

No. _____

**In the
Supreme Court of the United States**

DALE R. DEROLPH, ET AL.,
Petitioners,

v.

THE STATE EX REL.
STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Have the Petitioners been deprived of their rights, under the United States Constitution, to due process and equal protection of law by the decision of the Supreme Court of Ohio barring them from access to Ohio's courts for the enforcement of a final judgment, including remedial orders, entitling Petitioners to affirmative relief?

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioners are public school pupils, parents, teachers, school administrators, school boards, and school board members, who were plaintiffs in a successful challenge to the constitutionality of Ohio's public school funding system.

The specific Petitioners include: Dale R. DeRolph, parent and next friend of Nathan DeRolph; Randy Miskell; the Board of Education of the Northern Local School District; J. Kenneth Miller; Steven Johnson; Keely Thompson, parent and next friend of Christopher Thompson; Joseph Winnenberg; the Board of Education of the Southern Local School District; Louis Altier; Carol Spangler; Donna Blankenship, parent and next friend of Jami Blankenship; Mark Semanco; the Board of Education of the Dawson-Bryant Local School District; Carl Swartzwelder; Wayne White; David Bowers, parent and next friend of Christopher Bowers; Jon Carver; the Board of Education of the Lima City School District; James Eaton; Charles Buroker; Marion Gary Southers, Jr., parent and next friend of Sherri Southers and Brian Southers; Robert Rios; the Board of Education of the Youngstown City School District; Socrates Kolitsos; and Emanuel Catsoules. The foregoing Petitioners are collectively referred to herein as the "*DeRolph* Plaintiffs."

Additionally, the Ohio Coalition for Equity & Adequacy of School Funding, a duly constituted regional council of governments whose mission is to ensure a constitutional system of public school funding in Ohio, is also a Petitioner.

Judge Linton D. Lewis, Jr. and the Court of Common Pleas of Perry County, Ohio are not Petitioners.

Respondent

Respondent is the State of Ohio (“State”).

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to review the judgment rendered in this case by the Supreme Court of Ohio.

OPINIONS BELOW

The decision advanced for review is reported at *State ex rel. State of Ohio v. Lewis*, 99 Ohio St.3d 97, 789 N.E.2d 195 (2003) (“*Lewis*”) (App. 1a-15a). That decision is an outgrowth of four previous decisions of the Supreme Court of Ohio, each holding Ohio’s public school funding system unconstitutional, in violation of Section 2 of Article VI of the Ohio Constitution. Those decisions, in order of issuance, are reported at *DeRolph v. State*, 78 Ohio St.3d 193, 677 N.E.2d 733 (1997) (“*DeRolph I*”); *DeRolph v. State*, 78 Ohio St.3d 419, 678 N.E.2d 886 (1997) (“*DeRolph I* on reconsideration”); *DeRolph v. State*, 89 Ohio St.3d 1, 728 N.E.2d 993 (2000) (“*DeRolph II*”); *DeRolph v. State*, 93 Ohio St.3d 309, 754 N.E.2d 1184 (2001) (“*DeRolph III*”); *DeRolph v. State*, 97 Ohio St.3d 434, 780 N.E.2d 529 (2002) (“*DeRolph IV*”) (App. 17a-46a).

STATEMENT OF JURISDICTION

The Supreme Court of Ohio entered its final judgment granting the State of Ohio’s complaint for writ of prohibition on May 16, 2003. Petitioners respectfully invoke this Court’s jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the United States Constitution (App. 51a), which provides in relevant part as follows:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor 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.

STATEMENT OF THE CASE

Section 2 of Article VI of the Ohio Constitution provides in relevant part as follows: “The general assembly shall make such provisions, by taxation, or otherwise, as . . . will secure a thorough and efficient system of common schools throughout the state . . .” (App. 52a). In 1991, the *DeRolph* Plaintiffs initiated a lawsuit in the Perry County Court of Common Pleas (“trial court”) against the State of Ohio and its educational agencies challenging the constitutionality of Ohio’s elementary and secondary public school funding system under this and other provisions of the Ohio Constitution. The *DeRolph* Plaintiffs asserted that an overreliance on revenue from local property taxation had yielded profound inequities across Ohio’s school districts in everything from school facilities to supplies and curriculum, resulting in constitutionally inadequate levels of educational opportunity being available to many of Ohio’s public school pupils. The complaint sought a declaration that Ohio’s system of funding public education was unconstitutional and injunctive relief requiring the State to remedy the unconstitutional shortcomings in the system. In an unreported

decision, the trial court declared in July of 1994 that Ohio's school funding system violated the Ohio Constitution, and the court issued remedial orders. (App. 80a-88a).

