No. _____

In The

Supreme Court of the United States

ALEXANDER, KATHERINE, WILLIAM, and JAMES BERGMAN, by and through their parents and next friend, BRAD and LIBBY BERGMAN, et al.,

Petitioners,

v.

STATE OF KANSAS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Kansas Supreme Court

PETITION FOR WRIT OF CERTIORARI

TRISTAN L. DUNCAN
(Counsel of Record)
SHOOK, HARDY & BACON L.L.P.
2555 Grand Blvd.
Kansas City, Missouri 64108-2613
Telephone: (816) 559-2040
Facsimile: (816) 421-5547
Attorneys for Petitioners

September 13, 2006

I. QUESTIONS PRESENTED

1. Does a State violate Equal Protection when it purposefully disadvantages school children by unevenly restricting funds available for public education and then prohibiting under funded school districts from funding the difference out of local funds?

2. Does a State violate the First and Fourteenth Amendments when it purposefully but unevenly restricts State funds available for public education and then prohibits the under funded school districts from funding the difference out of local funds by imposing a mandatory cap on spending on public education?

3. Did the Kansas Supreme Court violate the Fourteenth Amendment's Due Process Guarantee when it refused to permit non-party parents and school children to intervene in an action in which the Court indefinitely suspended their right to use local funds to improve their public education without giving them notice or an opportunity to be heard?

4. Did the Kansas Supreme Court violate the 14th Amendment's Due Process Guarantee when it ignored common law limitations on its remedial discretion and arbitrarily ordered the legislature to indefinitely suspend petitioners' liberty and property interests until the legislature funded an undefined level of public education for all other children?

II. PARTIES TO THE PROCEEDING

Petitioners are parents and school children attending the Shawnee Mission Unified School District No. 512 or the Blue Valley Unified School District No. 229: Alexander, Katherine, William, James, Brad, and Libby Bergman, Patrick, Doug, Bob, and Debbie Dellinger, Madison, Breanna, and Carol Rowe, Connor, Cameron, and Ann Carollo, Sydney, Wyatt, and Kim Edmisten, Sarah, Nathan, and Dan Goldman, Abigail, Parker, and Bonnie Heying, Connor, Kylie, Courtney, and Tracy Rellihan, Ben and Mary McBride, Graham and Noah Eidemiller, Janice Langholz, Peter, Robby, Joseph, and Judy Moriarty, A.J., Will, Maureen and Trish Orth, Joe, Sydney, and Mary Bahr, Maxwell, Emma, and Christine Braasch, Chase and Susan Schaible Ainsworth, William, Harrison, and Brian Short, Helen, Anna, and Mary Petrow, Johnnie, Danielle, Alexandria, and Julie Norton, Morris, Charles, Ronald, and Barbara Bronstein, Lauren, Erik, Janis, and Christian Hansen, Ryan, Michael, Daniel, Greg, and Laurie Widrig, Lucy, Mary, and Dan Bush, Jonathon, Jefferson, Caroline, Brad, and Rebecca Adams, Andrew, Alexandra, Katie, Steve, and Lori Dykeman, Taylor, Zachary, Donna, and Jim Wilson, Jason, Michael, Michelle, and James Hoffman, Kristin, Eric, Mary, and Dave Larson, Grace, John, and Aymi Foley, Max, Reilly, Brad, and Michelle Agadoni, John Tyler, Megan, Caroline, Susan, and Mark Koenig, Addison, Jillian, and Michelle Schlatter, Hannah, Max, Janice, and Jeff Pinson, Emma, Cameron, David, and Susan Keefer, John, Paige, Kathryn, and Jim Dussold, Brenan Patrick, Conner James, Dillon Thomas, Linda, and Timothy Cavanaugh, Tyler, Andre, Ahmet, and Lori Kodanaz, Justin, Alexandra, Reid, Rhonda, and Patrick

PARTIES TO THE PROCEEDING – Continued

Johnston, Mark, John, Steven, Jennifer, Steve, and Jody Bolton, Blake, Erin, Benjamin, Phil, and Mary Hylton, Bradley, Leslie, Doug, and Shea Dixon, Spencer, Kendra, Betsy, and Tommy Avenia, Trent, Gardner, and Sheryl Wright, Morgan, Elizabeth, Lynne, and Gerald Matile, Marissa, Hayley, Stacey, and Howard Wizig, John, Joseph, William, and Anne Blessing.

