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Case No. 16-116818-A

IN THE SUPREME COURT OF THE STATE OF KANSAS

SALLIE A. SCRIBNER AND MARK E. MCNEMEE,
Plaintiffs-Appellants

v.

BOARD OF EDUCATION OF U.S.D. NO. 492 FLINTHILLS,
BUTLER COUNTY, KANSAS
Defendant-Appellee

AND

THE STATE OF KANSAS
Intervenor.

BRIEF OF APPELLEE

Appeal from the District Court of Butler County, Kansas
Honorable Charles M. Hart
District Court Case No. 15-CV-243

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NATURE OF THE CASE

Plaintiffs, Scribner and McNemee, are former teacher employees of the defendant, USD No. 492 (School District). The School District did not renew plaintiffs' annual contracts for the 2015-2016 school year. At the time that their contracts were not renewed in May 2015, plaintiffs were not "tenured" because that status did not exist. They had "tenure" or preferred status before the 2014 amendments to the teacher statutes became effective on July 1, 2014. See Session Laws 2014, Ch. 93, Sec. 49-54. Those amendments eliminated the statutory basis for K-12 teacher tenure but did not preclude teachers and school districts from agreeing to such status on a contractual basis. See K.S.A 2014 Supp. 72-5436 *et seq.*

Plaintiffs filed this action on August 10, 2015. (R. Vol. I, 9.) In Count I of their Petition, plaintiffs sought a declaratory judgment based on the theory that they had a "vested property right" in their prior statutorily created status. In effect, plaintiffs requested the district court to declare that the 2014 teacher amendments could not be applied to them because to do so would allegedly violate their constitutional right to procedural due process under the Fourteenth Amendment of the U.S. Constitution.

In Count II of their Petition, plaintiffs asserted a "breach of contract" claim on the theory that if the 2014 teacher amendments were constitutionally void as to them as alleged, then their employment contracts would have continued under the prior law. Plaintiffs sought reinstatement and an award of back pay for the School District's alleged breach of their contracts.

Both sides filed cross-motions for summary judgment and responses. The State of Kansas, as intervenor, also filed a brief in support of the constitutionality of the 2014 amendments. In a journal entry filed on September 29, 2016, the Honorable Charles M. Hart granted summary judgment to defendant School District with respect to all of plaintiffs' claims. (R. Vol. I, 206-213.) The district court also overruled plaintiffs' motion for summary judgment. (Id.)

The district court summarized its findings and conclusions regarding the constitutional due process issue as follows:

> **The text of the state law is clear and unambiguous. After July 1, 2014, the procedures in K.S.A. Supp. 72-5438, et. seq., no longer apply to any K-12 teachers. It is black-letter law that when legislation affects a general class of people, the legislative process provides all the process that is due. In precisely the circumstances presented before this Court, courts across the country uniformly have applied this rule and have held that when a state legislature eliminates civil service or tenure protections for public employees, the legislative process is all that's required to satisfy the Due Process Clause. Plaintiffs do not dispute that House Bill 2506 was duly and properly enacted as a matter of state law; nor do plaintiffs cite any case law interpreting the federal Due Process Clause as requiring a state legislature to hold formal hearings or follow any other particular federally mandated procedures where acting on proposed legislation. The "unique set of facts" and unusual situation in Darling v. Kansas Water Office, 245 Kan. 45, 48 (1989), is not present here. Instead, the foundational general rule that the legislative process provides all the process that is due controls in this case. Plaintiffs are requesting this Court do exactly what K.S.A. 72-5444 expressly prohibits: declare plaintiffs had a "vested right" which was not subject to amendments or nullification by the legislature. However, K.S.A. 72-5444 makes clear plaintiffs had no**

such right. HB 2506 does not violate the Due Process Clause.

(R. Vol. I, 6.)

ISSUES ON APPEAL

1. Do the 2014 amendments to the K-12 teacher statutes, as applied to plaintiffs, violate constitutional due process?
2. Did defendant School District breach plaintiffs' employment contracts by following the law which existed when their contracts were not renewed in 2015?

STATEMENT OF FACTS

In the litigation below, the parties filed a written stipulation of the 32 relevant facts which are set forth in plaintiffs'/appellants' brief. (R. Vol. I, 96-103.) Those stipulated facts were the sole factual basis used by the district court to decide the cross-summary judgment motions.

ARGUMENTS AND AUTHORITIES

I. THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT ON PLAINTIFFS' CONSTITUTIONAL DUE PROCESS THEORIES.

A. STANDARD OF REVIEW.

The School District concurs with plaintiffs' standard of review statement and citation. The facts are stipulated, and the constitutional issue on appeal is one of law for this Court to decide exercising unlimited review.