After a reversal by the appellate court, the Supreme Court of Ohio confirmed on March 24, 1997 that the State had failed in its constitutional duty to provide a thorough and efficient system of public education. *DeRolph I*. Citing "overwhelming" evidence that Ohio's schools "desperately lack the resources necessary to provide students with a minimally adequate education," the Supreme Court of Ohio declared Ohio's system of funding public schools unconstitutional. *Id.* at 197, 210.¹ The court directed that "Ohio's public school financing scheme must undergo a complete systematic overhaul" and ordered the legislature to eliminate four specific elements of the funding system "which contribute to the unworkability of the system." *Id.* at 212.²

The Supreme Court of Ohio stayed the effective date of its decision to permit the enactment of remedial legislation. The case was remanded to the trial court to conduct a hearing and issue findings as to whether the anticipated remedial

¹ The court concluded that schools were "starved for funds, lacked teachers, buildings, and equipment, and had inferior educational programs, and that their pupils were being deprived of educational opportunity." *DeRolph I* at 205.

² The factors identified were: "(1) the operation of the School Foundation Program, (2) the emphasis of Ohio's school funding system on local property tax, (3) the requirement of school district borrowing through the spending reserve and emergency school assistance loan programs, and (4) the lack of sufficient funding in the General Assembly's biennium budget for the construction and maintenance of public school buildings." *DeRolph I* at 212.

legislation satisfied the mandates of the Supreme Court of Ohio. After an evidentiary hearing in the fall of 1998, the trial court concluded that the State had failed to comply with the *DeRolph I* mandates. *DeRolph v. State*, 98 Ohio Misc.2d 1, 712 N.E.2d 125 (1999). Accordingly, the trial court ordered the State to undertake specific steps to remedy the continuing constitutional infirmities in Ohio's school funding system. *Id.* at 263.

The State immediately appealed the trial court's decision directly to the Supreme Court of Ohio, as authorized in *DeRolph I* on reconsideration. On May 11, 2000, the Supreme Court of Ohio concurred with the determination of the trial court and again declared that the State remained in violation of its constitutional mandate to provide a thorough and efficient system of public schools. *DeRolph II*. The court reiterated its earlier remedial order that the General Assembly undertake a "complete systematic overhaul" of school funding. *Id.* at 17. Additionally, the court explained and clarified its earlier remedial orders, expanding to seven the list of elements within the funding system that required attention from the legislature. *Id.* at 37.³ The court again stayed the effective date of its decision, this time retaining

³ The areas requiring scrutiny and further action by the legislature were: (1) the continued overreliance on local property taxes as a primary means to fund Ohio's schools; (2) structural deficiencies in the basic aid formula; (3) "the mechanism implemented to fund the construction of new school facilities and to repair older, decaying school buildings, until the task is complete"; (4) reevaluation of the legislatively enacted School Solvency Assistance Fund; (5) the necessity to address and immediately fund "unfunded mandates"; (6) the elimination of "[t]he phenomenon known as phantom revenue"; and (7) the development and rigorous enforcement of "[s]trict, statewide academic guidelines." *DeRolph II* at 37.

jurisdiction to review the legislation enacted in response to its remedial orders.

On September 6, 2001, the Supreme Court of Ohio issued its third *DeRolph* decision, again holding that the State had failed to provide a school funding system compliant with the Ohio Constitution. *DeRolph III*. The court indicated that the legislation presented for review “would be” constitutional if the State made certain specific changes to the school funding formula. *Id.* The State, however, moved for reconsideration. The State’s motion was granted, and in lieu of a decision on the merits of reconsideration, the court ordered the parties to mediation. *DeRolph v. State*, 93 Ohio St.3d 628, 758 N.E.2d 1113 (2001). The mediation effort failed, and the case was returned to the court’s active docket for decision on reconsideration.

On December 11, 2002, the Supreme Court of Ohio issued *DeRolph IV*, wherein it reiterated for the fourth time that “the current school-funding system is unconstitutional.” *DeRolph IV* at 435 (App. 19a). The court vacated *DeRolph III* and declared *DeRolph I* and *II* as the law of the case. *Id.* The court’s remedial order was comprehensive: “we direct the General Assembly to enact a school-funding scheme that is thorough and efficient, as explained in *DeRolph I*, *DeRolph II*, and the accompanying concurrences.” *Id.*

The Supreme Court of Ohio neither stayed the effective date of its *DeRolph IV* decision nor reserved ongoing jurisdiction over the case. On the same day as the decision, the court issued its judgment entry that Ohio’s public school funding system is unconstitutional and issued a mandate commanding the trial court to carry the judgment into execution. (App. 47a-50a).

After December 11, 2002, the State continued the operation of Ohio's public schools under the same system of laws declared unconstitutional by the Supreme Court of Ohio in *DeRolph IV*. On March 4, 2003, the Petitioners filed a motion for compliance conference in the trial court. (App. 61a-79a). The purpose of the request for a conference was to ascertain when and how the State intended to comply with the Supreme Court of Ohio's *DeRolph IV* orders and the prior directives of the trial court. *Id.* The State responded by filing an original action in the Supreme Court of Ohio requesting a writ of prohibition to bar the trial court from entertaining Petitioners' motion. Petitioners moved to intervene in the prohibition action, which motion was granted. (App. 16a).

