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IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION 6

KANSAS NATIONAL EDUCATION)
ASSOCIATION,)
_____) Plaintiff,) Case No.: 2014-CV-789
vs.)
STATE OF KANSAS, and)
SAMUEL D. BROWNBACK in his)
capacity as Governor of the)
State of Kansas,)
_____) Defendants.)

TRANSCRIPT OF ORAL ARGUMENT

PROCEEDINGS had before the
Honorable Larry D. Hendricks, Judge of Division 6 of
the District Court of Shawnee County, Kansas, at
Topeka, Kansas, on the 12th day of February, 2015.

APPEARANCES:

The Plaintiff, Kansas National Educational
Association, appeared by and through its counsel, Mr.
David M. Schauner, Kansas National Education
Association, 715 SW 10th Street, Topeka, Kansas
66612; also present was Mr. Jason Walta.

The Defendants, State of Kansas, et al.,
appeared by and through their counsel, Mr. Stephen R.
McAllister, Solicitor General of Kansas, Memorial
Building, Second Floor, 120 SW 10th Avenue, Topeka,
Kansas 66612-1597.

JENNIFER L. OLSEN, Certified Shorthand Reporter
Third Judicial District, Division 12, 233-8200 X-4302



I N D E X

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MOTION TO DISMISS

BY MR. McALLISTER. 4/36

BY MR. WALTA 23/39

DISMISSAL OF SPECIFIC PARTY DEFENDANT . . . 41

CERTIFICATE. 43

1 THE COURT: Court would call *Kansas*
2 *National Education Association versus State of*
3 *Kansas, Samuel Dale Brownback*, case number
4 2014-CV-789. Might I have the appearances, please.

5 MR. SCHAUNER: David Schauner on behalf of
6 the plaintiff along with previously admitted on
7 motion *pro hac vice*, Jason Walta, prepared to argue.

8 MR. McALLISTER: Stephen McAllister on
9 behalf of the State of Kansas and Governor Brownback
10 and with me, the assistant attorney general, Chris
11 Grunewald, ready for argument.

12 THE COURT: Very well. This matter is
13 before the Court on the defendants' motion to dismiss
14 and plaintiff's motion for summary judgment.
15 Gentlemen, have you talked among each other how you
16 would like to proceed? Do you want to start off and
17 argue both of them at one time or do you want to do
18 them independently? What's your pleasure?

19 MR. WALTA: Your Honor, I think it makes
20 sense to argue them both together and we're happy to
21 start with whoever you think would be most helpful.

22 THE COURT: Doesn't matter to me. The
23 motion to dismiss was filed first by Mr. McAllister.
24 If you would like to begin.

25 MR. McALLISTER: State is ready. We do

1 agree the issues overlap. So we think it makes sense
2 to argue them both together.

3 THE COURT: Very well.

4 MR. McALLISTER: May it please the Court,
5 in our motion to dismiss, the State offered several
6 reasons why the complaint should be dismissed as a
7 legal basis. Among those are preliminary issues that
8 we would urge the Court to address before it ever
9 considers the merits on whether the plaintiff has
10 established standing, whether the case is ripe, and
11 also the question of whether the governor is a proper
12 defendant in this action. I'll take each of those in
13 turn, but happy to answer questions at any time on
14 any of them, Your Honor.

15 With regard to the standing issue, the
16 requirements for associational standing are set forth
17 in the Kansas Bar Association case that's cited in
18 the briefs. In particular, three requirements, the
19 members of an association must have standing to sue
20 individually, the interests of the association are
21 germane to the organization's purpose, and neither
22 the claim asserted nor the relief requested requires
23 participation of individual members.

24 The State's position is that the claim of
25 associational standing here founders on the first

1 element, whether the members have suffered injury and
2 there's a couple of aspects to that. One is the
3 KNEA, in a sense, is twice removed from the actual
4 teachers. They are their bargaining units. They are
5 actually local. The KNEA does not bargain on their
6 behalf, those bargaining units that are affiliated
7 with the KNEA. But more importantly, no teacher has
8 suffered any injury that has been shown at this point
9 in time under the statutes and the provisions about
10 which they are complaining.

11 The provisions on the due process renewal
12 requirements would take effect only if some teacher
13 is given notice that they are being terminated, which
14 would probably occur, at the earliest, next May.
15 That has not occurred yet. There is no indication --
16 we don't know if it will occur next May.

17 Furthermore, the statute does not prohibit school
18 districts from providing these protections, it simply
19 gives them the discretion and some school districts,
20 in fact, have adopted these protections so the
21 teachers in those districts have no complaint. Even
22 if they get to May and the statute were to take
23 effect and perhaps deprive or eliminate rights for
24 some, it will do nothing in a number of districts
25 that have adopted their own protections.

1 This is much like the *Kansas Bar Association*
2 *versus Judges'* case, in the State's view, and the
3 Court should reach the same conclusion. There's no
4 proof of real injury here, sort of Article 3 if
5 you're in the federal system. Injury, in fact, just
6 isn't there. It may come and this relates to our
7 ripeness argument. Again, the injury is not present.
8 Its future, if at all, is speculative. We don't have
9 any actual facts the Court could review as to how it
10 would work.

11 THE COURT: Mr. McAllister, aren't they
12 attacking one subject rule and not the fact that
13 there's been no teacher that's had an opportunity or
14 not had an opportunity to explore due process. Isn't
15 that two separate topics?

16 MR. McALLISTER: Well, they are two
17 separate claims, so they could have had a direct
18 claim, which they've chosen not to bring, that the
19 change in the statute is somehow itself a
20 constitutional violation. The single-subject claim
21 may be more of what you'd call a procedural claim but
22 still, there has to be standing to raise a
23 constitutional claim and they have got to show how
24 they are actually injured in a way that justifies
25 them bringing a single-subject claim. So I agree

1 with, Your Honor. It's a different theory, it's a
2 different claim, but it doesn't eliminate the need to
3 prove standing or ripeness of the case.

4 So in the State's view, again, the better time
5 would be if, in fact, some teacher is terminated, and
6 these provisions then come into play. If they are in
7 a district that has not adopted protections, at that
8 point, the teachers could certainly raise the
9 challenge to the statute. We would be prepared to
10 defend it, but at least we wouldn't be arguing about
11 standing to raise the claim. So the fact that they
12 label it -- really their argument seems to be if you
13 call it single-subject, standing is out the window.
14 It doesn't matter.

15 We can -- the problem with that is any citizen,
16 basically, could make that claim that the legislature
17 did not follow a proper procedure in the
18 constitution. The law has now been passed so it's
19 time to bring a suit. That's not the way the
20 single-subject cases work. The people bringing those
21 claims typically have to have some injury or special
22 interest like the attorney general is involved in a
23 particular case that justifies a single-subject claim
24 being raised.

25 I would also like to address whether the governor

1 is a proper defendant and this one, I think, actually
2 is quite clear, Your Honor. The governor is neither
3 necessary or proper here. He has no role in the
4 enforcement of the statute and really, fundamentally,
5 because they have the State of Kansas as a defendant,
6 there is absolutely no need to name any other
7 official in the state and, in fact, the cases they
8 point to are primarily federal law cases where, of
9 course, you have to deal with Eleventh Amendment
10 immunity. The State cannot be named in *Petrella*
11 *versus Brownback*. They have to sue government
12 officials, but they cannot name the State of Kansas
13 when they are bringing federal claims. The Eleventh
14 Amendment bars that.

15 This is much like the school finance case,
16 *Gannon*. The only defendant in *Gannon* is the State of
17 Kansas. Those plaintiffs have not sued the governor
18 or any other executive official. They've named the
19 State of Kansas because they can when the claim is
20 based on the state constitution. So there's really
21 no need at all. Government -- or the governor has no
22 connection to these particular statutes, other than
23 their complaint alleges he signed it and if that's
24 the issue, that's absolute legislative immunity.
25 That's part of the legislative process.

1 But even apart from whether he has a role in
2 enforcement, there's simply no need to name the
3 governor when you can sue the State directly. All
4 the naming of officials in their official capacity,
5 that comes from--

6 (THEREUPON, the reporter asked that the
7 last statement be repeated.)

8 MR. McALLISTER: -- *Ex Parte Young*
9 doctrine in federal court, which is a function of the
10 Eleventh Amendment in the state's constitutional
11 immunity from claims brought under federal law. They
12 have brought claims solely under state law. That
13 immunity doesn't apply to the State. We are not
14 objecting to the State being named as a defendant.
15 The State is the defendant here and there's no reason
16 to include the governor as well in this suit.

17 Unless the Court has questions, I would turn to
18 the single-subject rule. Any questions on the
19 preliminary issues?

20 THE COURT: No. Would you agree that in a
21 case such as this and the relief they are asking, the
22 case controversy requirements are a little more
23 liberal than that in federal court requirements?

24 MR. McALLISTER: Well, I think there is
25 certainly the possibility. It is state law, state

1 constitutional law so it's not a federal claim and,
2 certainly, Article 3, strictly speaking, does not
3 govern--

4 THE COURT: We don't have a case or
5 controversy in the state constitution.

6 MR. McALLISTER: No, although our supreme
7 court has adopted and frequently applied federal
8 standing requirements. It has adopted rules
9 like no advisory opinions. You have Morrison against
10 Sebelius is an example of that where they said we
11 follow federal doctrine and do not issue advisory
12 opinions. So in that sense, I think Kansas standing
13 doctrine, as I just read from the KBA case, tracks by
14 and large federal requirements.

15 THE COURT: The KBA case though was
16 because the Eulers were involved with it and both --
17 Jack Euler really didn't have any standing to be
18 there because they didn't have any cases in small
19 claims. That was a whole different ball of wax than
20 what we are talking about here.

21 MR. McALLISTER: Well, arguably, except,
22 again, it was the lawyers collectively arguing. Here
23 you, in essence, have the teachers collectively
24 arguing, but the point I would suggest that's
25 important is that there is no individual yet that has

1 been shown to suffer any actual harm as result of the
2 law about which they're complaining. So I think in
3 many ways, it's very much like the KBA case where the
4 bar association was saying all lawyers have an
5 interest in making unauthorized people do not
6 practice law and the court found that an insufficient
7 interest.

8 Here, they are basically saying all teachers have
9 an interest in these procedures but not one of them
10 has yet been able to show how they've actually been
11 harmed by a change in the statute.

12 THE COURT: Losing due process, in their
13 position, I'm quoting their position, losing due
14 process isn't a harm?

15 MR. McALLISTER: Well, I think it could be
16 but it's not yet. That sort of goes to the ripeness.
17 In the abstract, I think that's the question for the
18 Court. In the abstract, without showing that anyone
19 has yet been actually affected by what they're
20 complaining about, is that injury -- in fact, does
21 that make this case ripe.

22 You know, there are certain instances but they
23 tend to be narrow. For example, statutes that
24 restrict speech. Yes, courts have said, well, the
25 fact that you might want to speak and now the statute

1 suggests it would be a crime has a chilling effect,
2 that's kind of an exception though to the typical
3 standing requirement for free speech issues. In most
4 other territory, the federal courts, certainly, and I
5 think our state supreme court have not really
6 relaxed.

7 Now, I will say to your point, relaxing or
8 changing standards for a single subject, granted,
9 there's something a little different about this. For
10 example, an attorney general comes in and brings a
11 suit against the governor or we had cases like the
12 *Carlin* case, which my colleagues talk about a lot,
13 but often, those have also been forewarned, those
14 *mandamus* cases in the supreme court where I think
15 that's a different proposition when you have the high
16 level of executive branch officials bringing a
17 proceeding directly in the supreme court to determine
18 an important issue. The rules are a little different
19 for forewarned *mandamus*.

20 This is a typical, traditional lawsuit brought by
21 a private plaintiff in district court that can be
22 appealed. So the private plaintiff should be held to
23 the typical and traditional standing standard.

24 THE COURT: Okay.

25 MR. McALLISTER: All right. With respect

1 to the single-subject rule, couple of things, Your
2 Honor, one, there is language in Article 2, Section
3 (16) which no one seems to want to take account of,
4 at least other than the State, and that language is
5 Article 2, Section (16) says, "No bill shall contain
6 more than one subject, except appropriation bills,"
7 and that language is important. In our view, it
8 helps demonstrate that the issue here, we disagree, I
9 think, with the plaintiff. They seem to think it's
10 open and shut. We think it's open. I do concede
11 there are arguments on both sides of this one,
12 plausible arguments, but our point is it's an open
13 question whether this particular situation is covered
14 by the single-subject rule and, in fact, would be a
15 violation of it.

16 The plaintiff wants to give no effect to that
17 excepted appropriation bill's language and I'll
18 confess, with some supreme court support, the Kansas
19 Supreme Court in the case suggested basically early
20 on that the amendments to the constitution in 1974
21 that added that language changed nothing and
22 that's -- the *Carlin* case suggests that.

23 With all due respect, that doesn't really take
24 account of the change in language, except
25 appropriations bills and in *Carlin*, the Kansas

1 Supreme Court didn't really look back at the true
2 history of what the legislature had done for the past
3 many decades. It said we looked at the bills in 1968
4 and '69 and decided they didn't put anything but
5 appropriations in appropriations' bills so it didn't
6 change anything.

7 THE COURT: Well, they also said they
8 weren't affirming or denying the authenticity or the
9 legality of the 1968 and '69 bills. The supreme
10 court said that, so they weren't really going back
11 and looking whether they were right or wrong. I
12 think they were just saying here's some things they
13 have done and here's the way they have done them in
14 the past.