Respondents are the Attorney General of the State of Kansas, the Kansas State Board of Education, and various state officials charged with enforcement of the challenged Kansas school finance statutes: Connie Morris, Janet Waugh, Sue Gamble, John W. Bacon, Bill Wagnon, Kathy Martin (substituted party), Ken Willard, Carol Rupe, Iris Van Meter, Steve E. Abrams, Bob L. Corkins (substituted party), the Salina Unified School District No. 305, the Dodge City Unified School District No. 443, and parents and school children attending those two school districts in Kansas: Ryan Montoy, Lajuan and Mytesha Robinson, Sierra and Seth Gwin, Rene Bess, Keely Boyce, Cruz Cedillo, Lynette Do, Christopher and Monique Harding, Joseph Hawkinson, Jennie Nguyen, Sandy, Nicole, and Bruce Thu Pham, Andrea Bethke, Damian and Dylan Arredondo, Eduardo Dominguez, Chris Freeman, Monica Garcia, William Zachary Harrison, Robert Hindman, Alex Jake, Yadira Moreno, Manuel Solorzano, Benjamin Vicente, Brittany Ash-Clark, Jin Jeon, Jacob Stack, Bronson Waite, Jacob Lemaster, Nicholas Woodfield Brooke, Blaine Smith, Jerry Dix, Tanner Robidou, Justin Hostetter.

III. CORPORATE DISCLOSURE STATEMENT

None of the Petitioners are a corporation that has issued shares to the public, nor are any a parent corporation, a subsidiary or affiliate of corporations that have done so.

IV. TABLE OF CONTENTS

		Page
I.	Questions Presented	i
II.	Parties to the Proceeding	ii
III.	Corporate Disclosure Statement	iv
IV.	Table of Contents	v
V.	Table of Authorities	vii
VI.	Opinions and Orders Below	1
VII.	Jurisdiction	1
VIII.	Constitutional and Statutory Provisions	1
IX.	Statement of the Case	2
X.	Reasons For Granting the Writ	13
	A. This case raises important issues of national significance by seeking to test the constitutionality of a state's efforts to create equality in its public school system by depriving some children, who the state perceives, wrongly, as privileged or advantaged, of equal protection and fundamental liberties guaranteed to them under the Constitution	13
	B. This case involves an important question of federal law that has not been, but should be, decided by this Court with respect to the constitutional limits on a state court's adjudication of the constitutionality of a state's school finance scheme under that state's constitution because, if left undisturbed, the Kansas Supreme Court's decisions disrupt the balance of power within our federalist system and interfere with the constitution's preservation of individual liberties	19
XI.	Conclusion	23

V. TABLE OF AUTHORITIES

Page

CASES

Brotherhood of Railroad Trainmen v. Baltimore & O.R. Co., 331 U.S. 519 (1947) 16

Brown v. Board of Ed. of Topeka, 347 U.S. 483 (1954) 3

Buckley v. Valeo, 424 U.S. 1 (1976) 12

Devlin v. Scardetti, 536 U.S. 1 (2002) 3, 16

Honda Motor Co. v. Oberg, 512 U.S. 415 (1994) 12, 20

International Union, United Automobile, Aerospace and Agricultural Implement Workers v. Scofield, 382 U.S. 205 (1965) 16

Keyishian v. Board of Regents of the University of the State of New York, 385 U.S. 589 (1967) 12

Meyer v. Nebraska, 262 U.S. 390 (1923) 14

Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502 (1941) 17

Missouri v. Jenkins (Jenkins I), 495 U.S. 33 (1990) 12, 22

Montoy v. State (Montoy II), 102 P.3d 1160 (Kan. 2005) 1, 7

Montoy v. State (Montoy III), 112 P.3d 923 (Kan. 2005) 1, 8

Montoy v. State (Montoy IV), 138 P.3d 755 (Kan. 2006) 1

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 11, 12, 14

Nixon v. Shrink, 528 U.S. 377 (2000) 11, 12

V. TABLE OF AUTHORITIES – Continued

Page

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 14, 15

Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) 21

San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) 11, 14

U.S.D. 229 v. State, 885 P.2d 1170 (Kan. 1994), *cert. denied*, 515 U.S. 1144 (1995) 5, 7

Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926) 21

Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) 21

Zelman v. Simmons-Harris, 336 U.S. 639 (2002) 16

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. I, § 1 ..... 1, 21

U.S. Const. Amend. XIV, § 1 ..... 1, 2, 20, 21, 22

U.S. Const. Art. IV, § 4 ..... 1, 21

Kan. Const. Art. 6, § 6 ..... 2, 8, 21

STATE AND FEDERAL REGULATIONS

28 U.S.C. § 1257(a) 1

K.S.A. 72-6405 et seq. 4

K.S.A. 72-6433(b)(9)(B) 2

VI. OPINIONS AND ORDERS BELOW

The Opinion of the Supreme Court of Kansas, dated January 3, 2005, is reported at *Montoy v. State* (*Montoy II*), 102 P.3d 1160 (Kan. 2005). App. 81. The Opinion of the Supreme Court of Kansas, dated June 3, 2005, is reported at *Montoy v. State* (*Montoy III*), 112 P.3d 923 (Kan. 2005). App. 38. The Order of the Supreme Court of Kansas, dated June 15, 2006, is unreported. App. 1. The Opinion of the Supreme Court of Kansas dated July 28, 2006 is reported at *Montoy v. State* (*Montoy IV*), 138 P.3d 755 (Kan. 2006). App. 2.