Petitioners also filed an answer to the State's complaint in the Supreme Court of Ohio asserting, among other defenses, that the order sought by the State would violate Petitioners' rights to due process of law as secured by the United States Constitution. (App. 58a). Petitioners thereby timely and properly raised federal constitutional questions at their first and only opportunity to respond to the writ of prohibition that is the subject of this petition for writ of certiorari. The federal constitutional questions were not expressly passed upon by the Supreme Court of Ohio.

On May 16, 2003, without further hearing, briefing, or argument, the Supreme Court of Ohio rendered its decision and entered a judgment granting the State's request for a writ of prohibition against the trial court. *Lewis* (App. 1a-15a).⁴ The court stated that "we now grant a peremptory writ and end any further *DeRolph* litigation in *DeRolph v. State.*" *Id.*

⁴ Reference in this Petition to "*Lewis*" includes both that decision and the writ of prohibition issued in connection with it.

at 104 (App. 13a). The court thus not only prohibited the trial court from conducting the status conference sought by Petitioners but additionally foreclosed Petitioners from access to *any* of the courts of Ohio in connection with *DeRolph*. Petitioners here seek review of *Lewis*.

REASONS FOR GRANTING THE WRIT

Ohio's 1.8 million public school pupils receive their education under a system of school funding laws that has now been declared unconstitutional by the Supreme Court of Ohio on four separate occasions. The declarations of unconstitutionality, and the accompanying remedial orders, are sweeping in scope, portending changes that likely exceed in reach and significance anything ever before mandated by that court. Those remedial orders are now empty promises.

Six years ago, in its first decision in the case, the Supreme Court of Ohio acknowledged the vast implications of its undertaking:

Today, Ohio stands at a crossroads. We must decide whether the promise of providing to our youth a free, public elementary and secondary education in a "thorough and efficient system" has been fulfilled. The importance of this case cannot be overestimated. It involves a wholesale constitutional attack on Ohio's system of funding public elementary and secondary education. Practically every Ohioan will be affected by our decision: the 1.8 million children in public schools and every taxpayer in the state. For the 1.8 million children involved, this case is about the opportunity to compete and succeed.

DeRolph I at 197. The remedial orders issued in *DeRolph I* and its progeny potentially reach every classroom, every teacher, and every student in the state. By rights, the *DeRolph* orders should alter forever the educational landscape in Ohio.

But in *Lewis*, the separate action here in issue, the Supreme Court of Ohio abruptly cut off Petitioners' access to Ohio's judicial system, invoked for the purpose of securing implementation of the remedial orders.

Lewis violates fundamental principles of federal constitutional law. The Due Process Clause of the Fourteenth Amendment does not permit *Lewis*' deprivation of the right of access to the courts, nor does it permit the consequent deprivation of the remedy ordered by the state's highest court for the declared violations of law. *Lewis* cannot be reconciled with historical traditions or notions of ordered liberty. Moreover, by depriving Petitioners of rights accorded all other litigants in Ohio, *Lewis* offends basic principles of equal protection.

Just as the momentous rulings in *DeRolph* were without parallel in Ohio, so, too, is *Lewis*' deprivation of the remedies decreed in that case. The breadth and manner of the deprivation wrought by *Lewis* call into question the continued vitality of the rule of law in Ohio and beyond.

I. THE SUPREME COURT OF OHIO HAS CONCLUSIVELY DETERMINED THAT PETITIONERS HAVE ENFORCEABLE RIGHTS TO EDUCATION UNDER THE OHIO CONSTITUTION, THAT THOSE RIGHTS ARE BEING VIOLATED, AND THAT PETITIONERS ARE ENTITLED TO RELIEF.

At the outset, and in order to clarify what is and is not in issue in this case, it may be helpful to identify the two distinct levels of this controversy. The first level concerns the educational entitlement of Ohio's school children pursuant to the Ohio Constitution. This is a matter of state law and has already been decided by the Supreme Court of Ohio in *DeRolph*.⁵ As a result, it is now settled law that the education clauses of the Ohio Constitution are not merely aspirational; rather, they create substantive entitlements on the part of Ohio's children and corresponding enforceable obligations on the part of the State. It is also absolutely settled that the State has neglected its obligation and that the laws that presently compose the State's school funding system are unconstitutional. Finally, the Supreme Court of Ohio, having repeatedly declared both of the foregoing, has also issued a series of remedial orders directing comprehensive reform of the unconstitutional system. All of the aforementioned issues are settled matters of state law, and the instant petition does not require this Court to examine any of them independently.⁶

⁵ "*DeRolph*" is generally used herein to refer collectively to *DeRolph IV* and the two earlier decisions reinstated by *DeRolph IV* (*DeRolph I* and *DeRolph II*).

⁶ Accordingly, this case does not require the application or reconsideration of *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

The second level of this controversy stems from the unprecedented action of the Supreme Court of Ohio in *Lewis*, a decision that, with but a single stroke, aborted the *DeRolph* litigation prior to the Petitioners ever having achieved *any* remedy for the violations declared in *DeRolph IV*.⁷ It is this second level of this controversy that brings Petitioners to this Court.