15 They are pretty clear about -- I think, they
16 would agree with you that you can add things to an
17 appropriations' bill, but what things can you add to
18 an appropriations' bill. Therein lies the argument.

19 MR. McALLISTER: I agree, Your Honor,
20 absolutely, and our suggestion is it's one thing -- I
21 mean, I guess there's a couple of ways to come at it.
22 One is to simply parch the cases and try to figure
23 out what fact patterns were in play and whether we
24 fit and to be honest, no case decided in Kansas, in
25 our view, is exactly like this case.

1 *Carlin* is clearly an omnibus appropriations' bill
2 with one provision that the governor was objecting to
3 was substantive. That's a lot different than this
4 one which is a real mixed bag. In fact, more than
5 half of the provisions here have nothing to do with
6 appropriations.

7 So one way is to parch the cases and try to see
8 where this case fits. Another is to think about the
9 rationale behind single subject and why we have the
10 rule, what it's trying to accomplish, and I would
11 like to address that for a moment.

12 If the fear is, and it is one of the reasons for
13 single subject, that legislatures will engage in
14 "logrolling", well, you have to understand what
15 "logrolling" is. I think sometimes in the briefing,
16 it may have been mischaracterized.

17 "Logrolling" is when you take separate proposals
18 that might not any of them stand on their own, pass a
19 majority, cobble them together so that enough people
20 in the legislature have something in there they want,
21 that the whole mess, if you will, gets passed, that's
22 "logrolling."

23 Here, we may have "logrolling" and that goes to
24 the remedy. Certainly, in the senate, it was a close
25 vote. They want to characterize this as like an

1 omnibus appropriations' bill that it had to pass so
2 whatever got attached to this was going to pass.
3 Well, that's absolutely not true. I think, as a
4 matter of fact, certainly in the senate.

5 Now, they have some suggestion about the house
6 but in the senate, there were plenty of legislators
7 and just to say personally, to some extent, living
8 through this as being one of the litigators in the
9 *Gannon* litigation, there were a lot of options on the
10 table last spring and one was that the legislature
11 would not appropriate more money or it would
12 appropriate a much different amount and try some
13 other things. In fact, the supreme court's opinion
14 does not say you must appropriate "X" amount of
15 dollars to fix this. So there was a lot going on.

16 There were definitely senators who objected to
17 increasing the money or increasing as much as it was.
18 So these provisions, in the senate at least, helped
19 put this bill over the top and so if the concern is
20 "logrolling" and that's what was really going on in
21 the senate, then the remedy here would be to strike
22 the entire statute, not just to carve off.

23 That's a fundamental difference, I think, between
24 the plaintiff and the state. They characterize it as
25 it's an appropriations must-pass bill with, quote,

1 "riders" attached. In the State's view, that's not
2 what this is. This is a multi-provision bill. Lots
3 of things going on and in the senate at least, all of
4 those things may have been necessary to achieve a
5 majority.

6 You know, the Utah case, I think, is a sensible
7 one, but before we go to Utah, which the plaintiffs
8 don't like, understandably, I want to refer to the
9 *Kansas One-Call System* case, with which this Court is
10 very familiar, and the kinds of things the Court said
11 there about what a high standard it is, how the Court
12 is supposed to be very flexible. The invalidity must
13 be manifest before it strikes down the law under
14 single-subject. And, of course, supporting that
15 notion is it's been 34 years since the Kansas Supreme
16 Court has struck a bill as a violation of the
17 single-subject rule.

18 So with that in mind, is there a way to
19 reasonably construe this as constitutional and the
20 State's answer is yes. Like the Utah Supreme Court
21 did, there really is no argument, and KNEA has not
22 made one, that all the provisions in this bill do not
23 relate to education. They do. So the only issue is
24 if some are money and some are other things, is that
25 an automatic and, *per se*, violation of single-subject

1 rule. And the State's view is no. That's, first of
2 all, a question the Kansas Supreme Court has never
3 been confronted with and, second of all, the answer
4 should be no.

5 It's very sensible for the legislature when it's
6 targeting, here it was equity funding. It's not the
7 whole school finance, by any means, it's just a
8 little piece of it, very small piece of it, actually,
9 and they added other education provisions. That's a
10 sensible way to legislate and it's certainly
11 consistent with the constitutional text which says
12 except appropriations' bills. So it makes an
13 exception for appropriation bills not having to
14 adhere as strictly to the single-subject interest and
15 here it is a single subject, it's education.

16 The only question is whether mixing money and
17 other provisions is automatically unconstitutional
18 and the State urges the Court to conclude that, no,
19 that is not automatically unconstitutional.

20 THE COURT: So, Mr. McAllister, it's your
21 position that you can make appropriations in the
22 bill, as this one does, because it says, we hereby
23 appropriate, we hereby appropriate on several
24 sections, and then you can call it, in this case, an
25 education bill, call it anything you want to and that

1 makes it not an appropriations' bill?

2 MR. McALLISTER: Well, I think two things,
3 Your Honor. One, yes, a qualified yes is the answer
4 to your question. Take, for example, a prison bill
5 and it says here's monies for prisons and here's also
6 some rules about how we are operating the prisons for
7 going forward. That seems to me to be a very
8 sensible way to legislate. So I would say, yes, but
9 also, there is a limit. So the State is not arguing
10 when you get, in essence, to the point that the
11 plaintiff is claiming, you know, a must-pass
12 provision or the general operating budget, we agree
13 with that notion that you can't take the omnibus bill
14 that's going to fund all of state government and then
15 start throwing on all these little riders and say
16 that's okay. But the legislature typically has not
17 done that.

18 THE COURT: But *Stephan v Carlin*, do you
19 believe that speaks only to omnibus appropriations'
20 bills?

21 MR. McALLISTER: I think on the facts,
22 yes. In terms of the language in the opinion, it can
23 be read more broadly but the question is how much
24 more broadly. At one point, the court refers to
25 important and extensive appropriations' bills, so

1 there may be a matter of degree there. This one, to
2 me, is not that extensive. All of them are
3 important, but it's not that extensive. More than
4 half of the provisions are not appropriations.

5 THE COURT: Doesn't the court in *Stephan*
6 give this Court guidance as to your jail example when
7 it says, "Appropriation bills may direct the amount
8 of money which may be spent, and for what purposes;
9 and they may express the legislature's direction as
10 to expenditures; they may transfer funds from one
11 account to another; they may direct that prior
12 unexpended appropriations lapse." That, "we hold
13 under Section 16, Article 2 of the Constitution,
14 appropriation bills may not include subjects wholly
15 foreign and unrelated to their primary purpose:
16 authorizing the expenditure of specific sums of money
17 for specific purposes."

18 Doesn't that address your example of the jail?
19 Yeah, jail, here's the money for you folks in jail
20 and here's the way you can use it. That's exactly
21 what they are saying is appropriate in these other
22 sections or other things that are added to
23 appropriations' bill, but is it appropriate to say
24 appropriate this, appropriate that, appropriate that,
25 take away due process. How does that relate as

1 *Stephan v Carlin* says that it should?

2 MR. McALLISTER: Well, it's, I think,
3 obviously, Your Honor, broader than that. But it's
4 still within the realm of education, very clearly,
5 and I would come back to the proposition that, again,
6 *Stephan v Carlin* does not take account of that
7 constitutional text except appropriations' bills.
8 Basically, the court just blindly says we are going
9 to say what we've said in older cases. We don't care
10 what the text says here. In fact, there was a
11 proposal and I understand you're a district court and
12 there's a supreme court--

13 THE COURT: They may blindly say so,
14 counselor, but I have to blindly follow it.

15 MR. McALLISTER: But you could help me if
16 you suggested that they blindly followed it.

17 THE COURT: I'm not saying that.

18 MR. McALLISTER: But they say, basically,
19 there is no difference before and after 1974 and, in
20 fact, there was a proposal to not put except
21 appropriations' bills in there and it was rejected
22 because people wanted to keep that in there. That's
23 got to mean something and we may end up arguing that
24 in another court. But what the legislature has done
25 here is certainly not unreasonable. It's not

1 unprecedented, that there are other cases, at least
2 the Utah case we offer seems to be exactly this
3 situation.

4 And, again, I want to be -- if the Court goes to
5 the point of deciding this is a single-subject
6 violation, then the very important issue becomes
7 remedy and that's where we differ strongly with the
8 KNEA in characterizing this.

9 I would accept the characterization that this is,
10 at some level, appropriations including other
11 substantive provisions, but that it's some sort of
12 must-pass appropriation bill with, quote, "riders"
13 attached to it, I do not accept that
14 characterization. To me, that's important in
15 deciding the remedy because it's clear under Kansas
16 case law, if you've got a big appropriations' bill of
17 some kind and somebody sticks on a couple of things,
18 the so-called riders, our courts have said, well,
19 slice off the riders. I acknowledge that, but here
20 again, this bill would not have passed the senate
21 without all of this stuff in it. It may have passed
22 the house, but it would not have passed the senate.

23 And so if the point is you're trying to prevent
24 "logrolling", the remedy is to strike the entire
25 bill, not just to carve off the provisions that

1 particular plaintiffs may challenge. And, of course,
2 the logic of their argument suggests all of the
3 non-appropriations' provisions in the bill are
4 unconstitutional and should be stripped, more than
5 half the bill should be stripped away and that's kind
6 of an odd end result to end up with a smaller, less
7 than half of the bill left and say that's what the
8 legislature would have wanted or would have intended.

9 So unless you have further questions, I'll stop
10 there and allow my colleague to have his turn.

11 THE COURT: No, I think I've asked my
12 questions. Thank you.

13 MR. WALTA: Good morning, Your Honor, may
14 it please the Court, I am Jason Walta here
15 representing KNEA which brings this suit on behalf of
16 its members, the vast majority of whom are K through
17 12 teachers, who are the very teachers who by an
18 improperly enacted provision of HB 2506--

19 (THEREUPON, the reporter asked that the
20 last statement be repeated.)

21 MR. WALTA: By an improperly enacted
22 provision of 2506 are no longer covered by the Kansas
23 Teacher Due Process law.

24 The case on the merits is straightforward.
25 *Carlin* controls here. The attorney general is just

1 now suggesting that maybe the case was wrongly
2 decided or poorly reasoned, but in its own formal
3 opinion letters, I'm referring to 2009 too here, it's
4 called *Carlin* its seminal case on multiple subjects
5 in appropriations' bills. And *Carlin* dealt with an
6 extensive appropriations' bill that included a policy
7 provision placing limits on the budgets that schools
8 could adopt and these provisions were vetoed by the
9 governor and the lawsuit involved the attorney
10 general's challenge to that veto, which the governor
11 defended by saying the policy provisions were
12 unlawfully enacted under the one-subject rule and
13 could not have been included in the bill anyway. And
14 this was the supreme court's first occasion to really
15 interpret these 1974 amendments and I really take
16 strong issue with the idea that *Carlin* just brushed
17 past the '74 amendments and followed old case law.

18 Actually, there was very little citation to the
19 old case law. They focused very intently on what
20 affect those amendments had and the court held that
21 the 1974 amendments maintained a bright-line rule
22 against including policy riders in bills involving
23 appropriations. They said that to include in an
24 appropriation bill matters wholly unrelated to the
25 setting apart of state funds and the authorized

1 authorization for the expenditure of those funds
2 clearly added a second subject and that that violated
3 the single-subject rule.

4 And the logic and reasoning of *Carlin* can't be
5 confined just to the big omnibus appropriation bill.
6 Just the opposite, and you have to really dig into
7 the *Carlin* decision to understand that and this was
8 referenced a little bit earlier in the State's
9 argument, but at page 257 in the Kansas Reports, it
10 says *Carlin* said that the amendment -- and, again,
11 it's focusing specifically on what the amendment
12 accomplished, was meant to conform to actual
13 legislative practice and to show what that practice
14 was, it cited approvingly a series of appropriations'
15 bills prior, prior to the revision.

16 And if you look at those appropriations' bills,
17 which we do in pages 19 and 20 of our summary
18 judgment brief, those bills, some of them were big
19 omnibus appropriations' bills but others were not.
20 They were limited appropriations' bills for a single,
21 for a single department or for a single purpose and
22 all of those were bills that did not contain policy
23 riders and so those were the kinds of appropriations'
24 bills the court was looking at when it said that the
25 amendments conformed to this practice. Appropriation

1 bills that have a single purpose, appropriation bills
2 that cover appropriation for a number of different
3 purposes, those are the kinds of things that are
4 encompassed within that exception for the
5 single-subject rule.

6 And the court also said that attaching riders to,
7 quote, "important and extensive appropriations" was
8 just an example, a particularly instructive example,
9 of the kind of evil that single-subject rule was
10 meant to prevent. But just an example, not the sole
11 example, not limited to appropriations but just an
12 example and we certainly submit that this bill, the
13 bill, the funding bill that was enacted, again, was
14 very much an important and extensive bill.

15 And the State says that, well, maybe it is
16 reasonable or sensible for a legislature to combine
17 appropriations and policy riders in the same bill,
18 but that's not the question that's being asked of
19 this Court to decide. The question is whether it's
20 constitutional. There are plenty of states that
21 don't have a single-subject rule, that don't
22 interpret their single-subject rule in this way and
23 they seem to get along just fine. But Kansas does
24 have the single-subject rule. It gets along just
25 fine when it follows it. So the question is whether

1 it's constitutional or not.