VII. JURISDICTION

On June 15, 2006, the Kansas Supreme Court denied Petitioners' Motion to Intervene without opinion. App. 1. On July 28, 2006, that Court entered an order dismissing the school finance case and releasing jurisdiction. App. 2. This Court has jurisdiction under 28 U.S.C. § 1257(a).

VIII. CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The First Amendment to the United States Constitution provides in relevant part that: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const. Amend. I, § 1.

2. The Fourteenth Amendment to the United States Constitution provides in relevant part: "No state shall . . . 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." U.S. Const. Amend. XIV, § 1.

3. Article 6 § 6 to the Kansas Constitution provides in relevant part: "The legislature shall make suitable provision for the finance of the educational interests of the state. . . . " Kan. Const. Art. 6 § 6.

6. The Kansas school finance statutes in relevant part are set out in the Appendix to the Petition. K.S.A. 72-6433(b)(9)(B). App. 92.

IX. STATEMENT OF THE CASE

> "The year was 2081, and everybody was finally equal. They weren't only equal before God and the law. They were equal every which way. Nobody was smarter than anybody else. Nobody was better looking than anybody else. Nobody was stronger or quicker than anybody else. All this equality was due to the 211th, 212th, and 213th Amendments to the Constitution, and to the unceasing vigilance of agents of the United States Handicapper General."
>
> – by Kurt Vonnegut, *Harrison Bergeron* (1961) attached in Appendices. App. 95.
>
> "My story mocks the idea of legally eliminating envy by outlawing excellence, which is precisely what the legislature means to do in the public schools, by putting a cap on local spending on them. Should it prevail it will be possible for me to say there are no longer any truly excellent public schools in all of Kansas. Talk about a level playing field!"
>
> – by Kurt Vonnegut, Unpublished Letter to the Editor of the *Lawrence Journal-World*, dated May 12, 2005 attached hereto in the Appendices. App. 94.

This case may be the most important litigation since *Brown v. Board of Education,* 347 U.S. 483 (1954). Nowhere is the juxtaposition of the two most revered constitutional values, liberty and equality, more at war and in desperate need of constitutional reconciliation than in this case. Here we have the question: How do you strike the proper balance between the liberty and equality interests of parents and local school districts who are willing and able to do more for their children than what the state is willing or able to provide and the equality interests of those parents and school districts who are unwilling or unable to do so? More importantly, who gets to decide that question – a state's highest court or this Court?[1]

At bottom, this case asks whether it is constitutional for a state to impose on public education spending caps which, in effect, handicap some school districts who the state perceives, wrongly, as privileged or advantaged, to achieve the appearance of equality among all school districts? More importantly, is it constitutional for a state

[1] As discussed herein, if petitioners are bound by the Kansas Supreme court decisions, then they should be treated as a "party," not as strangers to the action, because they, in effect, are non-named class members whose interests were not adequately represented by the existing parties to the litigation and who timely objected to the arguments advanced by plaintiffs on their behalf at the earliest opportunity after they became aware of them. *Devlin v. Scardetti,* 536 U.S. 1 (2002) (holding that non-named class members were entitled to appeal without first intervening when petitioners' interests were not adequately represented by existing parties).

to impose mandatory spending caps, not to prevent some school districts from being better than others, but to force some school districts into a permanently disadvantaged state by prohibiting the taxpayers within under funded districts from using their own money to fund the difference? When a state first deprives some of its children of an equal learning opportunity and then wrests from their parents the freedom to use their own money to make up the difference, does such oppressive state action violate the federal guarantee of equal protection and substantive due process?

1. Historical Background.

In 1992, seven years prior to the filing of the underlying lawsuit, the Kansas legislature amended the school finance statutes to create a system of funding public education whereby all schools in the state would receive comparable per pupil operating expenditures. Before then, dating back to Kansas's statehood in the 1800s all school districts in the state had been funded entirely from local property taxes, and the per pupil operating expenditures widely varied between school districts. Kansas School District Finance and Quality Performance Act (SDFQPA), K.S.A. 72-6405 *et seq*. These 1992 amendments changed the system of funding public education by redistributing tax revenue from local property, sales and income taxes to all school districts in the state according to a weighted formula. The formula established a foundational level of education to which all children in Kansas were entitled – the per pupil base rate. App. 85.

The Act included a supplemental means for funding educational services called the Local Option Budget

("LOB"). The LOB permitted local school districts to seek voter approval for additional local taxes to improve the education in that district. The Kansas school finance formula, however, set a ceiling on the amount of money any local school district could raise in local taxes for public education. This ceiling is known as the cap on the local option budget (the "Cap"). App. 13.

In 1992, the Blue Valley Unified School District No. 229 challenged the legislature's school finance formula as unconstitutional, including the cap on local spending. *U.S.D. 229 v. State*, 885 P.2d 1170 (Kan. 1994), *cert. denied*, 515 U.S. 1144 (1995). Applying a rationality standard of review, the Kansas Supreme Court concluded that all the funding differentials within the school finance formula were rationally related to a legitimate governmental objective and, therefore, were constitutional under both the state and federal constitutions. App. 85.

