struck down the law not because of anything unique to an initiative scheme, but rather because it limited

> the number of messengers available to spread core political speech. *Id.* at 422-23.

See Save Palisade, 279 F.3d at 1211. Four years later, in *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082 (10th Cir. 2006), the Tenth Circuit made the same distinction. After noting that in other cases it had struck down laws regulating the political speech that accompanies an initiative drive, the Tenth Circuit distinguished such cases as involving laws regulating the process of advocacy itself, for example by dictating who could speak or how the speaking must be done. *See id.* at 1099. The court stated that "[a]lthough the First Amendment protects political speech incident to an initiative campaign, it does not protect the right to make law, by initiative or otherwise." *See id.*

Again, in the present case, plaintiffs assert that they have been denied the right to pursue a vote within their school district for additional funding for public schools. Thus, plaintiffs have not asserted an abridgement of their speech incident to an initiative, but rather they assert a right to a particular initiative. In *Save Palisade* and again in *Initiative and Referendum Institute*, the Tenth Circuit made clear that there is no such fundamental right. In *Save Palisade*, the court held that the mere fact that the state has created an initiative process "does not require that an initiative process be granted to all political subdivisions or with respect to all subjects." *See Save Palisade*, 279 F.3d at 1211. Accordingly, this Court's citation to and reliance on *Save Palisade* was

apt, and the Court rejects this argument for reconsideration of its prior order.

2. Plaintiffs also argue that the Court failed to address their argument that a fundamental right is at issue here because the act of voting constitutes protected speech. Plaintiffs note that severe restrictions on voting rights may be subject to strict scrutiny. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992). The Court rejects this argument for the recognition of a fundamental right here. As explained above, the present case does not involve a restriction on plaintiffs' exercise of their right to vote on measures on the ballot, but instead involves a restriction on their ability to get something on the ballot in the first place. Thus, the Court concludes that this case is governed by *Save Palisades*, in which the Tenth Circuit rejected the application of strict scrutiny. In that case, the Tenth Circuit rejected the plaintiffs' reliance on right-to-vote cases, stating that "alleging a violation of free speech or voting rights does not transform what is essentially an initiative case into a voting rights case, and thereby trigger strict scrutiny." *See Save Palisade*, 279 F.3d at 1211 n.4. The Court rejects this basis for reconsideration.

3. Plaintiffs argue that reconsideration is warranted because the Court failed to address their argument that the "promulgation" of education constitutes speech. Plaintiffs argue that the LOB cap at issue here restricts the promulgation of education and thus restricts speech, and that Supreme Court

cases striking down campaign spending limits are therefore applicable to this case.

The Court rejects this argument. Plaintiffs have still failed to provide authority recognizing the specific fundamental right asserted here, namely the right to provide additional funds, through a tax approved by local vote, for public education. In its prior order, the Court discussed and distinguished Supreme Court cases involving education. 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). 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 or otherwise to "promulgate" education. Accordingly, the Court rejects this argument for the recognition of a fundamental right in this case.

4. Finally, plaintiffs seek reconsideration on the basis that the Court failed to appreciate plaintiffs' arguments for distinguishing the Supreme Court's opinion in *Rodriguez* (in which the Supreme Court rejected the strict scrutiny standard) and thus that the Court erred in ruling that *Rodriguez* governed the present case. The Court rejects this argument as well.

First, the Court did not rule in its prior order that *Rodriguez* "required" application of the rational basis standard, as plaintiffs argue. In rejecting the strict scrutiny standard, the Court first noted that plaintiffs had not been able to provide authority recognizing a fundamental right in this context, and it stated that it would not declare a new fundamental right in the absence of such authority. Moreover, the Court addressed each particular right asserted by plaintiffs. The Court also discussed *Rodriguez*, and it concluded, based on language in that opinion, that the Supreme Court's opinion in that case "supports" a rejection of strict scrutiny in the present case.

Plaintiffs argue that *Rodriguez* is distinguishable because in that case the plaintiffs sought more money from the state for public education, while in the present case, plaintiffs challenge their inability to provide additional local funds. This Court did not suggest in its prior opinion that *Rodriguez* was on all fours with the present case; indeed, the Court explicitly noted plaintiffs' argument that *Rodriguez* does not necessarily control here. Nevertheless, the Court cited the Supreme Court's recognition in *Rodriguez* of its traditional deference to state legislatures concerning fiscal schemes and the manner in which a state raises and disburses state and local tax revenues. The Court remains convinced that the Supreme Court's discussion of the applicable standard in *Rodriguez* is consistent with the application of the rational basis standard in the present case. Therefore, the Court rejects this basis for reconsideration as well.