The Supreme Court of Ohio's action in *Lewis* is wholly without precedent under Ohio law, and it is a shocking affront to rights protected by the Due Process Clause of the federal constitution. When a final judgment declares that a party has been wronged and provides remedial orders, the prevailing party has an enforceable right to the remedy so ordered. The duty of the courts to require compliance with such orders (even when directed at the other branches of government) is firmly established as a fundamental imperative in both the federal and Ohio systems of jurisprudence.

Consistent with the foregoing, in *DeRolph I*, the Supreme Court of Ohio emphatically rejected the argument that a constitutional challenge to the State's school funding system presented a nonjusticiable political question. "We will not dodge our responsibility by asserting that this case involves a nonjusticiable political question. To do so is unthinkable. We refuse to undermine our role as judicial arbiters and to

⁷ Although, as the State argued below, Petitioners could commence a *new* lawsuit aimed at vindicating educational rights, such a suit could not redress the ongoing deprivation of the remedy to which the school children are *presently* entitled, under *DeRolph IV*. Moreover, unless *Lewis* is reversed, a new suit could not yield anything more than Petitioners already have obtained – a comprehensive declaration of rights, with corresponding remedial orders, all of which are completely unenforceable.

pass our responsibilities onto the lap of the General Assembly.” *DeRolph I* at 198. Thereafter, the court continued to issue remedial orders, and it expressly confirmed that a remedy for the constitutional violations repeatedly identified by the court would be enforced. *DeRolph II* at 12 (“[W]hile it is for the General Assembly to legislate a remedy, courts *do* possess the authority to enforce their orders, since the power to declare a particular law or enactment unconstitutional must include the power to require a revision of that enactment, to ensure that it is then constitutional. If it did not, then the power to find a particular act unconstitutional would be a nullity.”).

The Supreme Court of Ohio never wavered in *DeRolph* from its resolve that it not only had the power but the duty to require the State to reform the unconstitutional funding system. In its final *DeRolph* decision, the court vacated *DeRolph III*, which represented a constriction of its earlier, more comprehensive remedial decrees, and reinstated those earlier decrees as follows:

[T]he General Assembly has not focused on the core constitutional directive of *DeRolph I*: “a complete systematic overhaul” of the school-funding system. Today we reiterate that that is what is needed, not further nibbling at the edges. Accordingly, we direct the General Assembly to enact a school-funding scheme that is thorough and efficient, as explained in *DeRolph I*, *DeRolph II*, and the accompanying concurrences.

DeRolph IV at 435 (citations omitted) (App. 19a).⁸

The vigor with which the parties and the court (including dissenting justices) addressed *DeRolph* throughout the decade of that litigation evidenced their common understanding that *DeRolph* was not a mere academic exercise. All understood that the case would, at the end, have legal and practical consequences of unparalleled magnitude. Nothing in the history of Ohio jurisprudence, generally, or *DeRolph*, in particular, foreshadowed *Lewis*' sudden and anomalous divestment of the *rights already declared and the relief already ordered* in *DeRolph IV*.

II. LEWIS' EXTRAORDINARY PROHIBITION OF JUDICIAL INVOLVEMENT IN THE ENFORCEMENT OF DEROLPH'S REMEDIAL DECREES DEPRIVES OHIO'S 1.8 MILLION SCHOOL CHILDREN OF PARAMOUNT INTERESTS, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A. *Lewis* Deprives Petitioners Of Their Right To Access Ohio's Courts.

The Due Process Clause of the federal constitution protects Petitioners' right to invoke the processes created by state law for the enforcement of remedial orders. *Lewis*'

⁸ *Lewis* did not modify the scope of *DeRolph IV* but in fact confirmed it. *Lewis* at 100 (App. 5a). In the five months separating *DeRolph IV* and *Lewis*, there were no statutory changes and no decisions of the Supreme Court of Ohio or the federal courts of relevance. The only change was in the composition of the Supreme Court of Ohio.

summary and arbitrary deprivation of this right cannot be reconciled with the Due Process Clause.

Under Ohio law, when a superior court issues remedial orders but declines to retain continuing jurisdiction, as the Supreme Court of Ohio did in *DeRolph IV*, the power to oversee enforcement of the remedy reverts to the trial court as a matter of course. Among the sources for such jurisdiction is Section 4, Article IV of the Ohio Constitution, which grants original jurisdiction to common pleas courts (i.e., trial courts) over “all justiciable matters . . . as may be provided by law.” Additionally, Ohio’s Declaratory Judgment Act specifically confers upon any court of record the power to grant further necessary or proper relief where, as here, a declaratory judgment has been entered. Ohio Rev. Code Ann. Chapter 2721; Ohio Rev. Code Ann. § 2721.09. Not surprisingly, the rules of procedure applicable to Ohio’s trial courts include a counterpart to Fed. R. Civ. P. 70,⁹ which has long been used by the federal courts to enforce a wide variety of judgments, including those mandating large-scale institutional reform.¹⁰

The mandate sent to the trial court following *DeRolph IV* (commanding the trial court to “proceed without delay to

⁹ Staff Notes to Ohio Rules of Civil Procedure 70 indicate that the wording of this rule is virtually identical to that of its federal counterpart. Ohio Rev. Code Ann., Rules of Court, Civil at 801 (West 1994).