2 I would like to point out a little bit of the
3 inconsistency between the attorney general's
4 litigation position here on this issue and the
5 position that it's expressed formally in its own
6 opinion letters throughout the years.

7 Here, they say that the 1974 amendment made a
8 significant change that should cause both the supreme
9 court and you to disregard the older cases laying
10 down this bright-line rule. But in a 1983 attorney
11 general opinion, 83-59, which we cite, they say that
12 the single-subject requirement has remained unchanged
13 since statehood. They say, as I said, *Carlin* is
14 probably bad law, it should be confined to fact in
15 fact. But in the 2009 formal opinion from the
16 attorney general, they call it the seminal case on
17 appropriations.

18 They also say that the proper remedy in this case
19 would be to toss out the entire bill, regardless of
20 the legislature's clear intent that its provisions be
21 severable. But in their attorney general's opinion
22 of 2000 -- this is 2007, I'm sorry, 2007-21, they say
23 that riders can be severed from an appropriations'
24 bill that has the severability clause.

25 I would like to turn to the issue of ripeness and

1 standing and injury. First of all, it's important to
2 take note that no additional facts are necessary to
3 decide the single-subject challenge before the Court
4 today, and that no facts that come up in a particular
5 teacher's termination will shed any additional light
6 on whether these riders in this bill violate the
7 single-subject rule. All the facts that are relevant
8 have already occurred. They are already before this
9 Court and the constitutional violation was complete
10 upon the governor signing the bill.

11 Now, as to whether KNEA's members are injured by
12 this bill, they certainly are. We've alleged as much
13 in our complaint and for purposes of a motion to
14 dismiss, that is sufficient. But the upshot of those
15 allegations is this. The policy provision, the due
16 process provisions of HB 2506 strip teachers of a
17 valuable job benefit. It strips them of it now and
18 that benefit is job security and, therefore,
19 decreases the overall compensation that they receive
20 in their job. It's no different than stripping a
21 teacher of their healthcare insurance. You wouldn't
22 say that that teacher is only injured once they get
23 sick and have to go to the hospital. They are
24 injured now. They no longer have that job benefit.

25 It's the same as if you stripped their pension.

1 You wouldn't say that that teacher is only injured
2 once they retire and don't have a pension. You would
3 say that they are injured now. And what I think is
4 the most analogous example would be a university
5 professor who has tenure. If you stripped that
6 professor of tenure, you wouldn't say that that
7 professor has not been injured and would only be
8 injured if he were later fired for reasons where
9 tenure would have otherwise protected him.

10 That loss of job protection could also have an
11 immediate chilling effect on teachers. Teachers
12 might be fearful, for example, to blow the whistle on
13 wrongdoing if they didn't think they were protected
14 against retaliation.

15 Now, the State says a few things. They say,
16 well, teachers through their professional negotiation
17 process could just bargain back those protections.
18 But the fact that they would have to achieve those
19 for the give and take of collective bargaining shows
20 that they are injured. They would have to give
21 something up in order to take it back and it might be
22 that the school wouldn't want to give them through
23 the process of collective negotiations, which would
24 also show that they've been injured because now the
25 State has something valuable that it's -- that it

1 doesn't want to give up that it didn't have before.

2 And, finally, there are some teachers, admittedly
3 very few, who are KNEA members who have no
4 professional negotiation at all because there is no
5 such relationship in the school districts where they
6 work and in that event, they don't have the option
7 for negotiating those benefits.

8 Now, the State also says that schools might offer
9 this just gratuitously. First of all, they can't
10 offer all of the protections that the due process law
11 has because the schools can't offer judicial review.
12 The existing provisions of the due process law
13 provide for a hearing, a decision, and then that
14 decision is appealable through the judicial process.
15 If that were just provided gratuitously outside of
16 any statute, there would be no provision for judicial
17 review and that is not something that -- so they
18 cannot get back everything that they had before.

19 The State said that every single provision in
20 this bill is about education. That's quite clearly
21 not the case. The first 27 or so sections deal with
22 appropriations, but all of those do not deal with
23 education. Several of them, like section (2), a
24 transfer of \$24 million from the department of
25 administration. Doesn't say anything about

1 education. Section (3), a transfer of \$2.5 million
2 from the department of aging and disability services.
3 No reference to education. Section (26), a transfer
4 of \$1 million from the highway patrol, again, no
5 reference to education. This is a multi-purpose
6 appropriation bill taking money from some
7 departments, having their appropriations lapse. It
8 affects a number of different state agencies and for
9 that reason, it is a very extensive -- in the words
10 *Carlin* used -- extendable appropriations' bill to
11 which there were attached a number of riders.

12 Now, we can discuss the issue of remedy here.
13 *Carlin* is clear that the appropriate remedy is to
14 strip out the challenged policy provision. Now, the
15 State's position here is really almost pure
16 "logrolling." They seem to be upping the stakes to
17 discourage the Court from ruling in KNEA's favor on
18 the single-subject rule, despite that the State has a
19 very unusual case for the attorney general to be
20 arguing in favor of throwing out more of the
21 legislature's work, in fact, as much of the
22 legislature's work as possible and they give
23 absolutely no weight at all to the severability
24 provision. They talked about how this was a
25 compromised bill. Well, that compromise included a

1 severability provision, one that's rather clear, and
2 so that should be honored as well.

3 I mentioned earlier that in its formally
4 expressed opinions, the attorney general has said
5 that severability is appropriate when you're
6 challenging a policy provision in an appropriations'
7 bill. We agree with that. We don't agree with their
8 *ad hoc* litigation position here that the entire bill
9 should be thrown out. There is no basis for throwing
10 out the other policy pieces or the appropriation
11 pieces. We don't claim to be injured by them and so
12 there is no need for them to be -- they don't serve
13 any appeal purpose for us. We are not injured by
14 them and the Court's remedy in this case should be
15 limited to the injury that we've, that we've
16 received.

17 Now, it may be that a decision in KNEA's favor
18 here would set a precedent or have some kind of
19 implications for other policy provisions in that
20 bill. But that doesn't require the Court to go
21 further than the relief that was requested and the
22 relief that we've requested is simply declaration
23 that the due process provisions of HB 2506 are void
24 and an injunction that prevents their enforcement.

25 I want to touch finally on the issue of the

1 governor, Governor Brownback as a defendant. I
2 understood the State to be conceding that we can get
3 all of the relief we need from the State as a
4 defendant and given that concession, I'm certainly
5 happy to stipulate to the dismissal of Governor
6 Brownback.

7 THE COURT: All right.

8 MR. WALTA: I'm happy to entertain any
9 questions the Court might have.

10 THE COURT: Well, I think you addressed it
11 briefly, but I would like you to talk a little bit
12 more about the standing issue of KNEA as it relates
13 to the fact that the State would have me believe that
14 you're two-fold from having the ability to have
15 standing. You have members and then members of the
16 membership and then you. So speak to me a little bit
17 about their argument as to standing as it relates to
18 that.

19 MR. WALTA: Yeah, I'm happy to. First of
20 all, paragraph four of the complaint would have to be
21 taken as true for purposes of the motion to dismiss.
22 To settle the matter, we say that these teachers are
23 our members and these teachers are our members.
24 KNEA, the local association and, in fact, NEA where I
25 work, we have what is called a unified membership

1 requirement. Any teacher who is a member of a local
2 association must also be a direct member of the state
3 association, in this case KNEA, and must also be a
4 direct member of NEA. So it is not the case that
5 KNEA represents the locals and the locals, in turn,
6 represent the teachers. All of the affected teachers
7 are also direct members of KNEA and in that sense, we
8 are not at all twice removed. We are instead a
9 direct representative. We have direct membership of
10 all of the teachers who are affected who are members
11 throughout the state.

12 If the Court needs -- feels as though it needs
13 additional factual development on that, we would be
14 certainly happy to provide an affidavit laying out
15 all of that. But the fact remains that we've alleged
16 these are our members and, in fact, they are our
17 members and so the twice-removed problem is really a
18 red herring.

19 THE COURT: All right. And their position
20 is members lack standing to sue individually or don't
21 have standing at this time because it's not ripe.
22 What's your position on that?

23 MR. WALTA: Well, my position, first of
24 all, is that they are. As I discussed earlier, our
25 position is that the removal of these rights

1 decreases, essentially, the overall value of their
2 compensation.

3 THE COURT: They don't -- your position is
4 we don't have to wait until someone is fired to
5 address the due process issue. The fact that the
6 bill was signed into law and is law takes away a
7 significant right of your members.

8 MR. WALTA: A significant right, a
9 significant job benefit, and a valuable one. I
10 probably couldn't tell you in dollars and cents
11 exactly how much it's worth. It might vary from
12 district to district, but that's not required for
13 standing.

14 And I also want to add that the primary relief
15 that we are looking for here is a declaration that
16 these provisions are invalid and in the declaratory
17 relief context, standing requirements are much more
18 flexible and this Court really needs no more factual
19 development coming from an individual teacher's
20 termination. You wouldn't elucidate the
21 single-subject question at all to have a debate about
22 whether a teacher engaged in grave misconduct or
23 minor misconduct causing his or her termination.
24 That just doesn't get us any closer to an answer on
25 the single-subject question and so it's our position

1 that they've been deprived of a valuable job benefit
2 now, that the facts are certainly completely
3 developed for a decision on the single-subject
4 question, and that because the primary relief we're
5 seeking is declaratory, there is really no need for
6 us to show an injury in the dollars-and-cents' level
7 of specificity. We're injured. The violation is
8 complete. The case is ripe for decision by this
9 Court.

10 THE COURT: Thank you. Mr. McAllister.

11 MR. McALLISTER: Well, Your Honor, I think
12 I would like to address just three points, but
13 certainly answer if you have other questions for me.
14 First of all on the standing issue, I heard my
15 colleague describe -- excuse me -- the loss of the
16 termination process rights as no different than
17 taking away health insurance or pension funds. Well,
18 it's absolutely different. If we took away health
19 insurance, people will have to pay for it themselves
20 if the school district no longer pays and if you took
21 away pension rights, that's actually money that's no
22 longer accruing for the benefit of that employee.

23 That's the point here. The loss of the
24 termination process is totally speculative whether
25 and if it will ever affect any of the teachers here.

1 They may be able to say, well, statistically every
2 year there are a few teachers non-renewed so it may
3 be that somebody maybe next May will be affected, but
4 we don't know who, we don't know how many, we don't
5 even know for sure if they will be because, again,
6 some districts have adopted the rights to protect the
7 teachers.

8 The second thing on the membership point, I found
9 that interesting. I did not understand it
10 completely, the connections from NEA on down, but as
11 I hear my colleague arguing, it suggests that NEA
12 could have just brought this suit under their theory
13 because the teachers have to be members all the way
14 up the chain. So why stop with KNEA. NEA could also
15 be the plaintiff here. So we could have a national
16 organization coming in and suing the state over this
17 and, again, the end result is I think it takes a very
18 broad view of standing, which even in declaratory
19 actions, there still are standing requirements. It's
20 not all just out the window because we have a
21 declaratory action.

22 The second point I would like to make, the notion
23 that the bill does not all relate to education, with
24 all due respect, I disagree. I don't have it in
25 front of me, but I think the provisions taking money

1 from various places were in order to fund education.
2 So if you're removing money from one department of
3 state government and directing it to education, it
4 seems to me that, logically, still involves
5 education. So I really do think all the provisions
6 involve education.

7 On the remedy point, in particular, I would point
8 the Court to some of the older cases and even *Tyson*,
9 a more recent case, which very clearly say the
10 general rule and the general remedy for a
11 single-subject violation is to strike the entire
12 bill. Cases like *Reilly versus Knapp*, which I think
13 is a 1919 case cited in the briefing, *Cashin versus*
14 *State Highway Commission*, which may be 1930s, say
15 that's clear. The exception, the narrow exception is
16 the riders on appropriations' bills. So, again, I
17 think we come back to the question where we differ on
18 the characterization.

19 Here, do we have riders on appropriations' bills?
20 Well, that would fit within the exception where you
21 just sever the riders, but the State's view is that's
22 not really a fair way to characterize this bill, and
23 particularly given the history in the Kansas Senate
24 of how this got through. The logic behind single
25 subject is you're trying to preclude "logrolling."

1 It's not accomplished by carving off just a couple of
2 sections. If it took all of those sections
3 collectively to get a majority vote in the senate,
4 the only remedy that comports with the theory and the
5 rationale of single subject is to invalidate the
6 entire action.

7 So unless the Court has further questions, I
8 think that's all I have to say.

9 THE COURT: No, I don't believe so. Thank
10 you.

11 MR. McALLISTER: Thank you.

12 THE COURT: Anything additional?

13 MR. WALTA: Your Honor, just a couple of
14 quick nits to pick. On this standing issue, the
15 State says that this is nothing like health
16 insurance, it's nothing like pensions. They
17 obviously didn't mention the example of a tenured
18 university professor, but it is quite like health
19 insurance. You could have a teacher who never got
20 sick or you could speculate about how the school
21 would just come in gratuitously and pay their
22 hospital bills, but the loss of the job benefit is
23 part of their compensation and they are harmed by its
24 being taken away.

25 The same goes for pension. You could have a

1 teacher who -- you could speculate whether teachers
2 will get hit by a bus on the day before their
3 retirement and will never collect that pension. It
4 is something that is there to be called upon later,
5 but it's a part of your compensation, it's part of
6 your job benefits now, and its removal is an injury.