Seven years later, in 1999, plaintiffs filed the underlying lawsuit against the State of Kansas, the Kansas State Board of Education, and various state officials responsible for enforcing the statute, again challenging the school finance scheme as unconstitutional under both the state and federal constitutions. This time, however, the court came to the opposite conclusion. App. 81, 88. At trial, the court accepted plaintiffs' federal equal protection argument and held that the school finance formula was not rationally related to a legitimate governmental purpose and caused a disparate impact on minority children. App. 84. The trial court concluded that the plaintiffs had proven that the insufficiency of funding was a proximate cause of the plaintiffs' poor performance on standardized tests. The court was persuaded by plaintiffs' argument that the "achievement

gap" proved plaintiffs were receiving a constitutionally inadequate and inequitable level of education. App. 88-89. The "achievement gap" is the difference between higher test scores on standardized tests taken by Caucasian students, on average, and the test scores of minorities, bilingual, and special education children.

Plaintiffs argued that one of the most significant factors contributing to low standardized test scores for plaintiff school districts was large class sizes. The trial court agreed that class sizes in large to midsize school districts had become "too large for adequate learning to take place."[2] The district court concluded, therefore, that the Kansas School District Finance and Quality Performance Act was unconstitutional.

This gross class size disparity was not unique to the plaintiff school districts, however. Petitioners' districts had even larger average class sizes than the plaintiff school districts. The cap prevented petitioners' school districts from achieving small class sizes commensurate with low enrollment districts as well and prohibited them from achieving the most important condition for improved learning – small class sizes.[3]

[2] (*See* Plaintiffs-Appellees brief at 34, 58, *citing* R. XXIII 447, R. XLII, 602, R. XLIV, 3263-64) ("Dodge City, Garden City, Wichita, Topeka, and Kansas City all now have pupil teacher ratios ranging from 17 to 1 to 22 to 1 compared to the significantly lower 7 to 1 and 12 to 1 pupil teacher ratios for some of the low-enrollment districts.").

[3] December 2005 Legislative Post Audit Committee Cost Analysis, Executive Summary, p.23. The Kansas Supreme Court referenced this report in its 7/28/06 final opinion. The report concluded that small class size is the only proven determinant of improved academic performance: "Four of Five class size studies we reviewed found that smaller classes

(Continued on following page)

Plaintiffs' legal strategy, however, was to argue to the court that petitioners' school districts neither needed nor deserved additional funding. App. 66. Plaintiffs painted a picture of class warfare between "rich" school districts and "poor" school districts and repeatedly described to the court a disparity between "the haves and have nots."[4]

The reality was, however, that while petitioners' schools were located in a property-rich area, their schools were not wealthy. On a comparative basis, the plaintiff school districts were, in fact, wealthier than petitioners' school districts because they received more money from the state in per pupil operating expenditures than did the non-party school districts. Shawnee Mission students for example receive $6,833, whereas Dodge City's students receive $8,216, over a $1,000 per pupil difference. *See* Ks. Board of Education's Per Pupil Expenditure Comparison By District for 2005-2006 school year.

On March 24, 2004, the defendants appealed to the Kansas Supreme Court, and on January 3, 2005, the court, in effect, overruled its earlier decision in *U.S.D. 229* and affirmed the district court in part, concluding that the legislature had failed to make suitable provision for the finance of the public schools as required by Article 6, § 6 of the Kansas constitution. *Montoy v. State*, 102 P.3d 1160 (Kan. 2005) (*Montoy II*). App. 81, 84. As a consequence, the court ordered the legislature to pass new legislation which would infuse substantially more money into public education

led to improved academic outcomes . . . Studies of factors other than class size were less consistent."

[4] *See* 4/4/05 Letter from plaintiffs to the Kansas Supreme Court, p.4.

and reallocate state funds according to new "guidelines," *i.e.*, (1) the actual costs of funding "an adequate education" and (2) equity. App. 90.

The court stayed the issuance of the mandate to allow the legislature a reasonable time to correct the constitutional infirmity in the school finance formula and set a deadline of April 12, 2005 for that to be accomplished. App. 90-91. The legislature responded by enacting changes to the school finance formula on March 30, 2005 (2005 H.B. 2247 [L. 2005, ch. 152], modified by 2005 S.B. 43 [L. 2005, ch. 194] [collectively referred to as H.B. 2247]). *See Montoy v. State*, 112 P.3d 923 (Kan. 2005) (*Montoy III*). App. 38.

For the first time since 1992, the legislature addressed the specific needs of many non-party school districts, including petitioners' school districts, by enacting local funding provisions beneficial to these school districts. These new local funding provisions were known as: (1) a new extraordinary declining enrollment factor, (2) an *increase* in the cap on the local option budget, and (3) a cost of living *increase* for teachers who live and work in relatively more expensive urban areas (collectively, the "local funding provisions"). App. 61-64, 65-67.