¹⁰ See *Morales Feliciano v. Hernandez Colon*, 771 F.Supp. 11, 12-13 (P.R. 1991) (“Rule 70 ‘gives the courts ample power to deal with parties who seek to thwart judgments by refusals to comply with orders to perform specific acts.’ . . . The rule also has been relied upon by courts to effectuate judgments in public reform litigation.”).

carry the [judgment] in this cause into execution” (App. 49a)), and Petitioners’ subsequent motion to that court for a status conference (seeking only judicial oversight of the reform process), are consistent with the foregoing sources of Ohio law, as traditionally implemented by Ohio’s judiciary. *Lewis*’ obstruction of the enforcement of a validly rendered and presently effective judgment (and accompanying remedial orders) is a singular aberration.

This Court historically has recognized that the federal constitution protects access to the judicial processes established by the states. In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), the Court noted that it “traditionally has held that the Due Process Clauses [of the Fifth and Fourteenth Amendments] protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances.” *Id.* at 429. The protection emanates from the understanding that the Due Process Clause creates a constitutionally protected interest in access to a forum created by the state for such purposes. *See id.*¹¹

This Court has indicated that whether or not access to the civil courts of the states is constitutionally protected depends upon the significance of the underlying interest sought to be adjudicated. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). Here, the educational interests at stake are vital – both to the children who have been deprived of them and to the society

¹¹ In addition to the Due Process Clause of the Fourteenth Amendment, the Court has derived the right of access to the courts from a variety of other constitutional provisions, including the Article IV Privileges and Immunities Clause, and the First, Fifth, and Fourteenth Amendments. *See Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002).

those children ultimately must sustain. As the Court recently observed, “We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to ‘sustaining our political and cultural heritage’ with a fundamental role in maintaining the fabric of society.” *Grutter v Bollinger*, 123 S.Ct. 2325, 2340 (2003) (quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982)). Accord *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) (“Today, education is perhaps the most important function of state and local governments.”). Similarly, in 1974 the United States Congress declared education to be a matter of national interest:

Recognizing that the Nation’s economic, political, and social security require a well-educated citizenry, the Congress (1) reaffirms, as a matter of high priority, the Nation’s goal of equal educational opportunity, and (2) declares it to be the policy of the United States of America that every citizen is entitled to an education to meet his or her full potential without financial barriers.

20 U.S.C. § 1221-1.

The constitutional significance of the right to public education was underscored in *Goss v. Lopez*, 419 U.S. 565 (1975), in which this Court found that depriving a single student of ten days of education was sufficiently consequential to require the protections of due process. How, then, can *Lewis* constitutionally deny Petitioners access to the judicial processes of the state, which processes offer the only means by which Petitioners may vindicate educational rights of countless students who otherwise must continue *into a second decade* to suffer educational deprivation of declared constitutional proportions?

By prohibiting Ohio's courts from the exercise of the jurisdiction they would otherwise use to enforce declared educational rights, *Lewis* has inflicted a deprivation of paramount interests, in violation of the federal constitution.¹²

B. The Right To A Previously Ordered Remedy Has Historically Been Protected By The Federal Courts And Is Implicit In The Concept Of Ordered Liberty.

Lewis' denial of Petitioners' federally-protected right of access to Ohio's courts works a complete deprivation of the remedy to which *DeRolph IV* entitles Petitioners. That deprivation of a remedy is itself an independent violation of rights protected by the federal constitution.

The federal courts historically have recognized, as an essential and fundamental underpinning of our legal system, the rights of successful litigants to rely upon, obtain the benefits of, and compel compliance with, the judgments awarded them. When *Lewis* closed the courthouse doors to Petitioners, it deprived them of these rights, stripping *DeRolph IV* of any practical effect and Ohio's school children of legally protected rights, as already adjudicated, in violation of substantive as well as procedural due process.

¹² Cf. *Barry v. Barchi*, 443 U.S. 55 (1979) (protected interest in horse trainer's license); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978) (protected interest in utility service); *Bell v. Burson*, 402 U.S. 535 (1971) (protected interest in driver's license).

Although members of the Court have at times urged varying approaches to substantive due process, the Court generally requires, as an initial matter, that the interests asserted to merit such protection be described with care and specificity; the Court has then examined such interests to determine whether they are both “‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed,’” and “objectively, ‘deeply rooted in this Nation’s history and tradition.’” *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997); *see also Chavez v. Martinez*, 123 S.Ct. 1994 (2003) (Thomas, J., concurring).

Applying the foregoing to the instant case, Petitioners’ interest in securing, through customary state processes, the remedy granted them by *DeRolph IV* – and blocked by *Lewis* – unquestionably qualifies for the protections of substantive due process. Beginning, as *Glucksberg* counsels, with a careful description of the interest asserted, it is critical that Petitioners’ interest is not a mere abstract “right to a remedy” but a right to the particular remedy *already ordered* by the highest court of Ohio.