7 On the issue of the remedy, they are essentially
8 asking this Court to -- they acknowledge that the
9 proper remedy for a rider on an appropriations' bill
10 is to strip that and if this Court finds that that's
11 what the violation is, which is what we've asked this
12 Court to do, then I think it follows that is the
13 appropriate remedy. They're essentially asking to
14 relitigate the merits again in the remedy section and
15 if this Court rules in our favor on the merits, it
16 should follow that through to the remedy.

17 And there's been a lot of speculation about what
18 was, what was the impetus for the passage of the
19 bill. This bill wouldn't have passed without the
20 inclusion of the due process provision. That is all
21 a lot of speculation that I don't think can really be
22 sustained and it certainly gives no weight at all to
23 the idea that the severability provision was also
24 included in the statute or was also included in the
25 bill as part of the overall bargaining and that's

1 entitled to a great deal of weight when it comes to
2 the severability question.

3 THE COURT: Thank you. I'm assuming you
4 have nothing further, Mr. McAllister?

5 MR. McALLISTER: I rest, yes.

6 THE COURT: Thank you. Thank you for the
7 arguments. First of all, I will grant, in part, the
8 motion to dismiss as it relates to Governor
9 Brownback, finding that it's appropriate to dismiss
10 him from this action and there's no objection by, as
11 I understood it, by the plaintiff to granting that
12 dismissal.

13 As to the remaining issues here, there are
14 significant issues, a lot of which I believe are
15 first impression. I've done some significant review
16 and looking at the case law and what has been
17 suggested by both the supreme court in the past and
18 currently, and I think as both of you said, the case
19 that addresses this that's the most recent is *Stephan*
20 *v Carlin* and there's really not been too many cases
21 since then that have anything to do with this. The
22 *Tyson* case a little bit.

23 So I will go back and review those once again in
24 light of the arguments made by the parties to the
25 Court today, and come up with a determination on the

1 remainder of the motion to dismiss and the motion for
2 summary judgment in one ruling and I'll get that out
3 as rapidly as my schedule will allow me to do that.
4 Anything else?

5 MR. SCHAUNER: No, Your Honor.

6 MR. McALLISTER: No, Your Honor.

7 THE COURT: Mr. McAllister, if you would
8 prepare an order evidencing the Court's ruling, I
9 would appreciate that. Is there anything else? If
10 not, the parties are excused.

11 (THEREUPON, the hearing concluded.)

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C E R T I F I C A T E

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

I, Jennifer L. Olsen, CSR, a Certified Shorthand Reporter, and the regularly appointed, qualified and acting official reporter of the Third Judicial District of the State of Kansas, do hereby certify that as such Official Reporter, I was present at and reported in Stenotype shorthand the above and foregoing proceedings in Case Number 2014-CV-789, *Kansas National Education Association vs. State of Kansas, et al.*, heard on February 12, 2015, before the Honorable Larry D. Hendricks, Judge of Division 6 of said Court.

I further certify that a transcript of my shorthand notes was typed and that the foregoing transcript, consisting of 42 typewritten pages, is a true copy of said **ORAL ARGUMENTS OF MOTIONS' HEARING**.

SIGNED, OFFICIALLY SEALED, and DELIVERED via email/PDF and U.S. Postal Service this 18th day of February, 2015.

Jennifer L. Olsen, CSR, #1288

#	4			
#1288 [1] - 43:22	4/36 [1] - 2:4	35:5, 36:12	3:4	association [8] -
\$	41 [1] - 2:7	addressed [1] -	appeared [2] - 1:16,	4:19, 4:20, 11:4,
\$24 [1] - 30:24	42 [1] - 43:17	33:10	1:21	33:24, 34:2, 34:3
,	43 [1] - 2:9	addresses [1] -	applied [1] - 10:7	Association [8] -
		41:19	apply [1] - 9:13	1:16, 1:18, 3:2, 4:17,
'69 [2] - 14:4, 14:9		adhere [1] - 18:14	appointed [1] - 43:5	6:1, 43:11
'74 [1] - 24:17	6	administration [1] -	appreciate [1] - 42:9	associational [2] -
		30:25	appropriate [14] -	4:16, 4:25
1	6 [3] - 1:1, 1:11,	admitted [1] - 3:6	16:11, 16:12, 16:14,	assuming [1] - 41:3
1 [1] - 31:4	43:13	admittedly [1] - 30:2	18:23, 20:21, 20:23,	attached [4] - 16:2,
10th [2] - 1:18, 1:23	66612 [1] - 1:19	adopt [1] - 24:8	20:24, 31:13, 32:5,	17:1, 22:13, 31:11
12 [2] - 23:17, 43:12	66612-1597 [1] - 1:24	adopted [8] - 5:20,	40:13, 41:9	attaching [1] - 26:6
120 [1] - 1:23		5:25, 7:7, 10:7, 10:8,	Appropriation [1] -	attacking [1] - 6:12
12th [1] - 1:13		37:6	20:7	attorney [1] - 3:10,
16 [3] - 13:3, 13:5,	7	advisory [2] - 10:9,	appropriation [12] -	7:22, 12:10, 23:25,
20:13		10:11	13:6, 13:17, 18:13,	24:9, 27:3, 27:10,
18th [1] - 43:20	715 [1] - 1:18	affect [2] - 24:20,	20:14, 22:12, 24:24,	27:16, 27:21, 31:19,
19 [1] - 25:17		36:25	25:5, 25:25, 26:1,	32:4
1919 [1] - 38:13	8	affected [4] - 11:19,	26:2, 31:6, 32:10	authenticity [1] -
1930s [1] - 38:14		34:6, 34:10, 37:3	appropriations [15] -	14:8
1968 [2] - 14:3, 14:9	83-59 [1] - 27:11	affects [1] - 31:8	13:25, 14:5, 15:6,	authorization [1] -
1974 [5] - 13:20,	A	affidavit [1] - 34:14	16:25, 18:21, 20:4,	25:1
21:19, 24:15, 24:21,		affiliated [1] - 5:6	20:12, 22:10, 24:23,	authorized [1] -
27:7		affirming [1] - 14:8	26:7, 26:11, 26:17,	24:25
1983 [1] - 27:10		agencies [1] - 31:8	27:17, 30:22, 31:7	authorizing [1] -
2		aging [1] - 31:2	appropriations' [27]	20:16
2 [4] - 13:2, 13:5,	ability [1] - 33:14	agree [8] - 4:1, 6:25,	- 14:5, 14:17, 14:18,	automatic [1] - 17:25
20:13, 30:23	able [2] - 11:10, 37:1	9:20, 14:16, 14:19,	15:1, 16:1, 18:12,	automatically [2] -
2.5 [1] - 31:1	absolute [1] - 8:24	19:12, 32:7	19:1, 19:19, 19:25,	18:17, 18:19
20 [1] - 25:17	absolutely [5] - 8:6,	al [2] - 1:20, 43:12	20:23, 21:7, 21:21,	Avenue [1] - 1:23
2000 [1] - 27:22	14:20, 16:3, 31:23,	allegations [1] -	22:16, 23:3, 24:5,	
2007 [1] - 27:22	36:18	28:15	24:6, 25:14, 25:16,	
2007-21 [1] - 27:22	abstract [2] - 11:17,	alleged [2] - 28:12,	25:19, 25:20, 25:23,	
2009 [2] - 24:3, 27:15	11:18	34:15	27:23, 31:10, 32:6,	
2014-CV-789 [3] -	accept [2] - 22:9,	alleges [1] - 8:23	38:16, 38:19, 40:9	
1:4, 3:4, 43:10	22:13	allow [2] - 23:10,	approvingly [1] -	
2015 [3] - 1:13,	accomplish [1] -	42:3	25:14	
43:12, 43:21	15:10	almost [1] - 31:15	arguably [1] - 10:21	
23/39 [1] - 2:5	accomplished [2] -	amendment [3] -	argue [4] - 3:7, 3:17,	
2506 [4] - 23:18,	25:12, 39:1	25:10, 25:11, 27:7	3:20, 4:2	
23:22, 28:16, 32:23	account [4] - 13:3,	Amendment [3] -	arguing [7] - 7:10,	
257 [1] - 25:9	13:24, 20:11, 21:6	8:9, 8:14, 9:10	10:22, 10:24, 19:9,	
26 [1] - 31:3	accruing [1] - 36:22	amendments [5] -	21:23, 31:20, 37:11	
27 [1] - 30:21	achieve [2] - 17:4,	13:20, 24:15, 24:17,	argument [8] - 3:11,	
3	29:18	24:20, 24:21, 25:25	6:7, 7:12, 14:18,	
3 [3] - 6:4, 10:2, 31:1	acknowledge [2] -	amount [3] - 16:12,	17:21, 23:2, 25:9,	
34 [1] - 17:15	22:19, 40:8	16:14, 20:7	33:17	
	acting [1] - 43:6	analogous [1] - 29:4	ARGUMENT [1] - 1:8	
	action [4] - 4:12,	answer [5] - 4:13,	ARGUMENTS [1] -	
	37:21, 39:6, 41:10	17:20, 18:3, 19:3,	43:18	
	actions [1] - 37:19	35:24, 36:13	arguments [4] -	
	actual [4] - 5:3, 6:9,	anyway [1] - 24:13	13:11, 13:12, 41:7,	
	11:1, 25:12	apart [2] - 9:1, 24:25	41:24	
	ad [1] - 32:8	appeal [1] - 32:13	Article [5] - 6:4, 10:2,	
	add [3] - 14:16,	appealable [1] -	13:2, 13:5, 20:13	
	14:17, 35:14	30:14	aspects [1] - 5:2	
	added [4] - 13:21,	appealed [1] - 12:22	asserted [1] - 4:22	
	18:9, 20:22, 25:2	APPEARANCES [1]	assistant [1] - 3:10	
	additional [4] - 28:2,	- 1:14	ASSOCIATION [1] -	
	28:5, 34:13, 39:12	appearances [1] -	1:3	
	address [6] - 4:8,			
	7:25, 15:11, 20:18,			