5. In summary, plaintiffs have still failed to provide authority supporting the recognition of a fundamental right as specifically asserted by plaintiffs. Accordingly, the Court reaffirms its prior reasoning and conclusions that the present case does not involve the abridgement of a fundamental right and that the strict scrutiny standard of review is not appropriate here. The Court therefore denies plaintiffs' motion for reconsideration of its dismissal of plaintiffs' due process claim and their claim for a violation of the Equal Protection Clause under the strict scrutiny standard. Moreover, in light [sic] that ruling, there is no basis for reconsideration of the Court's denial of plaintiffs' motion for a preliminary injunction.

IT IS THEREFORE ORDERED BY THE COURT THAT plaintiffs' motion for reconsideration (Doc. # 121) is **denied**.

IT IS SO ORDERED.

Dated this 28th day of January, 2013, in Kansas City, Kansas.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DIANE PETRELLA, next friend and guardian of minor N.P., minor C.P.; NICK PETRELLA, minor C.P., next friend and guardian of minor N.P.; MICHELLE TROUVE', next friend and guardian of minor J.T., minor Z.T., minor N.T.; MARC TROUVE', next friend and guardian of minor Z.T., minor N.T., minor J.T.; MEREDITH BIHUNIAK, next friend and guardian of minor S.B., minor O.B., minor A.B., minor E.B.; CHRIS BIHUNIAK, next friend and guardian of minor S.B., minor O.B., minor A.B., minor E.B.; MIKE WASHBURN, next friend and guardian of minor A.W., minor R.W.; LAURENCE FLORENS, next friend and guardian of minor A.W., minor R.W.; PAUL ERDNER, next friend and guardian of minor M.E., minor A.E.; JULIE ERDNER, next friend and guardian of minor M.E., minor A.E.; CHRISTOPHE	No. 11-3098

SAILLY, next friend and guardian of minor E.S., minor N.S.; CATALINA SAILLY, next friend and guardian of minor E.S., minor N.S.; JOHN WEBB ROBERTS, next friend and guardian of minor M.C.R., minor W.C.R.; TERRE MANNE, next friend and guardian of minor C.J.M.; ALISON BARNES MARTIN, next friend and guardian of minor C.O.M., minor C.E.M.; KURT KUHNKE, next friend and guardian of minor A.K.; LISA KUHNKE, next friend and guardian of minor A.K.,

Plaintiffs-Appellants,

v.

SAM BROWNBACK, Governor of Kansas, in his official capacity; DR. DIANE DEBACKER, in her official capacity as Kansas Commissioner of Education; JANET WAUGH, in her official capacity as Chair of the Kansas State Board of Education; KATHY MARTIN, in her official capacity as a member of the State Board of Education; SUE STORM, in her official capacity as a member of the Kansas State Board of Education; KENNETH WILLARD,

in his official capacity as a member of the Kansas State Board of Education; JOHN W. BACON, in his official capacity as a member of the Kansas State Board of Education; DR. WALT CHAPPELL, in his official capacity as a member of the Kansas State Board of Education; CAROLYN L. WIMS-CAMPBELL, in her official capacity as a member of the Kansas State Board of Education; JANA SHAVER, in her official capacity as Vice-Chair of the Kansas State Board of Education; SALLY CAUBLE, in her official capacity as a member of the Kansas State Board of Education; DAVID T. DENNIS, in her official capacity as a member of the Kansas State Board of Education; DEREK SCHMIDT, Kansas Attorney General, in his official capacity; RON ESTES, Kansas State Treasurer, in his official capacity,

Defendants-Appellees,

and

JEFF GANNON, next friend and guardian of minor L.G., minor A.G., minor G.G.; MEREDITH GANNON, next friend and guardian of minor

L.G., minor A.G., minor G.G.; ANDREA BURGESS, next friend and guardian of minor J.B.; JENNIFER KENNEDY, next friend and guardian of minor O.K.; SCHELENA OAKMAN, next friend and guardian of minor C.O.; MARTHA PINT, next friend and guardian of minor C.P.; DAVID SEEBER, next friend and guardian of minor A.S., minor B.S.; MISTY SEEBER, next friend and guardian of minor A.S., minor B.S.; JOHN CAIN, next friend and guardian of minor L.C.; BECKY CAIN, next friend and guardian of minor L.C.; DARRIN COX, next friend and guardian of minor J.C.; LOIS COX, next friend and guardian of minor J.C.; DANIE ELDREDGE, next friend and guardian of minor A.E.; JOSH ELDREDGE, next friend and guardian of minor A.E.; JIM HOLMES, next friend and guardian of minor J.H.; JOY HOLMES, next friend and guardian of minor J.H.; MATT NEWTON, next friend and guardian of minor L.N.; IVY NEWTON, next friend and guardian of minor L.N.; GLENN OWEN, next friend