On June 3, 2005, however, the Kansas Supreme Court held that the changes made by H.B. 2247 failed to bring the state's school financing formula into compliance with Article 6 § 6 of the Kansas constitution. App. 75-80. Most alarming was the court's stay of the new local funding provisions, including the increased cap, passed by the legislature in H.B. 2247. App. 79. The court stated:

> HB 2247's increased dependence on local property taxes, as decided by each school district, exacerbates disparities based on district wealth. **We fully acknowledge that once the legislature has provided suitable funding for the state school system, there may be nothing in the constitution that prevents the legislature from allowing school districts to raise additional funds for enhancements** to the constitutionally adequate education already provided. At least to the extent that funding remains constitutionally equalized, **local assessments for this purpose may be permissible**. ***Clearly, however, such assessments are not acceptable*** as a substitute for the state funding the legislature is obligated to provide under Article 6 § 6. That should pre-exist the local tax initiatives. (emphasis added.) App. 69..

Thereafter, on July 6, 2005, the legislature enacted S.B. 3 (L. 2005 Special Session, ch. 2), and in a subsequent opinion, the court ruled that it, in effect, complied with the court's June 3, 2005 order, for "interim purposes" only. App. 11. The court retained jurisdiction to review further legislative action in the 2006 session. Thereafter, the legislature enacted changes to the school finance formula yet again in S.B. 549 (L. 2006, ch. 197), which was signed by the governor on May 19, 2006.

On July 28, 2006, the court determined that with S.B. 549, the legislature had complied with its prior orders and dismissed the appeal with instructions to the trial court to dismiss the case. App. 24. Although the court lifted the stay, the court, in effect, upheld the cap on the local option budget, and the cap continues in operation to this day. The court's conditions on the operation of local funding provisions also continue in force. App. 26.

2. The manner of presenting the federal questions.

Although plaintiffs challenged the Kansas school finance statutes on behalf of all children in Kansas, petitioners never received notice of the lawsuit. App. 83-84. Moreover, the rules governing class actions, joinder of parties and claims, including necessary and indispensable parties, appear to never have been followed.

Plaintiffs, in effect, acted as class representative but did not adequately represent the interests of petitioners. Plaintiffs opposed allowing any local taxation for public education and, in the remedial phase of the case, vigorously opposed removal, or lessening, of the cap in any way. They urged the Court to redistribute funding away from petitioners' schools to their own schools. Their interests could not have been more adverse. The state defendants also failed to adequately represent petitioners' interests since they obviously sought to uphold the school finance scheme, including the cap, as constitutional.

The first time petitioners became aware of the underlying lawsuit was when they read about it in the newspapers sometime after the Kansas Supreme Court's January 3, 2005 surprising ruling. App. 81. At that time, petitioners had no reason to suspect that the Court would change its holding from its prior controlling precedent. More importantly, it was not until the Court's June 3, 2005 Decision that there was ever any hint that using local taxation for public education, while constitutional, was nevertheless inequitable and as such, impermissible. App. 69-79.

Petitioners first tried to protect their interests by filing an *amicus curiae* brief during the court's briefing schedule prior to its June 3, 2005 Decision. App. 43. Then,

on June 13, 2006, petitioners filed a Motion to Intervene. App. 1.

The federal questions pressed by petitioners were clear and precise and are quoted in relevant part below:

> "In *Rodriguez,* the United States Supreme Court expressly reserved the question of the constitutionality of state ceilings on local taxation which inhibit under-funded schools from improving their per pupil operating expenditures. The high Court expressly stated it would address that issue 'another day' . . . "

1. Equal Protection Analysis.

In 1973, the United States Supreme Court decided *San Antonio Sch. Dist. v. Rodriguez,* 411 U.S. 1 (1973), . . . Justice White stated that he believed a state's ceiling on local taxation presented a federal constitutional question for under funded schools. As he observed,

> But state [Texas] law places a . . . ceiling on the . . . tax rate, a limit that would surely be reached long before Edgewood (the plaintiff school district) attained an equal yield [to other school districts]. Edgewood is thus precluded in law, as well as in fact, from achieving a yield even close to that of some other districts. *Rodriguez*, 1 U.S. at 67.

2. Substantive Due Process Analysis.

For the reasons stated by Justice Stevens in *Nixon v. Shrink,* 528 U.S. 377 (2000) and the United States Supreme Court in *Moore v. City of East Cleveland,* 431 U.S. 494 (1977) the Kansas cap on expenditures for public education is

unconstitutional under a substantive due process analysis because the cap unduly interferes with the fundamental rights of citizens to spend their own money on something they value, i.e., improvement of their children's local public education. *Nixon,* 528 U.S. at 398-399, *citing, Moore v. City of East Cleveland,* 431 U.S. 494, 513 (1977).