The specific characteristics of the interests denied by *Lewis* are compelling. In substantive terms, the interests concern the educational rights of millions of current and future school children. The entitlement denied them is created by the Ohio Constitution, the supreme law of Ohio. The inadequacies in the school funding laws are so pervasive that the Supreme Court of Ohio has declared those laws “inherently incapable of achieving their constitutional purpose.” *DeRolph I* at 212. The continued operation of these laws exposes children to physical danger as well as to the lifelong consequences of educational neglect, impoverishing them physically, intellectually, and economically. This deprivation not only condemns them to

lives of diminished potential, but it also negatively affects the welfare of the entire state and nation.

In procedural terms, the Supreme Court of Ohio has recognized and declared all of the foregoing. It has acknowledged its duty to provide a remedy and its authority to enforce its orders. It has repeatedly issued remedial orders requiring comprehensive reform and providing specific direction regarding the nature of the reform.¹³ There has been no compliance whatever with *DeRolph IV*, and the harm to Ohio's children is ongoing.

It is in this specific context that Petitioners assert that the fruits of *DeRolph* are protected by procedural and substantive due process. The idea that a party may litigate rights of this magnitude for a decade, repeatedly emerge the victor, be the beneficiary of remedial orders issued by the highest court of the state, and then summarily be barred from enforcing the judgment in its favor is wholly inconsistent with notions of ordered liberty and the rule of law.

The entitlement to a remedy for a legal wrong in circumstances such as these is “deeply rooted in this Nation’s history and tradition.” *Glucksberg*, 521 U.S. at 702. As early as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), this Court recognized that “it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded” unless, as in *Marbury*, the courts lack jurisdiction over the dispute, which clearly is not the case here. *Id.* (quoting 3 William Blackstone, Commentaries *23). The Supreme Court of Ohio has expressly and forcefully

¹³ See *supra* footnotes 2 and 3, and *DeRolph IV* at 435.

recognized that the *DeRolph* dispute is within the jurisdiction, and subject to the remedial powers, of the courts.

In cases involving interests far less vital than those asserted here, and affecting far fewer people, this Court has evaluated remedies according to the Due Process Clause.¹⁴ In *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), for example, the Court found prospective relief alone inadequate to vindicate rights violated by a state tax law. By comparison, in this case (in which retrospective relief has never been sought), *Lewis* operates to perpetuate ongoing educational deprivation on a statewide scale, eliminating any consequences for the violators and foreclosing *any* means of relief for the victims. Absent the intervention of this Court, *Lewis*' deprivation of Petitioners' federally protected right to a remedy for the violations of legal rights declared in *DeRolph IV* is complete.¹⁵

Moreover, *Lewis*' sudden and extraordinary prohibition of the enforcement of remedies earlier and repeatedly ordered is reminiscent of the "bait-and-switch" scheme condemned by

¹⁴ Even a legal claim not yet reduced to judgment has been accorded protection as a property interest. *Logan*, 455 U.S. at 428-29 (holding that a cause of action is a protected property interest); *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 804 (1996) (describing a chose in action as "a protected property interest in its own right").

¹⁵ *Cf. Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 682 (1930) ("Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.").

this Court as violative of due process in *Reich v. Collins*, 513 U.S. 106 (1994).¹⁶ Here, Petitioners litigated *DeRolph* for an additional six years after the Supreme Court of Ohio first declared, in *DeRolph I*, that constitutional rights to education were justiciable and enforceable, and issued the first in a series of remedial orders. Subsequent proceedings were in reliance upon the consequent expectation of an enforceable remedy at the conclusion of the liability phase of the *DeRolph* litigation.

Neither the systemic nature of *DeRolph*'s remedial orders nor the refusal of the State to comply with them is a compelling reason to divest the school children of their entitlement to a remedy. This Court has unequivocally rejected the notion that a state or local government may refuse to comply with judicially ordered remedies.¹⁷ In the school desegregation cases, faced with the same kind of institutional intransigence (and with similar interests at stake), this Court approved the exercise of judicial authority to compel

¹⁶ “[D]ue process requires a ‘clear and certain’ remedy for taxes collected in violation of federal law. A State has the flexibility to provide that remedy before the disputed taxes are paid (predeprivation), after they are paid (postdeprivation), or both. But what it may not do, and what Georgia did here, is hold out what plainly appears to be a ‘clear and certain’ postdeprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists.” *Reich* at 108 (citations omitted); *see also NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

¹⁷ While the cases referenced in support of this proposition concern federal court enforcement of federal court orders, the principles underlying the cases apply with equal force in the context of state courts, likewise requiring those courts to act to enforce their own remedial decrees.

compliance with remedial decrees. *See, e.g., Swann v. Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 1, 15 (1971) (“If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.”).¹⁸ Moreover, the remedial authority of the judiciary takes on heightened importance where, as here, there are *ongoing* violations of declared rights. *See Hutto v. Finney*, 437 U.S. 678, 690 (1978).

