IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION 6

KANSAS NATIONAL EDUCATION ASSOCIATION, Plaintiff,
vs.
STATE OF KANSAS, and SAMUEL D. BROWNBACK in his capacity as Governor of the State of Kansas, Defendants.

Case No.: 2014-CV-789

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.

EXHIBIT
646

I N D E X

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

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

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

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

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

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

MR. McALLISTER: State is ready. We do

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

THE COURT: Very well.

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

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

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

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

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

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

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

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

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

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

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

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

I would also like to address whether the governor

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

MR. McALLISTER: All right. With respect

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

makes it not an appropriations' bill?

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

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

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

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

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

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

Stephan v Carlin says that it should?

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

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

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

THE COURT: I'm not saying that.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

it's constitutional or not.

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

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

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

I would like to turn to the issue of ripeness and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I want to touch finally on the issue of the

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

THE COURT: All right.

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

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

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

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

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

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

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

decreases, essentially, the overall value of their compensation.

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

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

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

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

THE COURT: Thank you. Mr. McAllister.

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

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

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

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

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

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

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

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

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

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

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

MR. McALLISTER: Thank you.

THE COURT: Anything additional?

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

The same goes for pension. You could have a

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

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

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

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

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

MR. McALLISTER: I rest, yes.

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

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

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

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

MR. SCHAUNER: No, Your Honor.

MR. McALLISTER: No, Your Honor.

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

(THEREUPON, the hearing concluded.)

CERTIFICATE

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