3. First Amendment Analysis.

The Kansas legislature's purpose in setting a ceiling on local taxes for improving public education is allegedly to equalize funding among school districts throughout the state for public education. . . . However, in *Buckley v. Valeo,* 424 U.S. 1 (1976), the United States Supreme Court rejected government imposed spending caps for similar egalitarian purposes as unconstitutional deprivations of liberty under the First Amendment. . . . The point was an uninhibited, wide-open, robust marketplace of ideas was compromised by such expenditure caps. *See Keyishian v. Board of Regents of the University of the State of New York,* 385 U.S. 589 (1967) (public education as a locus for the uninhibited, wide-open, robust marketplace of ideas deserving First Amendment protection).

4. Procedural Due Process.

The federal Constitution imposes an 'inherent equitable limitation' on a state court's remedial power through the Due Process Clause of the 14th Amendment . . . [which this Court violated in] staying the local funding provisions, citing, *Missouri v. Jenkins (Jenkins I),* 495 U.S. 33 (1990) and *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994)."

Petitioners now seek *certiorari* to review the Kansas Supreme court's denial of their intervention in this case. For all intents and purposes, petitioners were non-named class members who were foreclosed from intervening of right in public interest litigation and barred from asserting their own claims at the time the Kansas Supreme Court was determining the constitutionality of the school finance statutes and fashioning relief. App. 83-84. As virtual class members, petitioners are entitled to appeal. Petitioners, therefore, seek review of the state Supreme court's decisions.

X. REASONS FOR GRANTING THE WRIT

A. This case raises important issues of national significance by seeking to test the constitutionality of a State's efforts to create equality in its public school system by depriving some children, who the State perceives, wrongly, as privileged or advantaged, of equal protection and fundamental liberties guaranteed to them under the Constitution.

In a nation founded on individual liberty, self-government, and local initiative, it is inconceivable that a state would prohibit any community from enhancing public education through civic self-sacrifice and collective democratic action, but Kansas has done just that. The state's unstated, but ostensible, purpose is to make the state's public education uniform, but it accomplishes this goal by obstructing its citizens' freedom to use their own money to educate their children.

An objective observer might wonder how there could be any harm if children in one district or any district got "too much" education. Maybe the thinking is that if children learn "too much," that is, if they excel, then, by definition, they will no longer be "equal," which outcome must, according to the state, be prevented by severely rationing the funds certain districts may raise from local taxpayers. The state's remedy is to impose an artificial economic burden – a "cap" (read handicap) – to insure that the spending per student remains artificially low and cannot be overcome by the concerted democratic action of local citizens.

Kansas is not alone. At least five other states also impose spending caps on public education.[5] This Court has long held, however, that a parent's ability to "do more for one's children," including the "freedom to devote more money to the education of one's children," is a fundamental right under the Federal Constitution. *San Antonio Sch. Dist. v. Rodriguez,* 411 U.S. 1, 48 (1973); *Meyer v. Nebraska,* 262 U.S. 390 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). When the Kansas Supreme Court upheld the state law capping local school taxes at 27-31% of the

[5] Alaska, AK Stat. 14.17.410(c)(1) & (2) (23% spending cap); Colorado, CRS 22-54-108(3)(b)(1) (20% cap on total program funding from local sources); Kentucky, KRS, 157.440(2)(a) (no more than 30% of the district's budget can come from local levy); Minnesota, Minn. Stat. 126 C. 17(2) (any additional per pupil spending raised through local resources must not exceed 18.2% of the district's total formula allowance); Montana, MCA 20-9-308. In contrast, the majority of states appear to either not impose such caps on total spending for public education or if they do, the caps can be overridden by a vote of the local taxpayers.

state's funding level for a school's operating budget, a federal question was triggered because Kansas's cap on local taxation deprives Kansas citizens of fundamental federal rights.

Now Kansas citizens who vote to tax themselves more for the education of their children will be in violation of the state law and, arguably subject to punishment. We still are free to spend unlimited amounts on things that are not in the best interests of our children, like spectator sports, video games, and junk food, but it is illegal for petitioners to democratically vote an additional school tax upon themselves for the purpose of improving the education of all the children in their districts. Thus, the state ceiling on local taxation strips them of their political freedom.

As a result of the Kansas Supreme Court's rulings, petitioners will now be attending schools that are purposely under funded by the state and have some of the highest average class sizes in the state. They are forbidden to use their own local funds to offset this disparity. Yet, they are still required to fund the education of children in districts that are not under funded and in which class sizes are measurably smaller. App. 2-37.

Ironically, the constitution forbids outlawing private schools; therefore, the wealthy can spend unlimited sums on their children's private education – a disparate, but constitutional, result. *See Pierce v. Society of Sisters,* 268 U.S. 510 (1925). The constitution also prohibits outlawing vouchers, which means private schools already are subsidized with public funds. The "freedom of choice" of parents

to educate their children in either public or private schools is a superior constitutional value and therefore justifies this disparate, but constitutional, result. *See Zelman v. Simmons-Harris,* 336 U.S. 639 (2002). However, if the average Kansas family wants to *support* their public schools through higher voluntary local taxes, they cannot do so. This "choice" is somehow less worthy of constitutional protection.