and guardian of minor A.O.; RYAN RANK, next friend and guardian of minor M.R.; BEULAH WALKER, next friend and guardian of minor Q.W.; BIANCA ALVAREZ, next friend and guardian of minor M.A.; NORMA DEL REAL, next friend and guardian of minor P.D., minor V.D.; ADRIANA FIGUEROA, next friend and guardian of minor T.F.; EVA HERRERA, next friend and guardian of minor D.H., minor G.H., minor K.H.; REBECCA FRALICK, next friend and guardian of M.S.; CONSUELO TRETO, next friend and guardian of minor A.T.; MELISSA BYNUM, next friend and guardian of minor T.B.; EVETTE HAWTHORNE-CROSBY, next friend and guardian of minor B.C.; BRYANT CROSBY, next friend and guardian of minor B.C.; GEORGE MENDEZ, next friend and guardian of minor G.M.; MONICA MENDEZ, next friend and guardian of minor G.M.; SALLY MURGUIA, next friend and guardian of minor A.M.; RAMON MURGUIA, next friend and guardian of minor A.M.;

CLARA OSBORNE, next friend and guardian of minor N.W.,

Intervenor-Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS (D.C. No. 2:10-CV-02661-JWL-KGG)

(Filed Oct. 18, 2012)

Tristan L. Duncan, Shook, Hardy & Bacon, L.L.P., Kansas City, Missouri (William F. Northrip, and Zach Chaffee-McClure, Shook, Hardy & Bacon, L.L.P., Kansas City, Missouri, and Jonathan S. Massey, Massey & Gail, LLP, Washington, D.C., and Laurence H. Tribe, Cambridge, Massachusetts, with her on the briefs), for Plaintiffs-Appellants.

Arthur S. Chalmers, Hite, Fanning & Honeyman L.L.P., Wichita, Kansas (Gayle B. Tibbets, Hite, Fanning & Honeyman L.L.P., Wichita, Kansas; Jeffrey A. Chanay, Deputy Attorney General, Office of Kansas Attorney General, Topeka, Kansas; Cheryl L. Whelan, General Counsel, Kansas State Department of Education, Topeka, Kansas; Mark A. Ferguson and Eldon J. Shields, Gates, Shields & Ferguson, P.A., Overland Park, Kansas, with him on the brief), for Defendants-Appellees.

Alan L. Rupe, Kutak Rock LLP, Wichita, Kansas (John S. Robb, Somers, Robb & Robb, Newton, Kansas, with him on the brief), for Intervenor-Defendants-Appellees.

Before **GORSUCH**, **EBEL**, and **HOLMES**, Circuit Judges.

EBEL, Circuit Judge

In this litigation, Appellants, plaintiffs below, brought an action under 42 U.S.C. § 1983, challenging the statutory scheme by which the state of Kansas funds its public schools. The district court dismissed their suit for lack of standing. Exercising jurisdiction under 28 U.S.C. § 1291, we conclude that the Appellants have standing because their alleged injury – unequal treatment by the state – would be redressed by a favorable decision. Accordingly, we REVERSE.

I. BACKGROUND

A. Kansas School District Finance and Quality Performance Act

The Kansas Constitution requires the Kansas legislature to "make suitable provision for finance of the educational interests of the state." Kan. Const. art. 6, § 6. In 2005, the Kansas Supreme Court determined that the then-current school finance system

(the School District Finance and Quality Performance Act, or "Act") violated the state constitution because it "failed to make suitable provisions" for funding the public schools. *See Montoy v. State*, 278 Kan. 769, 120 P.3d 306, 310 (2005) ("*Montoy I*") (internal quotation marks omitted).[1] Among the Act's constitutional shortcomings were an overall underfunding of public education, and a wealth-based disparity in public education funding based on differences in assessed property values from district to district. *See id.* At the same time, the Kansas Supreme Court upheld the Act against an equal protection challenge, finding that the Act did not violate either the Kansas or United States constitutions on equal protection grounds. *See id.* at 308.

A few months after *Montoy I*, the Kansas Legislature passed new legislation that purported to address the Act's constitutional shortcomings. The Kansas Supreme Court considered the adequacy of that new legislation in *Montoy v. State*, 279 Kan. 817, 112 P.3d 923 (2005) ("*Montoy II*"). As pertinent to this appeal, the *Montoy II* court concluded that the new legislation was still inadequate under the Kansas Constitution, both because it still failed to provide enough

[1] The *Montoy* litigation arose out of an earlier challenge to Kansas's school finance system, which resulted in a series of decisions from the Kansas Supreme Court starting in 2003. For purposes of this opinion, we cite only three of the *Montoy* decisions, which we call "*Montoy I,*" "*Montoy II,*" and "*Montoy III.*" (These numbers bear no relation to the similar shorthand occasionally used within the *Montoy* opinions themselves.)

funding overall, and because its revisions to how local property taxes would be levied and distributed "exacerbate[d] disparities based on district wealth." *Montoy II*, 112 P.3d at 937.