JENNIFER L. OLSEN, Certified Shorthand Reporter

Third Judicial District, Division 12, 233-8200 X-4302

<p>25:18 bill [52] - 13:5, 14:17, 14:18, 15:1, 16:1, 16:19, 16:25, 17:2, 17:16, 17:22, 18:22, 18:25, 19:1, 19:4, 19:13, 20:23, 22:12, 22:16, 22:20, 22:25, 23:3, 23:5, 23:7, 24:6, 24:13, 24:24, 25:5, 26:12, 26:13, 26:14, 26:17, 27:19, 27:24, 28:6, 28:10, 28:12, 30:20, 31:6, 31:10, 31:25, 32:7, 32:8, 32:20, 35:6, 37:23, 38:12, 38:22, 40:9, 40:19, 40:25 bill's [1] - 13:17 bill's [27] - 13:6, 13:25, 14:3, 14:5, 14:9, 18:12, 18:13, 19:20, 19:25, 20:7, 20:14, 21:7, 21:21, 24:5, 24:22, 25:15, 25:16, 25:18, 25:19, 25:20, 25:22, 25:24, 26:1, 38:16, 38:19, 39:22 bit [5] - 25:8, 27:2, 33:11, 33:16, 41:22 blindly [4] - 21:8, 21:13, 21:14, 21:16 blow [1] - 29:12 branch [1] - 12:16 brief [1] - 25:18 briefing [2] - 15:15, 38:13 briefly [1] - 33:11 briefs [1] - 4:18 bright [2] - 24:21, 27:10 bright-line [2] - 24:21, 27:10 bring [2] - 6:18, 7:19 bringing [4] - 6:25, 7:20, 8:13, 12:16 brings [2] - 12:10, 23:15 broad [1] - 37:18 broader [1] - 21:3 broadly [2] - 19:23, 19:24 brought [4] - 9:11, 9:12, 12:20, 37:12 Brownback [6] - 3:3, 3:9, 8:11, 33:1, 33:6, 41:9 BROWNBACK [1] - 1:5</p>	<p>brushed [1] - 24:16 budget [1] - 19:12 budgets [1] - 24:7 Building [1] - 1:23 bus [1] - 40:2 BY [2] - 2:4, 2:5</p> <p style="text-align: center;">C</p> <p>cannot [3] - 8:10, 8:12, 30:18 capacity [2] - 1:6, 9:4 care [1] - 21:9 Carlin [16] - 12:12, 13:22, 13:25, 15:1, 19:18, 21:1, 21:6, 23:25, 24:4, 24:5, 24:16, 25:4, 25:7, 25:10, 27:13, 31:10, 31:13, 41:20 carve [2] - 16:22, 22:25 carving [1] - 39:1 Case [2] - 1:4, 43:10 case [43] - 3:3, 4:10, 4:17, 6:2, 7:3, 7:23, 8:15, 9:21, 9:22, 10:4, 10:13, 10:15, 11:3, 11:21, 12:12, 13:19, 13:22, 14:24, 14:25, 15:8, 17:6, 17:9, 18:24, 22:2, 22:16, 23:24, 24:1, 24:4, 24:17, 24:19, 27:16, 27:18, 30:21, 31:19, 32:14, 34:3, 34:4, 36:8, 38:9, 38:13, 41:16, 41:18, 41:22 cases [14] - 7:20, 8:7, 8:8, 10:18, 12:11, 12:14, 14:22, 15:7, 21:9, 22:1, 27:9, 38:8, 38:12, 41:20 Cashin [1] - 38:13 causing [1] - 35:23 cents [1] - 35:10 cents' [1] - 36:6 certain [1] - 11:22 certainly [15] - 7:8, 9:25, 10:2, 12:4, 15:24, 16:4, 18:10, 21:25, 26:12, 28:12, 33:4, 34:14, 36:2, 36:13, 40:22 CERTIFICATE [1] - 2:9 Certified [1] - 43:4</p>	<p>certify [2] - 43:7, 43:15 chain [1] - 37:14 challenge [4] - 7:9, 23:1, 24:10, 28:3 challenged [1] - 31:14 challenging [1] - 32:6 change [5] - 6:19, 11:11, 13:24, 14:6, 27:8 changed [1] - 13:21 changing [1] - 12:8 characterization [3] - 22:9, 22:14, 38:18 characterize [3] - 15:25, 16:24, 38:22 characterizing [1] - 22:8 chilling [2] - 12:1, 29:11 chosen [1] - 6:18 Chris [1] - 3:10 citation [1] - 24:18 cite [1] - 27:11 cited [3] - 4:17, 25:14, 38:13 citizen [1] - 7:15 claim [14] - 4:22, 4:24, 6:18, 6:20, 6:21, 6:23, 6:25, 7:2, 7:11, 7:16, 7:23, 8:19, 10:1, 32:11 claiming [1] - 19:11 claims [6] - 6:17, 7:21, 8:13, 9:11, 9:12, 10:19 clause [1] - 27:24 clear [7] - 8:2, 14:15, 22:15, 27:20, 31:13, 32:1, 38:15 clearly [5] - 15:1, 21:4, 25:2, 30:20, 38:9 close [1] - 15:24 closer [1] - 35:24 cobble [1] - 15:19 colleague [3] - 23:10, 36:15, 37:11 colleagues [1] - 12:12 collect [1] - 40:3 collective [2] - 29:19, 29:23 collectively [3] - 10:22, 10:23, 39:3 combine [1] - 26:16 coming [2] - 35:19, 37:16</p>	<p>Commission [1] - 38:14 compensation [4] - 28:19, 35:2, 39:23, 40:5 complaining [3] - 5:10, 11:2, 11:20 complaint [5] - 4:6, 5:21, 8:23, 28:13, 33:20 complete [2] - 28:9, 36:8 completely [2] - 36:2, 37:10 comports [1] - 39:4 compromise [1] - 31:25 compromised [1] - 31:25 concede [1] - 13:10 conceding [1] - 33:2 concern [1] - 16:19 concession [1] - 33:4 conclude [1] - 18:18 concluded [1] - 42:11 conclusion [1] - 6:3 confess [1] - 13:18 confined [2] - 25:5, 27:14 conform [1] - 25:12 conformed [1] - 25:25 confronted [1] - 18:3 connection [1] - 8:22 connections [1] - 37:10 considers [1] - 4:9 consistent [1] - 18:11 consisting [1] - 43:17 Constitution [1] - 20:13 constitution [4] - 7:18, 8:20, 10:5, 13:20 constitutional [10] - 6:20, 6:23, 9:10, 10:1, 17:19, 18:11, 21:7, 26:20, 27:1, 28:9 construe [1] - 17:19 contain [2] - 13:5, 25:22 context [1] - 35:17 controls [1] - 23:25 controversy [2] - 9:22, 10:5</p>	<p>copy [1] - 43:17 counsel [2] - 1:16, 1:21 counselor [1] - 21:14 COUNTY [2] - 1:1, 43:3 County [1] - 1:12 couple [5] - 5:2, 13:1, 14:21, 22:17, 39:1, 39:13 course [3] - 8:9, 17:14, 23:1 COURT [28] - 1:1, 3:1, 3:12, 3:22, 4:3, 6:11, 9:20, 10:4, 10:15, 11:12, 12:24, 14:7, 18:20, 19:18, 20:5, 21:13, 21:17, 23:11, 33:7, 33:10, 34:19, 35:3, 36:10, 39:9, 39:12, 41:3, 41:6, 42:7 court [21] - 9:9, 9:23, 10:7, 11:6, 12:5, 12:14, 12:17, 12:21, 13:18, 14:10, 19:24, 20:5, 21:8, 21:11, 21:12, 21:24, 24:20, 25:24, 26:6, 27:9, 41:17 Court [36] - 1:12, 3:1, 3:13, 4:4, 4:8, 6:3, 6:9, 9:17, 11:18, 13:19, 14:1, 17:9, 17:10, 17:11, 17:16, 17:20, 18:2, 18:18, 20:6, 22:4, 23:14, 26:19, 28:3, 28:9, 31:17, 32:20, 33:9, 34:12, 35:18, 36:9, 38:8, 39:7, 40:8, 40:10, 40:12, 40:15, 41:25, 43:14 Court's [2] - 32:14, 42:8 court's [2] - 16:13, 24:14 courts [3] - 11:24, 12:4, 22:18 cover [1] - 26:2 covered [2] - 13:13, 23:22 crime [1] - 12:1 CSR [2] - 43:4, 43:22</p> <p style="text-align: center;">D</p> <p>Dale [1] - 3:3 David [2] - 1:17, 3:5 deal [4] - 8:9, 30:21,</p>
---	--	---	---	---

JENNIFER L. OLSEN, Certified Shorthand Reporter

Third Judicial District, Division 12, 233-8200 X-4302

<p>30:22, 41:1 dealt [1] - 24:5 debate [1] - 35:21 decades [1] - 14:3 decide [2] - 26:19, 28:3 decided [3] - 14:4, 14:24, 24:2 deciding [2] - 22:5, 22:15 decision [6] - 25:7, 30:13, 30:14, 32:17, 36:3, 36:8 declaration [2] - 32:22, 35:15 declaratory [4] - 35:16, 36:5, 37:18, 37:21 decreases [2] - 28:19, 35:1 defend [1] - 7:10 DEFENDANT [1] - 2:7 defendant [6] - 4:12, 8:1, 8:5, 8:16, 9:14, 9:15, 33:1, 33:4 Defendants [2] - 1:7, 1:20 defendants' [1] - 3:13 defended [1] - 24:11 definitely [1] - 16:16 degree [1] - 20:1 DELIVERED [1] - 43:19 demonstrate [1] - 13:8 denying [1] - 14:8 department [4] - 25:21, 30:24, 31:2, 38:2 departments [1] - 31:7 deprive [1] - 5:23 deprived [1] - 36:1 describe [1] - 36:15 despite [1] - 31:18 determination [1] - 41:25 determine [1] - 12:17 developed [1] - 36:3 development [2] - 34:13, 35:19 differ [2] - 22:7, 38:17 difference [2] - 16:23, 21:19 different [13] - 7:1, 7:2, 10:19, 12:9, 12:15, 12:18, 15:3,</p>	<p>16:12, 26:2, 28:20, 31:8, 36:16, 36:18 dig [1] - 25:6 direct [6] - 6:17, 20:7, 20:11, 34:2, 34:4, 34:7, 34:9 directing [1] - 38:3 direction [1] - 20:9 directly [2] - 9:3, 12:17 disability [1] - 31:2 disagree [2] - 13:8, 37:24 discourage [1] - 31:17 discretion [1] - 5:19 discuss [1] - 31:12 discussed [1] - 34:24 DISMISS [1] - 2:3 dismiss [6] - 3:13, 3:23, 4:5, 28:14, 33:21, 41:8, 41:9, 42:1 dismissal [2] - 33:5, 41:12 DISMISSAL [1] - 2:7 dismissed [1] - 4:6 disregard [1] - 27:9 DISTRICT [1] - 1:1 district [6] - 7:7, 12:21, 21:11, 35:12, 36:20 District [2] - 1:12, 43:7 districts [6] - 5:18, 5:19, 5:21, 5:24, 30:5, 37:6 DIVISION [1] - 1:1 Division [2] - 1:11, 43:13 doctrine [3] - 9:9, 10:11, 10:13 dollars [3] - 16:15, 35:10, 36:6 dollars-and-cents' [1] - 36:6 done [6] - 14:2, 14:13, 19:17, 21:24, 41:15 down [3] - 17:13, 27:10, 37:10 Due [1] - 23:23 due [13] - 5:11, 6:14, 11:12, 11:13, 13:23, 20:25, 28:15, 30:10, 30:12, 32:23, 35:5, 37:24, 40:20</p>	<p style="text-align: center;">E</p> <p>earliest [1] - 5:14 early [1] - 13:19 EDUCATION [1] - 1:3 education [16] - 17:23, 18:9, 18:15, 18:25, 21:4, 30:20, 30:23, 31:1, 31:3, 31:5, 37:23, 38:1, 38:3, 38:5, 38:6 Education [3] - 1:17, 3:2, 43:11 Educational [1] - 1:15 effect [5] - 5:12, 5:23, 12:1, 13:16, 29:11 element [1] - 5:1 Eleventh [3] - 8:9, 8:13, 9:10 eliminate [2] - 5:23, 7:2 elucidate [1] - 35:20 email/PDF [1] - 43:20 employee [1] - 36:22 enacted [4] - 23:18, 23:21, 24:12, 26:13 encompassed [1] - 26:4 end [4] - 21:23, 23:6, 37:17 enforcement [3] - 8:4, 9:2, 32:24 engage [1] - 15:13 engaged [1] - 35:22 entertain [1] - 33:8 entire [6] - 16:22, 22:24, 27:19, 32:8, 38:11, 39:6 entitled [1] - 41:1 equity [1] - 18:6 essence [2] - 10:23, 19:10 essentially [3] - 35:1, 40:7, 40:13 established [1] - 4:10 et [2] - 1:20, 43:12 Euler [1] - 10:17 Eulers [1] - 10:16 event [1] - 30:6 evidencing [1] - 42:8 evil [1] - 26:9 Ex [1] - 9:8 exactly [4] - 14:25, 20:20, 22:2, 35:11 example [14] - 10:10,</p>	<p>11:23, 12:10, 19:4, 20:6, 20:18, 26:8, 26:10, 26:11, 26:12, 29:4, 29:12, 39:17 except [6] - 10:21, 13:6, 13:24, 18:12, 21:7, 21:20 excepted [1] - 13:17 exception [6] - 12:2, 18:13, 26:4, 38:15, 38:20 excuse [1] - 36:15 excused [1] - 42:10 executive [2] - 8:18, 12:16 existing [1] - 30:12 expenditure [2] - 20:16, 25:1 expenditures [1] - 20:10 explore [1] - 6:14 express [1] - 20:9 expressed [2] - 27:5, 32:4 extendable [1] - 31:10 extensive [7] - 19:25, 20:2, 20:3, 24:6, 26:7, 26:14, 31:9 extent [1] - 16:7</p>	<p>37:2 figure [1] - 14:22 filed [1] - 3:23 finally [2] - 30:2, 32:25 finance [2] - 8:15, 18:7 fine [2] - 26:23, 26:25 fired [2] - 29:8, 35:4 first [12] - 3:23, 4:25, 18:1, 24:14, 28:1, 30:9, 30:21, 33:19, 34:23, 36:14, 41:7, 41:15 fit [2] - 14:24, 38:20 fits [1] - 15:8 fix [1] - 16:15 flexible [2] - 17:12, 35:18 Floor [1] - 1:23 focused [1] - 24:19 focusing [1] - 25:11 fold [1] - 33:14 folks [1] - 20:19 follow [4] - 7:17, 10:11, 21:14, 40:16 followed [2] - 21:16, 24:17 follows [2] - 26:25, 40:12 foregoing [2] - 43:10, 43:16 foreign [1] - 20:15 forewarned [2] - 12:13, 12:19 formal [2] - 24:2, 27:15 formally [2] - 27:5, 32:3 forth [1] - 4:16 forward [1] - 19:7 f [1] - 4:25 four [1] - 33:20 free [1] - 12:3 frequently [1] - 10:7 front [1] - 37:25 function [1] - 9:9 fund [2] - 19:14, 38:1 fundamental [1] - 16:23 fundamentally [1] - 8:4 funding [2] - 18:6, 26:13 funds [4] - 20:10, 24:25, 25:1, 36:17 furthermore [1] - 5:17 future [1] - 6:8</p>
F				
<p>f - 5:20, 6:5, 6:12, 7:5, 7:11, 8:7, 11:20, 11:25, 13:14, 14:23, 15:4, 16:4, 16:13, 21:10, 21:20, 27:14, 27:15, 29:18, 31:21, 33:13, 33:24, 34:15, 34:16, 35:5 facts [6] - 6:9, 19:21, 28:2, 28:4, 28:7, 36:2 factual [2] - 34:13, 35:18 fair [1] - 38:22 familiar [1] - 17:10 favor [4] - 31:17, 31:20, 32:17, 40:15 fear [1] - 15:12 fearful [1] - 29:12 February [3] - 1:13, 43:12, 43:21 federal [11] - 6:5, 8:8, 8:13, 9:9, 9:11, 9:23, 10:1, 10:7, 10:11, 10:14, 12:4 few [3] - 29:15, 30:3,</p>				