Remedial decrees impose significant obligations on those to whom they are directed. In the desegregation cases, faced with requests for the dissolution of remedial decrees and the withdrawal of judicial supervision after decades of reform efforts by formerly segregated school systems, this Court has indicated that there must first be a showing of good faith compliance with the decrees for a period of time sufficient to eliminate the “vestiges of past discrimination . . . to the extent practicable.” *Board of Ed. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 250 (1991); *see also Freeman v. Pitts*, 503 U.S. 467 (1992). By comparison, in the instant case there has never been *any* compliance with *DeRolph IV*, and the constitutional violations for which Petitioners seek a remedy are *present* ones. The issue is not whether a remedy thus far provided is sufficient; no remedy of any kind has ever been provided in response to *DeRolph IV*. Indeed, at the time *Lewis* was issued, a mere five months after *DeRolph IV*, the State was brazenly continuing, as it still does, to operate the

¹⁸ This Court has even acknowledged the power of the judiciary to order that taxes be levied when necessary to remedy adjudicated wrongs. *Missouri v. Jenkins*, 495 U.S. 33, 55 (1990).

very same school funding system that had *four times* been declared unconstitutional.

The question thus presented to this Court is not one of degree. Instead, the question is whether litigants may, consistent with procedural and substantive due process, be cut off from *any remedy whatsoever* for ongoing wrongs that have already been judicially declared and accompanied by remedial orders. The Due Process Clause is implicated not simply because the State has refused to comply with *DeRolph IV*, but because *Lewis* flatly held that litigants may be barred from applying to the courts to secure the enforcement of binding judicial decrees.

Lewis stands “ordered liberty” on its head, enabling Ohio’s legislative and executive branches to continue to knowingly violate the law while affirmatively *prohibiting* Ohio’s courts from enforcing compliance with the law. The lawless methodology of *Lewis*, the unconstitutional harm it knowingly inflicts on a powerless and dependent class of victims, and the fact that *Lewis* emanates from the highest level of the very branch of state government most charged with, and relied upon for, the protection of such victims is beyond understanding or excuse.¹⁹

Finally, in addition to analyzing substantive due process claims in terms of historical notions of ordered liberty, this

¹⁹ See *United States v. Wallace*, 218 F. Supp. 290, 292 (N.D. Ala. 1963) (“In the final analysis, the concept of law and order, the very essence of a republican form of government, embraces the notion that when the judicial process of a state or federal court, acting within the sphere of its competence, has been exhausted and has resulted in a final judgment, all persons affected thereby are obliged to obey it.”).

Court at times has evaluated challenged state action in terms of a “shocks the conscience” standard. *See generally Chavez*, 123 S.Ct. 1994. In this regard, if *Lewis* is not “conscience shocking,” it is difficult to conceive of any governmental conduct that would merit such description. While this Court has variously employed – and sometimes questioned, as lacking clear parameters – both the shocks-the-conscience and implicit-in-ordered-liberty approaches to substantive due process (*see generally id.*; *County of Sacramento v. Lewis*, 523 U.S. 833 (1998)), this is not a case that tests the outer limits of either approach. However analyzed, the manner and impact of the deprivation wrought by *Lewis* violate the Due Process Clause.

C. *Lewis’ Unprecedented Deprivation Of The Right To Enforce Remedial Decrees Is A Violation Of Equal Protection.*

This Court has recognized that when a state creates a judicial process, it may not grant the benefits of that process to some litigants and deny it to others without implicating the often-intertwined issues of equal protection and due process. *See generally M.L.B. v. S.L.J.*, 519 U.S. at 120 (“[T]he Court’s decisions concerning access to judicial processes, commencing with *Griffin* and running through *Mayer*, reflect both equal protection and due process concerns.”); *Griffin v. Illinois*, 351 U.S. 12 (1956), *construed in Lindsey v. Normet*, 405 U.S. 56, 77 (1972) (“When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating

the Equal Protection Clause.”); *see also Boddie v. Connecticut*, 401 U.S. 371, 377 (1971).²⁰

Ohio law historically and routinely grants *all* litigants the right to seek the aid of its courts in the enforcement of judgments. *Lewis* singles out one group of claimants – those seeking enforcement of the educational clauses of the Ohio Constitution, as declared and ordered in *DeRolph* – denying them and them alone access to the judicial processes historically available to all others. *Lewis* not only lacks a compelling state interest, it lacks any proper purpose whatever. As this Court has stated in another context, “Central both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.” *Romer v. Evans*, 517 U.S. 620, 633 (1996).²¹

²⁰ Concerning the relationship between due process and equal protection generally, *see also Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (“[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The ‘equal protection of the laws’ is a more explicit safeguard of prohibited unfairness than ‘due process of law,’ and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.”).

²¹ *Cf.*, *Primes v. Tyler*, 43 Ohio St.2d 195, 205, 331 N.E.2d 723, 729 (1975) (striking down Ohio’s “guest statute” on the grounds that the statute “by its grant of a special privilege and immunity to negligent drivers who injure nonpaying passengers is . . . violative of the Fourteenth Amendment to the United States Constitution, in that it denies due process of law and equal protection of the laws to the people of this state.”).