After *Montoy II*, the Kansas Legislature again amended the Act. This latest iteration of the Act, Kan. Stat. Ann. § 72-6405 et seq., is the subject of the present litigation. The Kansas Supreme Court deemed the current version of the Act sufficient to bring the system into "substantial compliance" with its prior orders. *See Montoy v. State*, 138 P.3d 755, 765 (2006) ("*Montoy III*").

The Act attempts to ensure equal per-pupil funding across all school districts according to a complex formula. The formula establishes a "Base State Aid Per Pupil" figure, *see* Kan. Stat. Ann. § 72-6410(b)(1), which is then multiplied by a given district's adjusted enrollment to determine the "State Financial Aid," i.e., the minimum funding that district will receive from the state. *See id.* § 72-6410(a). Adjustments to a district's actual enrollment numbers are made according to a series of weighting factors, which take into account such things as the number of bilingual or special education students in a given district; the number and percentage of "at-risk" students in the district; whether the district has unusually high or low enrollment; the transportation needs of the district; and whether a district is operating a new facility. *See id.* §§ 72-6411-72-6415b, 72-6442b. Thus, for example, a district with high numbers of at-risk students, or high numbers of students

requiring bus transportation, will have its actual enrollment adjusted upwards, to help it meet the costs associated with those factors.

The Act requires each school district to levy an ad valorem property tax of 20 mills for school finance purposes. Kan. Stat. Ann. § 72-6431. The amount of money raised through this local tax is designated the district's "Local Effort." *Id.* § 72-6410(c). If a district's Local Effort generates less than the level of State Financial Aid to which the district is entitled under the formula above, the State makes up the difference with "General State Aid." *Id.* § 72-6416(b). If on the other hand, a district's Local Effort equals or exceeds the level of State Financial Aid to which it is entitled, the district receives no General State Aid. *Id.* Any Local Effort in excess of the State Financial Aid target is remitted to the state and used to cover General State Aid distributions to other districts. *Id.* § 72-6431(c), (d).

The Act also authorizes districts to adopt a "Local Option Budget" ("LOB"), which permits a district to raise extra money by levying additional property taxes beyond the 20 mill minimum. *Id.* § 72-6433(b). The LOB is capped, however, at 31% of the district's State Financial Aid entitlement. *Id.* Districts that utilize a LOB are further entitled to "Supplemental General State Aid" based on where the district ranks in terms of assessed property value. *Id.* § 72-6434. Low-ranking districts receive more Supplemental General State Aid than higher-ranking districts, and

the highest-ranking districts receive no Supplemental General State Aid at all. *Id.*

The LOB cap, in some form, has been part of the scheme since the Act was initially enacted in 1992. Initially the cap was 25%. Kan. Sess. Laws 1992, ch. 280, § 29. In 2005 and 2006, responding to the Kansas Supreme Court's orders in the *Montoy* litigation, the legislature increased the cap. Kan. Sess. Laws 2005, ch. 194, § 17; Kan. Sess. Laws 2006, ch. 197, § 19. In holding the Legislature's first corrective attempt at a funding scheme was still inadequate, the state high court noted that "the legislation's increase in the LOB cap exacerbates the wealth-based disparities between districts." *Montoy II*, 112 P.3d at 934.

B. Procedural Background

Appellants are students, and parents of students, in the Shawnee Mission Unified School District ("SMSD"). They filed this action under 42 U.S.C. § 1983 in the District of Kansas in December 2010, claiming that the LOB cap violated their federal Equal Protection and Due Process rights, as guaranteed by the Fourteenth Amendment to the United States Constitution. Appellants named as Defendants, Appellees here, various state officials, including the Governor, the Attorney General, the Treasurer, the Commissioner of Education, and the Chair and members of the State Board of Education ("Appellees").

According to Appellants' complaint below, the LOB cap has caused SMSD to reduce its budget and reduce the educational services it provides. SMSD has cut its budget by $20 million over a two-year span, including cutting nearly 100 teachers, and class sizes have increased. The LOB cap has also caused SMSD to announce and begin implementing the closure of certain schools in the district.