<p>G</p> <p>Gannon [3] - 8:16, 16:9</p> <p>General [1] - 1:22</p> <p>general [11] - 3:10, 7:22, 12:10, 19:12, 23:25, 27:11, 27:16, 31:19, 32:4, 38:10</p> <p>general's [3] - 24:10, 27:3, 27:21</p> <p>gentlemen [1] - 3:15</p> <p>germane [1] - 4:21</p> <p>given [3] - 5:13, 33:4, 38:23</p> <p>govern [1] - 10:3</p> <p>government [4] - 8:11, 8:21, 19:14, 38:3</p> <p>governor [13] - 4:11, 7:25, 8:2, 8:17, 8:21, 9:3, 9:16, 12:11, 15:2, 24:9, 24:10, 28:10, 33:1</p> <p>Governor [5] - 1:6, 3:9, 33:1, 33:5, 41:8</p> <p>grant [1] - 41:7</p> <p>granted [1] - 12:8</p> <p>granting [1] - 41:11</p> <p>gratuitously [3] - 30:9, 30:15, 39:21</p> <p>grave [1] - 35:22</p> <p>great [1] - 41:1</p> <p>Grunewald [1] - 3:11</p> <p>guess [1] - 14:21</p> <p>guidance [1] - 20:6</p>	<p>HEARING [1] - 43:18</p> <p>held [2] - 12:22, 24:20</p> <p>help [1] - 21:15</p> <p>helped [1] - 16:18</p> <p>helpful [1] - 3:21</p> <p>helps [1] - 13:8</p> <p>Hendricks [2] - 1:11, 43:13</p> <p>hereby [3] - 18:22, 18:23, 43:7</p> <p>herring [1] - 34:18</p> <p>high [2] - 12:15, 17:11</p> <p>Highway [1] - 38:14</p> <p>highway [1] - 31:4</p> <p>history [2] - 14:2, 38:23</p> <p>hit [1] - 40:2</p> <p>hoc [1] - 32:8</p> <p>hold [1] - 20:12</p> <p>honest [1] - 14:24</p> <p>Honor [13] - 3:19, 4:14, 7:1, 8:2, 13:2, 14:19, 19:3, 21:3, 23:13, 36:11, 39:13, 42:5, 42:6</p> <p>Honorable [2] - 1:11, 43:13</p> <p>honored [1] - 32:2</p> <p>hospital [2] - 28:23, 39:22</p> <p>house [2] - 16:5, 22:22</p>	<p>24:13, 31:25, 40:24</p> <p>including [2] - 22:10, 24:22</p> <p>Inclusion [1] - 40:20</p> <p>inconsistency [1] - 27:3</p> <p>increasing [2] - 16:17</p> <p>Independently [1] - 3:18</p> <p>Indication [1] - 5:15</p> <p>individual [3] - 4:23, 10:25, 35:19</p> <p>Individually [2] - 4:20, 34:20</p> <p>injunction [1] - 32:24</p> <p>Injured [13] - 6:24, 28:11, 28:22, 28:24, 29:1, 29:3, 29:7, 29:8, 29:20, 29:24, 32:11, 32:13, 36:7</p> <p>injury [11] - 5:1, 5:8, 6:4, 6:5, 6:7, 7:21, 11:20, 28:1, 32:15, 36:6, 40:6</p> <p>Instances [1] - 11:22</p> <p>Instead [1] - 34:8</p> <p>Instructive [1] - 26:8</p> <p>Insufficient [1] - 11:6</p> <p>insurance [5] - 28:21, 36:17, 36:19, 39:16, 39:19</p> <p>intended [1] - 23:8</p> <p>Intent [1] - 27:20</p> <p>intently [1] - 24:19</p> <p>Interest [5] - 7:22, 11:5, 11:7, 11:9, 18:14</p> <p>Interesting [1] - 37:9</p> <p>Interests [1] - 4:20</p> <p>Interpret [2] - 24:15, 26:22</p> <p>Invalid [1] - 35:16</p> <p>Invalidate [1] - 39:5</p> <p>invalidity [1] - 17:12</p> <p>Involve [1] - 38:6</p> <p>Involved [3] - 7:22, 10:16, 24:9</p> <p>involves [1] - 38:4</p> <p>involving [1] - 24:22</p> <p>Issue [17] - 4:15, 8:24, 10:11, 12:18, 13:8, 17:23, 22:6, 24:16, 27:4, 27:25, 31:12, 32:25, 33:12, 35:5, 36:14, 39:14, 40:7</p> <p>Issues [6] - 4:1, 4:7, 9:19, 12:3, 41:13, 41:14</p>	<p>itself [1] - 6:19</p> <p>J</p> <p>Jack [1] - 10:17</p> <p>jail [4] - 20:6, 20:18, 20:19</p> <p>Jason [3] - 1:19, 3:7, 23:14</p> <p>Jennifer [2] - 43:4, 43:22</p> <p>Job [9] - 28:17, 28:18, 28:20, 28:24, 29:10, 35:9, 36:1, 39:22, 40:6</p> <p>Judge [2] - 1:11, 43:13</p> <p>Judges' [1] - 6:2</p> <p>judgment [3] - 3:14, 25:18, 42:2</p> <p>Judicial [3] - 30:11, 30:14, 30:16</p> <p>Judicial [1] - 43:6</p> <p>justifies [2] - 6:24, 7:23</p>	<p>L</p> <p>label [1] - 7:12</p> <p>lack [1] - 34:20</p> <p>language [7] - 13:2, 13:4, 13:7, 13:17, 13:21, 13:24, 19:22</p> <p>lapse [2] - 20:12, 31:7</p> <p>large [1] - 10:14</p> <p>Larry [2] - 1:11, 43:13</p> <p>last [3] - 9:7, 16:10, 23:20</p> <p>law [19] - 7:18, 8:8, 9:11, 9:12, 9:25, 10:1, 11:2, 11:6, 17:13, 22:16, 23:23, 24:17, 24:19, 27:14, 30:10, 30:12, 35:6, 41:16</p> <p>lawsuit [2] - 12:20, 24:9</p> <p>lawyers [2] - 10:22, 11:4</p> <p>laying [2] - 27:9, 34:14</p> <p>least [5] - 7:10, 13:4, 16:18, 17:3, 22:1</p> <p>left [1] - 23:7</p> <p>legal [1] - 4:7</p> <p>legality [1] - 14:9</p> <p>legislate [2] - 18:10, 19:8</p> <p>legislative [3] - 8:24, 8:25, 25:13</p> <p>legislators [1] - 16:6</p> <p>legislature [9] - 7:16, 14:2, 15:20, 16:10, 18:5, 19:16, 21:24, 23:8, 26:16</p> <p>legislature's [4] - 20:9, 27:20, 31:21, 31:22</p> <p>legislatures [1] - 15:13</p> <p>less [1] - 23:6</p> <p>letters [2] - 24:3, 27:6</p> <p>level [3] - 12:16, 22:10, 36:6</p> <p>liberal [1] - 9:23</p> <p>lies [1] - 14:18</p> <p>light [2] - 28:5, 41:24</p> <p>limit [1] - 19:9</p> <p>limited [3] - 25:20, 26:11, 32:15</p> <p>limits [1] - 24:7</p> <p>line [2] - 24:21, 27:10</p> <p>litigation [3] - 16:9,</p>
<p>H</p> <p>hac [1] - 3:7</p> <p>half [4] - 15:5, 20:4, 23:5, 23:7</p> <p>happy [6] - 3:20, 4:13, 33:5, 33:8, 33:19, 34:14</p> <p>harm [2] - 11:1, 11:14</p> <p>harmed [2] - 11:11, 39:23</p> <p>HB [3] - 23:18, 28:16, 32:23</p> <p>health [4] - 36:17, 36:18, 39:15, 39:18</p> <p>healthcare [1] - 28:21</p> <p>hear [1] - 37:11</p> <p>heard [2] - 36:14, 43:12</p> <p>hearing [2] - 30:13, 42:11</p>	<p>I</p> <p>idea [2] - 24:16, 40:23</p> <p>immediate [1] - 29:11</p> <p>immunity [4] - 8:10, 8:24, 9:11, 9:13</p> <p>impetus [1] - 40:18</p> <p>Implications [1] - 32:19</p> <p>Important [10] - 10:25, 12:18, 13:7, 19:25, 20:3, 22:6, 22:14, 26:7, 26:14, 28:1</p> <p>importantly [1] - 5:7</p> <p>Impression [1] - 41:15</p> <p>Improperly [2] - 23:18, 23:21</p> <p>IN [1] - 1:1</p> <p>include [3] - 9:16, 20:14, 24:23</p> <p>Included [5] - 24:6,</p>	<p>K</p> <p>KANSAS [4] - 1:1, 1:3, 1:5, 43:2</p> <p>Kansas [33] - 1:6, 1:12, 1:13, 1:15, 1:17, 1:18, 1:20, 1:22, 1:24, 3:1, 3:3, 3:9, 4:17, 6:1, 8:5, 8:12, 8:17, 8:19, 10:12, 13:18, 13:25, 14:24, 17:9, 17:15, 18:2, 22:15, 23:22, 25:9, 26:23, 38:23, 43:7, 43:11, 43:12</p> <p>KBA [3] - 10:13, 10:15, 11:3</p> <p>keep [1] - 21:22</p> <p>kind [5] - 12:2, 22:17, 23:5, 26:9, 32:18</p> <p>kinds [3] - 17:10, 25:23, 26:3</p> <p>Knapp [1] - 38:12</p> <p>KNEA [13] - 5:3, 5:5, 5:7, 17:21, 22:8, 23:15, 30:3, 33:12, 33:24, 34:3, 34:5, 34:7, 37:14</p> <p>KNEA's [3] - 28:11, 31:17, 32:17</p>	<p>KANSAS [4] - 1:1, 1:3, 1:5, 43:2</p> <p>Kansas [33] - 1:6, 1:12, 1:13, 1:15, 1:17, 1:18, 1:20, 1:22, 1:24, 3:1, 3:3, 3:9, 4:17, 6:1, 8:5, 8:12, 8:17, 8:19, 10:12, 13:18, 13:25, 14:24, 17:9, 17:15, 18:2, 22:15, 23:22, 25:9, 26:23, 38:23, 43:7, 43:11, 43:12</p> <p>KBA [3] - 10:13, 10:15, 11:3</p> <p>keep [1] - 21:22</p> <p>kind [5] - 12:2, 22:17, 23:5, 26:9, 32:18</p> <p>kinds [3] - 17:10, 25:23, 26:3</p> <p>Knapp [1] - 38:12</p> <p>KNEA [13] - 5:3, 5:5, 5:7, 17:21, 22:8, 23:15, 30:3, 33:12, 33:24, 34:3, 34:5, 34:7, 37:14</p> <p>KNEA's [3] - 28:11, 31:17, 32:17</p>	<p>laying [2] - 27:9, 34:14</p> <p>least [5] - 7:10, 13:4, 16:18, 17:3, 22:1</p> <p>left [1] - 23:7</p> <p>legal [1] - 4:7</p> <p>legality [1] - 14:9</p> <p>legislate [2] - 18:10, 19:8</p> <p>legislative [3] - 8:24, 8:25, 25:13</p> <p>legislators [1] - 16:6</p> <p>legislature [9] - 7:16, 14:2, 15:20, 16:10, 18:5, 19:16, 21:24, 23:8, 26:16</p> <p>legislature's [4] - 20:9, 27:20, 31:21, 31:22</p> <p>legislatures [1] - 15:13</p> <p>less [1] - 23:6</p> <p>letters [2] - 24:3, 27:6</p> <p>level [3] - 12:16, 22:10, 36:6</p> <p>liberal [1] - 9:23</p> <p>lies [1] - 14:18</p> <p>light [2] - 28:5, 41:24</p> <p>limit [1] - 19:9</p> <p>limited [3] - 25:20, 26:11, 32:15</p> <p>limits [1] - 24:7</p> <p>line [2] - 24:21, 27:10</p> <p>litigation [3] - 16:9,</p>

JENNIFER L. OLSEN, Certified Shorthand Reporter
Third Judicial District, Division 12, 233-8200 X-4302