Petitioners had an absolute right to be involved as parties in the underlying action and appeal. Any remedy the Kansas Supreme Court fashioned would impact petitioners. App. 83-84. Petitioners were entitled to be involved to defend their interests and make their constitutional claims.

The Kansas Supreme Court's refusal to permit petitioners' intervention to assert this federal question under the unique circumstances in this case, therefore, deprived petitioners of due process because it foreclosed petitioners' access to the courts. *See Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers v. Scofield,* 382 U.S. 205, 215-216 (1965). Although the Kansas Supreme Court did not permit petitioners to be parties to the appeal, they normally would be bound by the Kansas Supreme Court's adverse judgment and decrees. *Devlin v. Scardetti*, 536 U.S. 1 (2002) (stating that non-named class members, like petitioners, who have objected at the earliest opportunity after first learning of the class representative's adverse positions on behalf of the class have the power to bring an appeal without first intervening); *Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 524 (1947) (intervention is of right if petitioner is legally bound by the decision and adversely affected by it "there being no other way in which he can better assert the particular

interest which warrants intervention. . . . [A]nd since petitioner cannot appeal from any subsequent order or judgment in the proceeding unless he does intervene, the order denying intervention has the degree of definitiveness which supports an appeal. . . ."); *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502, 508 (1941) ("[O]ur jurisdiction to consider an appeal from an order denying intervention thus depends upon the nature of the right. If the right is absolute, then the order is appealable, and we may judge it on its merits.").

A related constitutional question, therefore, is: Are petitioners bound by the Kansas Supreme Court's ruling that: "[While] there may be nothing in the constitution that prevents the legislature from allowing school districts to raise additional funds for enhancements. . . . At least to the extent that funding remains constitutionally equalized, local assessments for this purpose may be permissible. . . . ***[Until then, however] such assessments are not acceptable***?" Thus, the Court seems to regard local taxation to be "unacceptable" unless, or until, the legislature first funds a "constitutionally adequate education." App. 69. "That should preexist the local tax initiatives." App. 69.

In this extraordinary ruling, the Court, in effect, admits the local funding provisions are constitutional, "we fully acknowledge . . . there may be nothing in the constitution that prevents the legislature from allowing school districts to raise additional funds. . . ." App. 69. However, even though they are constitutional, the court still prohibits them as "unacceptable" because the court believes such self-help would be "disequalizing." App. 7, 63. If petitioners are bound by this, they are entitled to appeal the judgment.

The Kansas Supreme Court never defined what comprises a constitutionally adequate base education, however. App. 31-34. As Justice Rosen stated in his concurring opinion, " . . . the decisions in this case demonstrate that the model for a constitutionally adequate education has not been a stationary, definable concept." App. 34. It is a "moving target." App. 33. Therefore, petitioners' fundamental federal right to increase the funds available for the education of their children is in limbo, effectively held hostage by the Kansas Supreme Court, pending an undetermined definition of an adequate base level of education. App. 31.

While petitioners are seeking relief in federal court, any lower federal court might require petitioners to exhaust all of their administrative remedies, including an appeal to this Court, before seeking relief there. As a practical matter, the Court's ruling already did and likely will again chill future legislation to expand local funding provisions or remove the cap entirely. App. 24.

The Court's Decisions already induced the legislature to adopt preferential treatment for other school children's needs, not based on any objective or neutral criterion but, instead, based upon improper classifications of race, national origin, and learning disabilities. App. 19, 84-85, 88. Plaintiffs' entire case at trial and on appeal was premised on the "achievement gap" between minority, bilingual, and special education children versus Caucasian students. App. 19, 84-85, 88. The remedy the Kansas Supreme Court ordered was intended to correct this "achievement gap" by forcing the state to reallocate more state aid to those school districts with a higher proportion of these categories of students. App. 19, 84-85, 88. Thus, the funding scheme devised by the legislature, at the direction of the Court, involved a kind of reverse discrimination.

In contrast, a suspect-class neutral remedy would not have ordered additional funding to those districts having higher proportions of minority, bilingual, or special education children, but instead would have ordered additional funding according to objective and race-neutral performance-based criterion which would be directed at the problem – non-proficiency on standardized tests, not the color of a child's skin. In this way, all children scoring below the proficiency level would receive equal treatment. Alternatively, ordering sufficient funding for smaller class sizes in those districts lacking small average class sizes similarly would have been a race-neutral remedy proportionate to solving the alleged wrong.

B. This case involves an important question of federal law that has not been, but should be, decided by this Court with respect to the constitutional limits on a state court's adjudication of the constitutionality of a state's school finance scheme under that state's constitution because if left undisturbed, the Kansas Supreme Court's decisions disrupt the balance of power within our federalist system and interfere with the constitution's preservation of individual liberties.