Appellants asserted a fundamental liberty interest in directing and participating in the upbringing and education of their children; a fundamental property interest in spending their own money to improve public education in their district, thereby protecting their property values; and a First Amendment right to assemble, associate, and petition for improved public education through increased local taxation. Appellants sought various forms of relief, including a preliminary and permanent injunction against the enforcement of the LOB cap, a declaratory judgment that the LOB cap violated the Fourteenth Amendment; a preliminary and permanent injunction against the implementation of the planned SMSD school closures, and "such other and further relief" as the court might find just and proper.

On Appellees' motion, the district court dismissed the case for lack of standing. The district court concluded that because the LOB cap was not severable from the rest of the Act, a finding that the LOB cap was unconstitutional would result in the invalidation of the entire Act. Further, because the district court concluded that Kansas law provided no independent

taxing authority for school boards, a favorable decision for the plaintiffs would result in the SMSD school board being unable to levy any taxes at all. The court held that, while under other circumstances the "cap can be challenged," in this case, "[i]t is only plaintiffs' desired *remedy* – striking only the cap, so that the school district retains the right to impose an LOB tax – that does not work." Dist. Ct. op. at 13 (emphasis added). In other words, the district court held, a favorable decision would not redress the plaintiffs' alleged injury, because it would deprive the SMSD of any funding at all, and that was not a result that the plaintiffs were seeking. This appeal followed.

II. JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction over this federal constitutional claim under 28 U.S.C. § 1331. We have jurisdiction to review the district court's final judgment, which Appellants timely appealed, under 28 U.S.C. § 1291. Though the district court ultimately determined it lacked subject-matter jurisdiction, "a federal court always has jurisdiction to determine its own jurisdiction." *United States v. Ruiz*, 536 U.S. 622, 627 (2002); *see also Latu v. Ashcroft*, 375 F.3d 1012, 1017 (10th Cir. 2004) (noting "inherent jurisdiction of Article III federal courts to determine their jurisdiction").

This Court reviews a dismissal for lack of standing "de novo, applying the same standard used by the

district court." *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1189 (10th Cir. 2000) (internal quotation marks omitted). Appellants, as the party seeking to invoke federal jurisdiction, bear the burden of establishing standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1154 (10th Cir. 2005).

III. DISCUSSION

We pause to emphasize two points. First, whether Appellants ultimately can prove that the state in fact "intentionally underfunds" the Appellants' district, or that the Act in fact creates classifications without sufficient justification, is beyond the scope of this appeal. Here we address only the district court's conclusion that Appellants lacked standing to challenge the LOB cap because their alleged injuries were not redressable. We do not address the district court's conclusions that the LOB cap was not severable from the remainder of the Act, nor the conclusion that Kansas school districts lack independent taxing authority. As to these latter two points, we believe the district court's conclusions are premature and we vacate those conclusions for further consideration if necessary. Second, the dismissal for lack of standing came at the pleading stage, not on a motion for summary judgment or later in the litigation. Consequently, Appellants' burden in establishing standing is lightened considerably. *See Coll v. First Am. Title Ins. Co.*, 642 F.3d 876, 892 (10th Cir. 2011) ("In addressing

standing at the motion-to-dismiss stage of these proceedings, we must accept as true all material allegations of the complaint, and must construe the complaint in favor of the [Plaintiffs, as] complaining part[ies].") (alterations in original, internal quotation marks omitted) (citing *Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006) (en banc)); *see also Lujan*, 504 U.S. at 561 ("[O]n a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.") (internal quotation marks omitted).

A. Standing

We disagree that Appellants' alleged injuries could not be redressed by a favorable decision on the merits. Accordingly, we hold that Appellants have standing.

The federal judicial power extends only to "cases" and "controversies." U.S. Const. Art. III. For a case or controversy to be justiciable, it must involve "questions presented in an adversary context and . . . capable of resolution through the judicial process." *Massachusetts v. E.P.A.*, 549 U.S. 497, 516 (2007). The three requirements of Article III standing – injury-in-fact, causation, and redressability – ensure that the parties to any litigation have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends

for illumination." *Id.* at 517. It is the plaintiff's burden to demonstrate that these requirements are met. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). Each of these requirements "must be established before a federal court can review the merits of a case." *Consumer Data Indus. Assoc. v. King*, 678 F.3d 898, 902 (10th Cir. 2012).