<p>27:4, 32:8 litigators [1] - 16:8 living [1] - 16:7 local [3] - 5:5, 33:24, 34:1 locals [2] - 34:5 logic [3] - 23:2, 25:4, 38:24 logically [1] - 38:4 logrolling [9] - 15:14, 15:15, 15:17, 15:22, 15:23, 16:20, 22:24, 31:16, 38:25 look [2] - 14:1, 25:16 looked [1] - 14:3 looking [4] - 14:11, 25:24, 35:15, 41:16 losing [2] - 11:12, 11:13 loss [4] - 29:10, 36:15, 36:23, 39:22</p>	<p>37:8 Memorial [1] - 1:22 mention [1] - 39:17 mentioned [1] - 32:3 merits [4] - 4:9, 23:24, 40:14, 40:15 mess [1] - 15:21 might [8] - 3:4, 11:25, 15:18, 29:12, 29:21, 30:8, 33:9, 35:11 million [3] - 30:24, 31:1, 31:4 mind [1] - 17:18 minor [1] - 35:23 mischaracterized [1] - 15:16 misconduct [2] - 35:22, 35:23 mixed [1] - 15:4 mixing [1] - 18:16 moment [1] - 15:11 money [1] - 16:11, 16:17, 17:24, 18:16, 20:8, 20:16, 20:19, 31:6, 36:21, 37:25, 38:2 monies [1] - 19:5 morning [1] - 23:13 Morrison [1] - 10:9 most [4] - 3:21, 12:3, 29:4, 41:19 MOTION [1] - 2:3 motion [10] - 3:7, 3:13, 3:14, 3:23, 4:5, 28:13, 33:21, 41:8, 42:1 MOTIONS [1] - 43:18 MR [32] - 2:4, 2:5, 3:5, 3:8, 3:19, 3:25, 4:4, 6:16, 9:8, 9:24, 10:6, 10:21, 11:15, 11:15, 12:25, 14:19, 19:2, 19:21, 21:2, 21:15, 21:18, 36:10, 36:11, 39:11, 41:4, 41:5, 42:6, 42:7 mean [2] - 14:21, 21:23 means [1] - 18:7 meant [2] - 25:12, 26:10 member [3] - 34:1, 34:2, 34:4 members [17] - 4:19, 4:23, 5:1, 23:16, 28:11, 30:3, 33:15, 33:23, 34:7, 34:10, 34:16, 34:17, 34:20, 35:7, 37:13 membership [4] - 33:16, 33:25, 34:9,</p>	<p>must-pass [3] - 16:25, 19:11, 22:12</p> <p style="text-align: center;">N</p> <p>name [3] - 8:6, 8:12, 9:2 named [3] - 8:10, 8:18, 9:14 naming [1] - 9:4 narrow [2] - 11:23, 38:15 national [1] - 37:15 NATIONAL [1] - 1:3 National [4] - 1:15, 1:17, 3:2, 43:11 NEA [5] - 33:24, 34:4, 37:10, 37:11, 37:14 necessary [3] - 8:3, 17:4, 28:2 need [7] - 7:2, 8:6, 8:21, 9:2, 32:12, 33:3, 36:5 needs [3] - 34:12, 35:18 negotiating [1] - 30:7 negotiation [2] - 29:16, 30:4 negotiations [1] - 29:23 never [3] - 18:2, 39:19, 40:3 next [3] - 5:14, 5:16, 37:3 nits [1] - 39:14 non [2] - 23:3, 37:2 non-appropriations [1] - 23:3 non-renewed [1] - 37:2 note [1] - 28:2 notes [1] - 43:16 nothing [8] - 5:24, 13:21, 15:5, 39:15, 39:16, 41:4 notice [1] - 5:13 notion [3] - 17:15, 19:13, 37:22 Number [1] - 43:10 number [5] - 3:3, 5:24, 26:2, 31:8, 31:11</p>	<p>objection [1] - 41:10 obviously [2] - 21:3, 39:17 occasion [1] - 24:14 occur [2] - 5:14, 5:16 occurred [2] - 5:15, 28:8 odd [1] - 23:6 OF [7] - 1:1, 1:5, 1:8, 2:7, 43:2, 43:3, 43:18 offer [4] - 22:2, 30:8, 30:10, 30:11 offered [1] - 4:5 official [4] - 8:7, 8:18, 9:4, 43:6 Official [1] - 43:8 OFFICIALLY [1] - 43:19 officials [3] - 8:12, 9:4, 12:16 often [1] - 12:13 old [2] - 24:17, 24:19 older [3] - 21:9, 27:9, 38:8 Olsen [2] - 43:4, 43:22 omnibus [8] - 15:1, 16:1, 19:13, 19:19, 25:5, 25:19 once [3] - 28:22, 29:2, 41:23 one [28] - 3:17, 5:2, 6:12, 8:1, 11:9, 13:2, 13:3, 13:6, 13:11, 14:20, 14:22, 15:2, 15:4, 15:7, 15:12, 16:8, 16:10, 17:7, 17:22, 18:22, 19:3, 19:24, 20:1, 20:10, 24:12, 32:1, 35:9, 38:2, 42:2 One [1] - 17:9 One-Call [1] - 17:9 one-subject [1] - 24:12 open [3] - 13:10, 13:12 operating [2] - 19:6, 19:12 opinion [7] - 16:13, 19:22, 24:3, 27:6, 27:11, 27:15, 27:21 opinions [3] - 10:9, 10:12, 32:4 opportunity [2] - 6:13, 6:14 opposite [1] - 25:6 option [1] - 30:6 options [1] - 16:9</p>	<p>ORAL [2] - 1:8, 43:18 order [3] - 29:21, 38:1, 42:8 organization [1] - 37:16 organization's [1] - 4:21 otherwise [1] - 29:9 outside [1] - 30:15 overall [3] - 28:19, 35:1, 40:25 overlap [1] - 4:1 own [4] - 5:25, 15:18, 24:2, 27:5</p> <p style="text-align: center;">P</p> <p>page [1] - 25:9 pages [2] - 25:17, 43:17 paragraph [1] - 33:20 parch [2] - 14:22, 15:7 part [8] - 8:25, 39:23, 40:5, 40:25, 41:7 Parts [1] - 9:8 participation [1] - 4:23 particular [7] - 4:18, 7:23, 8:22, 13:13, 23:1, 28:4, 38:7 particularly [2] - 26:8, 38:23 parties [2] - 41:24, 42:10 PARTY [1] - 2:7 pass [6] - 15:18, 16:1, 16:2, 16:25, 19:11, 22:12 passage [1] - 40:18 passed [6] - 7:18, 15:21, 22:20, 22:21, 22:22, 40:19 past [4] - 14:2, 14:14, 24:17, 41:17 patrol [1] - 31:4 patterns [1] - 14:23 pay [2] - 36:19, 39:21 pays [1] - 36:20 pension [6] - 28:25, 29:2, 36:17, 36:21, 39:25, 40:3 pensions [1] - 39:16 people [5] - 7:20, 11:5, 15:19, 21:22, 36:19 per [1] - 17:25 perhaps [1] - 5:23 personally [1] - 16:7</p>
<p style="text-align: center;">O</p> <p>objected [1] - 16:16 objecting [2] - 9:14, 15:2</p>				

JENNIFER L. OLSEN, Certified Shorthand Reporter
 Third Judicial District, Division 12, 233-8200 X-4302

<p>Petrella [1] - 8:10 pick [1] - 39:14 piece [2] - 18:8 pieces [2] - 32:10, 32:11 places [1] - 38:1 placing [1] - 24:7 plaintiff [10] - 3:6, 4:9, 12:21, 12:22, 13:9, 13:16, 16:24, 19:11, 37:15, 41:11 Plaintiff [2] - 1:4, 1:15 plaintiffs [1] - 3:14 plaintiffs [3] - 8:17, 17:7, 23:1 plausible [1] - 13:12 play [2] - 7:6, 14:23 pleasure [1] - 3:18 plenty [2] - 16:6, 26:20 point [16] - 5:8, 7:8, 8:8, 10:24, 12:7, 13:12, 19:10, 19:24, 22:5, 22:23, 27:2, 36:23, 37:8, 37:22, 38:7 points [1] - 36:12 policy [10] - 24:6, 24:11, 24:22, 25:22, 26:17, 28:15, 31:14, 32:6, 32:10, 32:19 poorly [1] - 24:2 position [14] - 4:24, 11:13, 18:21, 27:4, 27:5, 31:15, 32:8, 34:19, 34:22, 34:23, 34:25, 35:3, 35:25 possibility [1] - 9:25 possible [1] - 31:22 Postal [1] - 43:20 practice [4] - 11:6, 25:13, 25:25 precedent [1] - 32:18 preclude [1] - 38:25 preliminary [2] - 4:7, 9:19 prepare [1] - 42:8 prepared [2] - 3:7, 7:9 present [3] - 1:19, 6:7, 43:8 pretty [1] - 14:15 prevent [2] - 22:23, 26:10 prevents [1] - 32:24 previously [1] - 3:6 primarily [1] - 8:8 primary [3] - 20:15, 35:14, 36:4</p>	<p>prison [1] - 19:4 prisons [2] - 19:5, 19:6 private [2] - 12:21, 12:22 pro [1] - 3:7 problem [2] - 7:15, 34:17 procedural [1] - 6:21 procedure [1] - 7:17 procedures [1] - 11:9 proceed [1] - 3:16 proceeding [1] - 12:17 proceedings [1] - 43:10 PROCEEDINGS [1] - 1:10 process [17] - 5:11, 6:14, 8:25, 11:12, 11:14, 20:25, 28:16, 29:17, 29:23, 30:10, 30:12, 30:14, 32:23, 35:5, 36:16, 36:24, 40:20 Process [1] - 23:23 professional [2] - 29:16, 30:4 professor [4] - 29:5, 29:6, 29:7, 39:18 prohibit [1] - 5:17 proof [1] - 6:4 proper [6] - 4:11, 7:17, 8:1, 8:3, 27:18, 40:9 proposal [2] - 21:11, 21:20 proposals [1] - 15:17 proposition [2] - 12:15, 21:5 protect [1] - 37:6 protected [2] - 29:9, 29:13 protection [1] - 29:10 protections [8] - 5:18, 5:20, 5:25, 7:7, 29:17, 30:10 prove [1] - 7:3 provide [2] - 30:13, 34:14 provided [1] - 30:15 providing [1] - 5:18 provision [15] - 15:2, 17:2, 19:12, 23:18, 23:22, 24:7, 28:15, 30:16, 30:19, 31:14, 31:24, 32:1, 32:6, 40:20, 40:23</p>	<p>provisions [22] - 5:9, 5:11, 7:6, 15:5, 16:18, 17:22, 18:9, 18:17, 20:4, 22:11, 22:25, 23:3, 24:8, 24:11, 27:20, 28:16, 30:12, 32:19, 32:23, 35:16, 37:25, 38:5 pure [1] - 31:15 purpose [6] - 4:21, 20:15, 25:21, 26:1, 31:5, 32:13 purposes [5] - 20:8, 20:17, 26:3, 28:13, 33:21 put [3] - 14:4, 16:19, 21:20</p>	<p>reasonably [1] - 17:19 reasoned [1] - 24:2 reasoning [1] - 25:4 reasons [3] - 4:6, 15:12, 29:8 receive [1] - 28:19 received [1] - 32:16 recent [2] - 38:9, 41:19 red [1] - 34:18 refer [1] - 17:8 reference [2] - 31:3, 31:5 referenced [1] - 25:8 referring [1] - 24:3 refers [1] - 19:24 regard [1] - 4:15 regardless [1] - 27:19 regularly [1] - 43:5 Relly [1] - 38:12 rejected [1] - 21:21 relate [3] - 17:23, 20:25, 37:23 relates [4] - 6:6, 33:12, 33:17, 41:8 relationship [1] - 30:5 relaxed [1] - 12:6 relaxing [1] - 12:7 r levant [1] - 28:7 relief [8] - 4:22, 9:21, 32:21, 32:22, 33:3, 35:14, 35:17, 36:4 relitigate [1] - 40:14 remainder [1] - 42:1 remained [1] - 27:12 remaining [1] - 41:13 remains [1] - 34:15 remedy [17] - 15:24, 16:21, 22:7, 22:15, 22:24, 27:18, 31:12, 31:13, 32:14, 38:7, 38:10, 39:4, 40:7, 40:9, 40:13, 40:14, 40:16 removal [2] - 34:25, 40:6 removed [3] - 5:3, 34:8, 34:17 removing [1] - 38:2 renewal [1] - 5:11 renewed [1] - 37:2 repeated [2] - 9:7, 23:20 reported [1] - 43:9 reporter [3] - 9:6, 23:19, 43:6 Reporter [2] - 43:5</p>	<p>43:8 Reports [1] - 25:9 represent [1] - 34:6 representative [1] - 34:9 representing [1] - 23:15 represents [1] - 34:5 requested [3] - 4:22, 32:21, 32:22 require [1] - 32:20 required [1] - 35:12 requirement [3] - 12:3, 27:12, 34:1 requirements [9] - 4:16, 4:18, 5:12, 9:22, 9:23, 10:8, 10:14, 35:17, 37:19 requires [1] - 4:22 respect [3] - 12:25, 13:23, 37:24 rest [1] - 41:5 restrict [1] - 11:24 result [3] - 11:1, 23:6, 37:17 retaliation [1] - 29:14 retire [1] - 29:2 retirement [1] - 40:3 review [6] - 6:9, 30:11, 30:17, 41:15, 41:23 revision [1] - 25:15 rider [1] - 40:9 riders [16] - 17:1, 19:15, 22:12, 22:18, 22:19, 24:22, 25:23, 26:6, 26:17, 27:23, 28:6, 31:11, 38:16, 38:19, 38:21 rights [5] - 5:23, 34:25, 36:16, 36:21, 37:6 ripe [4] - 4:10, 11:21, 34:21, 36:8 ripeness [4] - 6:7, 7:3, 11:16, 27:25 role [2] - 8:3, 9:1 rule [19] - 6:12, 9:18, 13:1, 13:14, 15:10, 17:17, 18:1, 24:12, 24:21, 25:3, 26:5, 26:9, 26:21, 26:22, 26:24, 27:10, 28:7, 31:18, 38:10 rules [4] - 10:8, 12:18, 19:6, 40:15 ruling [3] - 31:17, 42:2, 42:8</p>
Q				
<p>qualified [2] - 19:3, 43:5 questions [8] - 4:13, 9:17, 9:18, 23:9, 23:12, 33:9, 36:13, 39:7 quick [1] - 39:14 quite [3] - 8:2, 30:20, 39:18 quote [3] - 16:25, 22:12, 26:7 quoting [1] - 11:13</p>				
R				
<p>raise [3] - 6:22, 7:8, 7:11 raised [1] - 7:24 rapidly [1] - 42:3 rather [1] - 32:1 rationale [2] - 15:9, 39:5 reach [1] - 6:3 read [2] - 10:13, 19:23 ready [2] - 3:11, 3:25 real [2] - 6:4, 15:4 really [2] - 7:12, 8:4, 8:20, 10:17, 12:5, 13:23, 14:1, 14:10, 16:20, 17:21, 24:14, 24:15, 25:6, 31:15, 34:17, 35:18, 36:5, 38:5, 38:22, 40:21, 41:20 realm [1] - 21:4 reason [2] - 9:15, 31:9 reasonable [1] - 26:16</p>				