Lewis deliberately and selectively excluded Ohio's most vulnerable citizens from the judicial processes available under state law to all others. In so doing, *Lewis* denied the school children the rights afforded them by Ohio's most basic law, depriving them of the education this Court has described as "pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society." *Grutter*, 123 S.Ct. at 2340. *Lewis* is not only morally unconscionable. It also violates the fundamental promises of due process and equal protection contained in the United States Constitution.

In sum, Petitioners respectfully submit that this Court should accept review of this case in order to address significant issues of federal constitutional law, including procedural and substantive due process and equal protection of law. *Lewis* raises significant issues concerning the traditional procedural due process entitlements of litigants who seek access to the courts to vindicate important substantive rights. It also raises a broader issue of whether, consistent with substantive due process, litigants who have already established their substantive rights (and acquired remedial orders) may be denied all access to the courts, even when the courts clearly have jurisdiction to provide and enforce a remedy for the ongoing violations of such rights. Finally, *Lewis* offers an opportunity for the Court to address the important equal protection issues raised by *Lewis*' differential treatment of the school children of Ohio as compared with all other litigants in Ohio.

III. REVIEW IS WARRANTED BY THE IMPORTANT INTERESTS AT STAKE.

This Court has long recognized that public education serves the essential purpose of preparing a citizenry capable

of continuing our democracy. See *Brown v. Board of Educ.*, 347 U.S. 483. Moreover, the importance of education has grown as our nation has evolved from the industrial revolution to the information age. The demands of economic productivity and basic citizenship are increasingly complex, placing heightened demands upon our public schools.²²

In *Grutter*, this Court approved race-based law school admissions criteria, while noting that hoped-for improvements in pre-college educational opportunities would foretell the day when such considerations would no longer be necessary.²³ Yet *Lewis* perpetuates the very disparities underlying *Grutter*'s compensatory criteria – at least for those in Ohio's flawed public schools.

This Court is no stranger to the problems of these schools. In *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the Court was given a ringside view of the deplorable conditions

²² Thirty years ago, in *San Antonio Indep. Sch. Dist. v. Rodriguez*, this Court held that education is not a fundamental right for purposes of federal equal protection analysis. As noted *supra* footnote 6, the instant case does not require a re-examination of *Rodriguez*. Nevertheless, this Court may view this case as an opportunity to reconsider the fundamentality of education in a context in which children are routinely deprived of such rights and in light of the heightened contemporary importance of those rights.

²³ “As lower school education in minority communities improves, an increase in the number of such students may be anticipated. From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.” *Grutter*, 123 S.Ct. at 2364 (Ginsburg, J., concurring).

in the Cleveland City School District, Ohio's largest. The educational deprivation portrayed in *Zelman* persists, and it continues to inflict its greatest harms on those with the greatest needs, for whom public education is meant to open doors – not shut them forever. The words of Justice Thomas echo in depressed schools throughout Ohio. “[T]he promise of public school education has failed poor inner-city blacks. While in theory providing education to everyone, the quality of public schools varies significantly across districts.” *Id.* at 682. *Zelman*'s voucher program may offer escape for a few, but the vast majority of Cleveland's students continue to attend the same underfunded, failing schools condemned by the State, itself, in *Zelman*. Moreover, while *Zelman* revealed educational deprivation in Cleveland, *DeRolph* constitutes a far more comprehensive indictment of public education throughout the State of Ohio.

Remedies for systemic violations of constitutional rights by governmental agencies may be complex, time consuming, and at times unpopular, but the notion of denying any remedy whatsoever has never been tolerated. Had this Court in *Brown v. Board of Education* declared the rights of school children to attend integrated schools but deprived them of the ability to enforce that decree, there can be little doubt that segregation would have continued for decades – and perhaps forever. No less than the children in *Brown*, Ohio's children are entitled to a remedy.

There is yet a broader issue presented by this case. At the present time, numerous other states are engaged in school

funding litigation.²⁴ In some of those states, the legislatures have demonstrated the same unwillingness to institute court-ordered reforms as has been demonstrated in Ohio. If *Lewis* becomes the model for the nation, the formula for back-door evisceration of legal rights will be clear – recognize the constitutional right but deny judicial enforcement of a remedy for violations of those rights. Legal protections will effectively be eliminated – not by any change in the law itself but by the absence of any enforceable remedy for its violation.

While the consequences of *Lewis* are enormous when measured in the context of school funding suits, even this does not represent the full extent of the damage caused by *Lewis*. The gaping hole *Lewis* creates in the fabric of due process potentially endangers *any* fundamental right, not just those concerned with education. When basic rights are so easily denied, the rule of law has ceased to exist.

²⁴ See Advocacy Center for Children’s Educational Success with Standards (visited Aug. 12, 2003) <<http://www.accessednetwork.org/states/index.htm>> for the status of school funding litigation in the 50 states.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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