1. Injury

The injury alleged must be "concrete and particularized," and the threat of that injury must be "actual and imminent, not conjectural or hypothetical." *Summers*, 555 U.S. at 493. Here, Appellants alleged that that their school district is being "intentionally underfund[ed]," and that they receive less funding per pupil, in violation of their equal protection rights. Aplt. App. at 45 (Complaint at ¶ 6). They alleged that their First Amendment rights of association and expression are implicated by the LOB cap, which prohibits them from taking political action to attempt to raise additional tax revenues for their school district, and that this violates their due process rights. Appellants alleged further that the LOB cap caused increases in class size, the closure of three schools in the district, and the planned closure of a fourth. All of these allegations, taken as true, as they must be at the motion to dismiss stage, suffice to state an injury-in-fact for purposes of Article III standing. *See Lujan*, 504 U.S. at 561 (at the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice"); *United*

States v. Colo. Supreme Ct., 87 F.3d 1161, 1165 (10th Cir. 1996); *see also In re Special Grand Jury 89-2*, 450 F.3d 1159, 1173 (10th Cir. 2006) ("[A]n infringement on Appellants' interest in [exercising First Amendment rights] can constitute the requisite injury in fact for Article III standing even though they are raising no First Amendment claim.").

2. Causation

The causation prong of Article III standing requires that the injury be "fairly traceable to the challenged action of the defendant." *Lujan*, 504 U.S. at 560 (internal alterations omitted). As pled, the LOB cap is the source of Appellants' alleged injury. But for the LOB cap, Appellants claim, the school district could submit a proposed property tax increase to the voters. This is sufficient to meet the causation requirement. *See Duke Power Co. v. Carolina Envt'l Study Grp., Inc.*, 438 U.S. 59, 74-78 (1978) (causation requirement satisfied in declaratory judgment action where challenged statute was "but for" cause of plaintiffs' alleged injuries); *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009) (at motion to dismiss stage, in action against city, county, mayor, and other city officials, plaintiffs' allegations that challenged ordinance was "but for" cause of injuries sufficed to meet causation requirement).

Appellees contend that causation is not met because Appellants cannot identify any specific action on *Appellees'* part that has caused them harm. The

Court rejects this argument. It cannot seriously be disputed that the proper vehicle for challenging the constitutionality of a state statute, where only prospective, non-monetary relief is sought, is an action against the state officials responsible for the enforcement of that statute. *See Ex parte Young*, 209 U.S. 123, 161 (1908). Nor can it be disputed that the Governor and Attorney General of the state of Kansas have responsibility for the enforcement of the laws of the state. *See* Kan. Const. Art. I § 3; Kan. Stat. Ann. § 75-702. And this Court has already held, in another challenge to Kansas's school finance scheme, that the state school board officials and Commissioner of Education are proper defendants in such a suit. *See Robinson v. Kansas*, 295 F.3d 1183, 1191 (10th Cir. 2002), *abrogated on other grounds by Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159 (10th Cir. 2012).

3. Redressability

Even where injury and causation are sufficiently established, Article III standing will be denied unless it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotation marks omitted). The district court's conclusion that Appellants' alleged injury was not redressable was based on an inaccurate characterization of that injury. 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.

It is this alleged unequal treatment that constitutes the injury. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995); *NE Fla. Chap., Assoc. Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 667 (1993). Unequal treatment may be redressed either by extending the sought-after benefit to the disfavored class, or by withdrawing the benefit from the favored class. *See Davis v. Mich. Dept. of Treas.*, 489 U.S. 803, 817-18 (1989); *Heckler v. Mathews*, 465 U.S. 728, 740 (1984); *see also Iowa-Des Moines Nat. Bank v. Bennett*, 284 U.S. 239, 247 (1931). There was no requirement that Appellants in this case show that they would actually have raised more money if the cap were struck down. *See Adarand*, 515 U.S. at 211 ("The aggrieved party need not allege that he would have obtained the benefit but for the barrier in order to establish standing.") (internal quotation marks omitted); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 280 n.14 (1978) ("[E]ven if Bakke had been unable to prove that he would have been admitted [to medical school] in the absence of the [challenged] special program, it would not follow that he lacked standing.").

Instead, a favorable decision on the merits could redress the Appellants' alleged injuries. Without

prejudging the merits, Appellants could get meaningful relief under a variety of scenarios. Most preferable to Appellants would be an invalidation of the LOB cap coupled with a finding that the cap is severable. *See Local 514 Transp. Workers Union of Am. v. Keating*, 358 F.3d 743, 750 (10th Cir. 2004) (finding standing where plaintiff's alleged injury was caused by the challenged statute, and characterizing the "favorable decision" as including both the merits answer and the severability answer). However, Appellants could also get relief through an injunction against the Act as a whole, because it would redress Appellants' alleged injury of discriminatory treatment. Or the district court could strike down the LOB cap and the Act, but stay its order to give the Kansas Legislature time to respond. In summary, injunctive or declaratory relief as to the LOB cap alone would, on the facts alleged, redress the injury by extending to Appellants the benefit they claim to be deprived of, and injunctive or declaratory relief as to the Act as a whole would also redress the injury of constitutionally unequal treatment by withdrawing from all school districts the alleged discriminatory benefit. *See Davis*, 489 U.S. at 817-18; *Heckler*, 465 U.S. at 740; *Jacobs v. Barr*, 959 F.2d 313, 317 (D.C. Cir. 1992) ("In this case, a court could order the benefits . . . to be extended to [the plaintiff], or it could declare the statute a nullity. . . . In either case, the equal protection violation would be redressed."). This is sufficient, at this early stage of the litigation, to establish Appellants' standing. Indeed, the district court acknowledged that the invalidation of "the entire funding scheme" would be