The legal battle regarding the adequacy of and equity in funding K-12 public education is raging across the country in state courts with conflicting results.[6] App. 25-26. This battle involves claims by state legislators that the court is usurping its authority to make policy in public school finance. This battle is particularly intense in

[6] *The Validity of Public School Funding Systems*, 110 A.L.R. 5th 293 (2006 Supp.).

Kansas. Many in the Kansas legislature have proposed constitutional amendments to limit judicial authority or want to require elections of judges in the future.[7]

Thus, the *Montoy* decisions pose a constitutional crisis. By ignoring common law restrictions on its equitable power, the Court engaged in arbitrary adjudication. As in *Honda Motor Co. v. Oberg,* 512 U.S. 415 (1994), where this Court struck down a highest state court's *interpretation* of the state constitutional amendment on Fourteenth Amendment procedural due process grounds because of the state's utter disregard of common law limitations on remedial discretion, so here too, the Kansas Supreme Court's opinions and orders fail to comply with the traditional common law equitable doctrine limiting a state court's remedial discretion to the least obtrusive means to democratic governance to remedy the constitutional wrong. This absent procedure would "provide protection against arbitrary and inaccurate adjudication."

The equitable common law doctrine restricting a judicial remedial decree to the least restrictive means to remedy the alleged constitutional wrong would not have permitted the Kansas Supreme Court to stay or condition local funding, a means not causally related to the court's alleged end. Local funding is not harmful to the plaintiff school districts and is beneficial to other school districts that need additional funding for public education to achieve per pupil expenditures comparable to those enjoyed by a majority of other school districts in the state.

[7] *See, e.g.*, "Judicial Rulings Raise Ire," 8/24/06, *N.E. Johnson County Sun*, Vol. 56, No.34, p. 1A, 7A; "Penalty Right for Nuss," 8/24/06, *N.E. Johnson County Sun*, Vol. 56, No.34, p. 7A; www.sunpublications.com.

App. 24. Conditioning local funding on the state first funding an undefined base level of education indefinitely suspends petitioners' liberty and property rights. It is, therefore, an excessive and arbitrary remedy. The Federal Constitution requires a more narrow tailoring of the Kansas Supreme Court's remedial decrees to comport with the Fourteenth Amendment Due Process Guarantee.

Unlike the situation in *Pruneyard Shopping Center v. Robins,* 447 U.S. 74 (1980), where this Court held that a state court can interpret a state constitution's first amendment more broadly than the federal equivalent and thereby augment free speech rights beyond what the Federal Constitution would protect, the state constitutional provision at issue here does not protect such negative rights, *i.e.*, individual liberties. Rather, Article 6 § 6, of the Kansas Constitution involves a governmental benefit, *i.e.*, public education.

Since the Kansas Supreme Court's interpretation of the Education Article unduly impinges on petitioners' federal liberty and property rights, it contravenes the First and Fourteenth Amendments. As this Court in *Pruneyard* stated, "Our reasoning . . . does not . . . limit [a state's] sovereign right to adopt in its own Constitution *individual liberties* more expansive than those conferred by the Federal Constitution ***so long as*** [they do not] contravene any other federal constitutional provision." *Id.* at 81 (citing *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (emphasis added)).

Thus, this case involves issues of vast national importance regarding preserving the balance of power within our federalist system of government – a balance of power

designed to secure individual liberty. These issues are too vital to this nation to allow the Kansas Supreme Court Decisions to go unchallenged.

As Justice Kennedy forewarned:

> This assertion of judicial power in one of the most sensitive of policy areas, that involving taxation, [for public education] begins a process that over time could threaten *fundamental alteration of the form of government our constitution embodies. Missouri v. Jenkins (Jenkins I)*, 495 U.S. 33, 81. (Emphasis added.)

When this Court talks about a court's remedial authority being exercised in such a way that "over time [the exercise of such power] could threaten fundamental alteration of the form of government our constitution embodies," then fundamental freedoms protected by the Fourteenth Amendment's Due Process Guarantee are at stake.

In the end, petitioners ask very little. They recognize their civic duty to help fund other school districts located in less property-rich areas and willingly hand over their taxes for this purpose. They also enthusiastically support state funding for those districts, which, like petitioners, lack the necessary learning conditions proven to correlate with higher test scores, *i.e.*, small class sizes. However, what is intolerable is the state's concerted effort to arbitrarily, unjustifiably, and unreasonably restrict their ability to voluntarily tax themselves to pay for additional teachers to reduce class sizes – a benefit which the state provides to others but intentionally withholds from petitioners.

Absent the requested constitutional protection, Kansas succeeds in outlawing excellence and making a mockery of equality.

XI. CONCLUSION

For the reasons stated above, the Court should grant *certiorari*.

Respectfully submitted,

TRISTAN L. DUNCAN
(*Counsel of Record*)
SHOOK, HARDY & BACON L.L.P.
2555 Grand Blvd.
Kansas City, Missouri 64108-2613
Telephone: (816) 559-2040
Facsimile: (816) 421-5547
Attorneys for Petitioners