JENNIFER L. OLSEN, Certified Shorthand Reporter
 Third Judicial District, Division 12, 233-8200 X-4302

S	18:23, 30:23 severed [1] - 27:23 shall [1] - 13:5 SHAWNEE [2] - 1:1, 43:3 Shawnee [1] - 1:12 shed [1] - 28:5 Shorthand [1] - 43:4 shorthand [2] - 43:9, 43:15 show [5] - 6:23, 11:10, 25:13, 29:24, 36:6 showing [1] - 11:18 shown [2] - 5:8, 11:1 shows [1] - 29:19 shut [1] - 13:10 sick [2] - 28:23, 39:20 sides [1] - 13:11 signed [2] - 8:23, 35:6 SIGNED [1] - 43:19 significant [6] - 27:8, 35:7, 35:8, 35:9, 41:14, 41:15 signing [1] - 28:10 simply [4] - 5:18, 9:2, 14:22, 32:22 single [38] - 6:20, 6:25, 7:13, 7:20, 7:23, 9:18, 12:8, 13:1, 13:14, 15:9, 15:13, 17:14, 17:17, 17:25, 18:14, 18:15, 22:5, 25:3, 25:20, 25:21, 26:1, 26:5, 26:9, 26:21, 26:22, 26:24, 27:12, 28:3, 28:7, 30:19, 31:18, 35:21, 35:25, 36:3, 38:11, 38:24, 39:5 single-subject [27] - 6:20, 6:25, 7:13, 7:20, 7:23, 9:18, 13:1, 13:14, 17:14, 17:17, 17:25, 18:14, 22:5, 25:3, 26:5, 26:9, 26:21, 26:22, 26:24, 27:12, 28:3, 28:7, 31:18, 35:21, 35:25, 36:3, 38:11 situation [2] - 13:13, 22:3 slice [1] - 22:19 small [2] - 10:18, 18:8 smaller [1] - 23:6 so-called [1] - 22:18 sole [1] - 26:10	solely [1] - 9:12 Solicitor [1] - 1:22 someone [1] - 35:4 sometimes [1] - 15:15 sorry [1] - 27:22 sort [3] - 6:4, 11:16, 22:11 speaking [1] - 10:2 speaks [1] - 19:19 special [1] - 7:21 SPECIFIC [1] - 2:7 specific [2] - 20:16, 20:17 specifically [1] - 25:11 specificity [1] - 36:7 speculate [2] - 39:20, 40:1 speculation [2] - 40:17, 40:21 speculative [2] - 6:8, 36:24 speech [2] - 11:24, 12:3 spent [1] - 20:8 spring [1] - 16:10 ss [1] - 43:2 stakes [1] - 31:16 stand [1] - 15:18 standard [2] - 12:23, 17:11 standards [1] - 12:8 standing [28] - 4:10, 4:15, 4:16, 4:19, 4:25, 6:22, 7:3, 7:11, 7:13, 10:8, 10:12, 10:17, 12:3, 12:23, 28:1, 33:12, 33:15, 33:17, 34:20, 34:21, 35:13, 35:17, 36:14, 37:18, 37:19, 39:14 start [3] - 3:16, 3:21, 19:15 state [16] - 3:25, 8:7, 8:20, 9:12, 9:25, 10:5, 12:5, 16:24, 19:14, 24:25, 31:8, 34:2, 34:11, 37:16, 38:3 STATE [2] - 1:5, 43:2 State [30] - 1:6, 1:20, 3:2, 3:9, 4:5, 8:5, 8:10, 8:12, 8:16, 8:19, 9:3, 9:13, 9:14, 9:15, 13:4, 18:18, 19:9, 26:15, 29:15, 29:25, 30:8, 30:19, 31:18, 33:2, 33:3, 33:13, 38:14, 39:15,	43:7, 43:11 state's [1] - 9:10 State's [6] - 4:24, 6:2, 7:4, 17:1, 17:20, 18:1, 25:8, 31:15, 38:21 statehood [1] - 27:13 statement [2] - 9:7, 23:20 states [1] - 26:20 statistically [1] - 37:1 statute [10] - 5:17, 5:22, 6:19, 7:9, 8:4, 11:11, 11:25, 16:22, 30:16, 40:24 statutes [3] - 5:9, 8:22, 11:23 Stenotype [1] - 43:9 Stephan [5] - 19:18, 20:5, 21:1, 21:6, 41:19 Stephen [2] - 1:21, 3:8 sticks [1] - 22:17 still [4] - 6:22, 21:4, 37:19, 38:4 stipulate [1] - 33:5 stop [2] - 23:9, 37:14 straightforward [1] - 23:24 Street [1] - 1:18 strictly [2] - 10:2, 18:14 strike [3] - 16:21, 22:24, 38:11 strikes [1] - 17:13 strip [3] - 28:16, 31:14, 40:10 stripped [4] - 23:4, 23:5, 28:25, 29:5 stripping [1] - 28:20 strips [1] - 28:17 strong [1] - 24:16 strongly [1] - 22:7 struck [1] - 17:16 stuff [1] - 22:21 subject [37] - 6:12, 6:20, 6:25, 7:13, 7:20, 7:23, 9:18, 12:8, 13:1, 13:6, 13:14, 15:9, 15:13, 17:14, 17:17, 17:25, 18:14, 18:15, 22:5, 24:12, 25:2, 25:3, 26:5, 26:9, 26:21, 26:22, 26:24, 27:12, 28:3, 28:7, 31:18, 35:21, 35:25, 36:3, 38:11, 38:25, 39:5	subjects [2] - 20:14, 24:4 submit [1] - 26:12 substantive [2] - 15:3, 22:11 sue [4] - 4:19, 8:11, 9:3, 34:20 sued [1] - 8:17 suffer [1] - 11:1 suffered [2] - 5:1, 5:8 sufficient [1] - 28:14 suggest [1] - 10:24 suggested [3] - 13:19, 21:16, 41:17 suggesting [1] - 24:1 suggestion [2] - 14:20, 16:5 suggests [4] - 12:1, 13:22, 23:2, 37:11 suing [1] - 37:16 suit [5] - 7:19, 9:16, 12:11, 23:15, 37:12 summary [3] - 3:14, 25:17, 42:2 sums [1] - 20:16 support [1] - 13:18 supporting [1] - 17:14 supposed [1] - 17:12 supreme [11] - 10:6, 12:5, 12:14, 12:17, 13:18, 14:9, 16:13, 21:12, 24:14, 27:8, 41:17 Supreme [5] - 13:19, 14:1, 17:15, 17:20, 18:2 sustained [1] - 40:22 SW [2] - 1:18, 1:23 System [1] - 17:9 system [1] - 6:5
T				
<table border="1"> <tbody> <tr> <td data-bbox="1117 1423 1328 1845"> table [1] - 16:10 targeting [1] - 18:6 Teacher [1] - 23:23 teacher [11] - 5:7, 5:12, 6:13, 7:5, 28:21, 28:22, 29:1, 34:1, 35:22, 39:19, 40:1 teacher's [2] - 28:5, 35:19 teachers [22] - 5:4, 5:21, 7:8, 10:23, 11:8, 23:17, 28:16, 29:11, 29:16, 30:2, 33:22, 33:23, 34:6, 34:10, 36:25, 37:2, </td> </tr> </tbody> </table>				table [1] - 16:10 targeting [1] - 18:6 Teacher [1] - 23:23 teacher [11] - 5:7, 5:12, 6:13, 7:5, 28:21, 28:22, 29:1, 34:1, 35:22, 39:19, 40:1 teacher's [2] - 28:5, 35:19 teachers [22] - 5:4, 5:21, 7:8, 10:23, 11:8, 23:17, 28:16, 29:11, 29:16, 30:2, 33:22, 33:23, 34:6, 34:10, 36:25, 37:2,
table [1] - 16:10 targeting [1] - 18:6 Teacher [1] - 23:23 teacher [11] - 5:7, 5:12, 6:13, 7:5, 28:21, 28:22, 29:1, 34:1, 35:22, 39:19, 40:1 teacher's [2] - 28:5, 35:19 teachers [22] - 5:4, 5:21, 7:8, 10:23, 11:8, 23:17, 28:16, 29:11, 29:16, 30:2, 33:22, 33:23, 34:6, 34:10, 36:25, 37:2,				

JENNIFER L. OLSEN, Certified Shorthand Reporter

Third Judicial District, Division 12, 233-8200 X-4302

<p>37:7, 37:13, 40:1 tend [1] - 11:23 tenure [3] - 29:5, 29:6, 29:9 tenured [1] - 39:17 terminated [2] - 5:13, 7:5 termination [5] - 28:5, 35:20, 35:23, 36:16, 36:24 terms [1] - 19:22 territory [1] - 12:4 text [3] - 18:11, 21:7, 21:10 THE [28] - 1:1, 3:1, 3:12, 3:22, 4:3, 6:11, 9:20, 10:4, 10:15, 11:12, 12:24, 14:7, 18:20, 19:18, 20:5, 21:13, 21:17, 23:11, 33:7, 33:10, 34:19, 35:3, 36:10, 39:9, 39:12, 41:3, 41:6, 42:7 themselves [1] - 36:19 theory [3] - 7:1, 37:12, 39:4 therefore [1] - 28:18 therein [1] - 14:18 THEREUPON [3] - 9:6, 23:19, 42:11 they've [5] - 6:18, 8:18, 11:10, 29:24, 36:1 Third [1] - 43:6 three [2] - 4:18, 36:12 throughout [2] - 27:6, 34:11 throwing [3] - 19:15, 31:20, 32:9 thrown [1] - 32:9 TO [1] - 2:3 today [2] - 28:4, 41:25 together [3] - 3:20, 4:2, 15:19 took [3] - 36:18, 36:20, 39:2 top [1] - 16:19 Topeka [3] - 1:13, 1:18, 1:23 topics [1] - 6:15 toss [1] - 27:19 totally [1] - 36:24 touch [1] - 32:25 tracks [1] - 10:13 traditional [2] - 12:20, 12:23</p>	<p>TRANSCRIPT [1] - 1:8 transcript [2] - 43:15, 43:16 transfer [4] - 20:10, 30:24, 31:1, 31:3 true [4] - 14:1, 16:3, 33:21, 43:17 try [3] - 14:22, 15:7, 16:12 trying [3] - 15:10, 22:23, 38:25 turn [5] - 4:13, 9:17, 23:10, 27:25, 34:5 twice [3] - 5:3, 34:8, 34:17 twice-removed [1] - 34:17 t [4] - 6:15, 6:16, 19:2, 33:14 two-fold [1] - 33:14 typed [1] - 43:16 typewritten [1] - 43:17 t [3] - 12:2, 12:20, 12:23 typically [2] - 7:21, 19:16 Tyson [2] - 38:8, 41:22</p>	<p>21:25 unrelated [2] - 20:15, 24:24 unusual [1] - 31:19 up [7] - 21:23, 23:6, 28:4, 29:21, 30:1, 37:14, 41:25 upping [1] - 31:16 upshot [1] - 28:14 urge [1] - 4:8 urges [1] - 18:18 Utah [4] - 17:6, 17:7, 17:20, 22:2</p>	<p>24:24 window [2] - 7:13, 37:20 words [1] - 31:9 worth [1] - 35:11 wrongdoing [1] - 29:13 wrongly [1] - 24:1</p>
		V	Y
		<p>valuable [4] - 28:17, 29:25, 35:9, 36:1 value [1] - 35:1 various [1] - 38:1 vary [1] - 35:11 vast [1] - 23:16 versus [5] - 3:2, 6:2, 8:11, 38:12, 38:13 veto [1] - 24:10 vetoed [1] - 24:8 via [1] - 43:19 vice [1] - 3:7 view [8] - 6:2, 7:4, 13:7, 14:25, 17:1, 18:1, 37:18, 38:21 violate [1] - 28:6 violated [1] - 25:2 violation [9] - 6:20, 13:15, 17:16, 17:25, 22:6, 28:9, 36:7, 38:11, 40:11 void [1] - 32:23 vote [2] - 15:25, 39:3 vs [2] - 1:4, 43:11</p>	<p>year [1] - 37:2 years [2] - 17:15, 27:6 Young [1] - 9:8</p>
	U		
	<p>U.S [1] - 43:20 unauthorized [1] - 11:5 unchanged [1] - 27:12 unconstitutional [3] - 18:17, 18:19, 23:4 under [8] - 5:9, 9:11, 9:12, 17:13, 20:13, 22:15, 24:12, 37:12 understandably [1] - 17:8 understood [2] - 33:2, 41:11 unexpended [1] - 20:12 unified [1] - 33:25 units [2] - 5:4, 5:6 university [2] - 29:4, 39:18 unlawfully [1] - 24:12 unless [3] - 9:17, 23:9, 39:7 unprecedented [1] - 22:1 unreasonable [1] -</p>		
		W	
		<p>wait [1] - 35:4 WALTA [9] - 2:5, 3:19, 23:13, 23:21, 33:8, 33:19, 34:23, 35:8, 39:13 Walta [3] - 1:19, 3:7, 23:14 wants [1] - 13:16 wax [1] - 10:19 ways [2] - 11:3, 14:21 weight [3] - 31:23, 40:22, 41:1 whistle [1] - 29:12 whole [3] - 10:19, 15:21, 18:7 wholly [2] - 20:14,</p>	

JENNIFER L. OLSEN, Certified Shorthand Reporter
Third Judicial District, Division 12, 233-8200 X-4302