"an effective result if in fact the cap is unconstitutional." Dist. Ct. op. at 13.

The district court reasoned, however, that because Appellants' "desired remedy" was the excision of the LOB cap alone, and such excision was impossible, Appellants' alleged injury would not be redressed. *Id.* But as we have made clear, Appellants' alleged injury, while flowing from the LOB cap, was not "the inability of the district to raise unlimited funds," Dist. Ct. op. at 1, but rather the alleged unequal treatment (manifested in, among other things, lower per-pupil funding) that prevented them from even attempting to level the playing field. That Appellants would have *preferred* to see the LOB cap alone invalidated does not render that injury incapable of redress. Appellants' Complaint is titled "Complaint for Declaratory, Injunctive, or Other Relief." Aplt. App. at 43. Appellants expressly sought not only declaratory and injunctive relief against the enforcement of the LOB cap, but also "such other and further relief as [the district] Court should find just and proper." *Id.* at 61. Equitable relief can take many forms, and at this early stage of the proceeding the court should not assume it will be unable to fashion relief that could remedy any constitutional violation found. Although Appellants repeatedly stressed that they did not seek the invalidation of the entire scheme, only invalidation of the LOB cap, Appellants clearly contemplated the possibility that the entire scheme might be struck. *See* Aplt. App. at 2233 (Plaintiffs' Supplemental Memorandum Addressing Severability);

2317-18 (transcript of hearing on motion for preliminary injunction). They did not expressly disavow that possibility, nor did they ever concede that the wholesale invalidation of the Act would mean that their injury could not be redressed.

The standing inquiry, at the motion to dismiss stage, asks only whether the plaintiff has sufficiently alleged a cognizable injury, fairly traceable to the challenged conduct that is likely to be redressed by a favorable judicial decision. *See Lujan*, 504 U.S. at 560-61. In some cases, it may well be that only one remedy will alleviate the injury, such that the unavailability of that remedy, or at least the inability of the court to provide it, means the injury cannot be redressed, and the plaintiff lacks standing. *See, e.g.*, *id.* at 570-71 (remedy of forcing federal agencies to consult with Secretary of the Interior could not be provided by court when federal agencies were not parties; thus, among other reasons, plaintiffs lacked standing); *Turner v. McGee*, 681 F.3d 1215, 1218-19 (10th Cir. 2012) (no standing where plaintiff failed to establish that federal court had power to enjoin tribal court, and that tribal court in turn had power to affect challenged state-court conviction). But as we have just discussed, a court sustaining an equal protection challenge has "two remedial alternatives: it may either declare the statute a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion." *Heckler*, 465 U.S. at 738

(internal quotation marks and alterations omitted); *see Cunico v. Pueblo Sch. Dist. No. 60*, 917 F.2d 431, 442 (10th Cir. 1990) ("[T]he command of equal protection is observed either when the State terminates its preferential treatment of the person who benefits from the discrimination or when it extends such treatment to the person aggrieved.").

We conclude that Appellants have carried their burden to establish the three requirements of Article III standing.

B. Severability and independent taxing authority

As the foregoing discussion of standing makes clear, Appellants' Article III standing does not depend upon their certain ability to raise funding from within the district. Instead, Appellants have standing because, under the lenient standard applicable at this early stage of the litigation, they have alleged a violation of their right to equal protection that is fairly traceable to the challenged statute, and which would be redressed by a favorable decision on the merits, even if such a decision resulted in the wholesale invalidation of the Act. Standing is established, in other words, regardless of whether the LOB cap is severable from the remainder of the Act.

Therefore, the district court did not need to determine, at this early stage, whether the challenged LOB cap can be severed from the Act, or whether, if not, other Kansas statutes confer taxing

authority on individual school districts. Accordingly, we do not reach those questions, and we VACATE those portions of the district court's order. Only if, on remand, the district court concludes that the LOB cap is unconstitutional, should it then determine whether the cap is severable under Kansas law, applying Kansas's test for severability as articulated, for example, in *Thompson v. KFB Insurance Co.*, 850 P.2d 773, 782 (Kan. 1993). *See Davidson*, 236 F.3d at 1195 ("In order to determine whether partial invalidation of a state statute is appropriate, federal courts look to state law.").

IV. CONCLUSION

For the foregoing reasons, we hold that Appellants have standing to challenge the constitutionality of the LOB cap, regardless of whether the cap is severable from the rest of the Act. The district court's dismissal for lack of standing is REVERSED, and its conclusions as to severability and independent taxing authority are VACATED. The case is REMANDED to the district court for a consideration of the merits.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees,

and

EVETTE HAWTHORNE-CROSBY, next friend and guardian of minor B.C., et al.,

Defendant Intervenors-Appellees.

BLUE VALLEY UNIFIED SCHOOL DISTRICT NO. 229, et al.,

Amici Curiae.

Nos. 13-3334 & 14-3023

ORDER

(Filed Jun. 29, 2015)

Appellant's [sic] petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

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

(Filed Mar. 31, 2014)

ORAL ARGUMENT REQUESTED

* * *

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	**2011-12 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 (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.

[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.

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-

* * *

No. 15-113908-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

LUKE GANNON,
By his next friends and guardians, *et al.*,

Plaintiffs/Appellees

vs.

STATE OF KANSAS,

Defendant/Appellee

BRIEF OF APPELLANT/APPLICANT-INTERVENOR, SHAWNEE MISSION UNIFIED SCHOOL DISTRICT NO. 512

(Filed Aug. 10, 2015)

Appeal from the District Court of Shawnee County, Kansas, Honorable Judges Franklin R. Theis, Robert J. Fleming, and Jack L. Burr, District Court Case No. 10-c-1569

Tristan L. Duncan (*PHV App. Pending*)
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ATTORNEY FOR APPELLANT

* * *

As an illustration, however, under the SDFQPA, U.S.D. 512 historically receives substantially less General State Aid per pupil than most other districts, including Plaintiffs.

General State Aid Per Pupil, by year					
	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014
SMSD (#512)	**$2,810.98**	**$2,785.81**	**$2,878.12**	**$2,972.58**	**$3,073.14**
Kansas City School District (#500)	$5,465.82	$5,464.17	$5,585.98	$5,674.37	$5,839.40
Dodge City School District (#443)	$5,722.41	$5,570.91	$5,672.95	$5,816.01	$5,841.00
Hutchinson School District (#308)	$4,570.01	$4,620.10	$4,704.10	$4,697.52	$4,672.38
Wichita School District (#259)	$4,757.71	$4,715.73	$4,849.86	$5,088.81	$5.127.03

R. Vol. 28, p. 3599.

Even after combining all revenue sources, U.S.D. 512 is far behind Plaintiffs and the State average in total state aid per pupil, per year:

Total State Aid Per Pupil, by Year							
	2008-2009	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	2013-2014 inequality:
SMSD (#512)	**$4,701**	**$4,046**	**$3,993**	**$4,393**	**$4,389**	**$4,514**	--
Statewide Average	$7,344	$6,326	$6,511	$6,983	$6,984	$7,088	$2,574 per pupil *more* than SMSD (157%)
Kansas City School District (#500)	$9,102	$7,937	$8,339	$8,852	$8,778	$8,915	$4,401 per pupil *more* than SMSD (197%)
Dodge City School District (#443)	$9,865	$8,405	$8,617	$9,093	$9,014	$9,146	$4,632 per pupil *more* than SMSD (203%)
Hutchinson School District (#308)	$7,818	$6,918	$7,275	$7,560	$7,611	$7,727	$3,213 per pupil more than SMSD (171%)
Wichita School District (#259)	$7,918	$6,933	$7,092	$7,501	$7,774	$7,931	$3,417 per pupil more than SMSD (176%)

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The same is true in terms of total expenditures per pupil, per year:

Total Expenditures Per Pupil, By Year					
	2008-2009	2010-2011	2011-2012	2012-2013	2013-2014
SMSD (#512)	**$12,174**	**$11,817**	**$12,374**	**$12,042**	**$12,379**
Statewide Average	$12,660	$12,282	$12,647	$12,776	$12,959
Kansas City School District (#500)	$16,265	$15,553	$14,706	$14,987	$15,388
Dodge City School District (#443)	$12,867	$12,026	$13,320	$12,525	$13,032
Hutchinson School District (#308)	$12,350	$12,133	$11,654	$11,850	$12,271
Wichita School District (#259)	$12,370	$13,069	$12,734	$13,704	$13,258

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