B. ALL OF PLAINTIFFS' DUE PROCESS THEORIES ARE FORECLOSED BY K.S.A. 72-5444.

Plaintiffs' various due process arguments can be summarized into one solitary proposition: because plaintiffs were "tenured" under the teacher statutes before the 2014 amendments, plaintiffs were or should have been "grandfathered in" to certain "vested rights" and could never lose their tenured status. This proposition, however, is erroneous and directly contrary to K.S.A. 72-5444 which expressed the clear intent of the Kansas legislature when the teacher statutes were first adopted in 1974 and has never changed:

> **72-5444. Contractual rights; limitation on creation; not impaired.** Nothing in this act shall be construed to create any right, or to authorize the creation of any right, which is not subject to amendment or nullification by act of the legislature. Nothing in this act and no amendment or repeal of this act or any part thereof shall be construed to constitute an impairment of any existing contractual right.

K.S.A. 72-5444; Session Laws 1974, Ch. 301.

There was nothing sacred about K.S.A. 2013 Supp. 72-5436 *et seq.*, which was first adopted in 1974 and has sometimes been referred to as the Kansas Teacher Due Process Act. It is not a provision of the Kansas Constitution. The 1974 teacher statutes were enacted with the express proviso included in K.S.A. 72-5444 quoted above that no "right" was being created which could not be repealed or amended by a subsequent legislature. From day one, the 1974 legislature put all teachers and Kansas citizens on notice in K.S.A. 72-5444 that a "vested right" was not being created. What the legislature gave, the legislature could take away the next year or 10 or 40 years down the road. Id.

Plaintiffs' due process theories completely ignore K.S.A. 72-5444. They argue instead:

a) The 2014 teacher amendments must be construed to apply "prospectively" (i.e., "grandfathering in" plaintiffs);

b) If this Court construes the 2014 amendments to apply "retroactively" to plaintiffs, then those amendments violated plaintiffs' right to constitutional due process; and

c) The legislative process surrounding the 2014 amendments was "defective" and did not provide plaintiffs with due process.

All of these arguments are totally devoid of any merit.

Plaintiffs' annual employment contracts were not renewed on May 12, 2015, and plaintiffs were given written notice of nonrenewal the same day. At that time (and currently), K.S.A. 2014 Supp. 72-5437 mandated that the School District give plaintiffs (as professional employees required to hold a teaching certificate to teach) written notice of nonrenewal of their annual employment contracts by May 15, 2015. There is no factual dispute in this case as to whether the School Board complied with this statute. It did. Plaintiffs have stipulated to that fact. (See Stip. Fact Nos. 6-8.) Moreover, compliance with K.S.A. 2014 Supp. 72-5437 was all that was necessary to nonrenew plaintiffs' contracts under Kansas law in 2015.

Although plaintiffs do not dispute that the School District complied with the law as it existed in May 2015 (and as it exists today), plaintiffs assert that the law existing prior to July 1, 2014, should have been applied to them. Prior to that date, the definition of "teacher" in K.S.A. 2013 Supp. 72-5436 and K.S.A. 2013 Supp. 72-5438 would have applied to them. That is because K.S.A. 2013 Supp. 72-5445 (before the 2014

amendments) provided different treatment for some K-12 teachers than others. Those who had completed at least three consecutive years of employment and had been offered a fourth contract (like plaintiffs) came within K.S.A. 2013 Supp. 72-5438 regarding nonrenewal. Under that prior statute, the School Board would have given plaintiffs a statement of reasons for the nonrenewal. Id. Plaintiffs could also have requested an administrative hearing with a hearing officer. Id.

Thus, plaintiffs are contending in this case that the School Board in 2015 should have applied the teacher statutes as they existed prior to July 1, 2014, which was before the 2014 amendments to those statutes became effective. Plaintiffs argue that the amended statutes should be declared null and void as applied to them based on the theory that they were constitutionally entitled to be "grandfathered in" to the prior law. It is important to note that plaintiffs are not arguing that all K-12 teachers were entitled to be grandfathered in, just teachers like themselves who had reached the preferred status (i.e., three consecutive years plus a contract offer for a fourth) as defined in 2013 Supp. 72-5445. This preferred status is sometimes called "tenure."[1] Of course, the definition of the preferred status (tenure) was itself a creation of statute and has changed numerous times over the years before the 2014 legislative amendments.

Kansas law has never provided preferred status or tenure for all K-12 teachers. Indeed, before 1937, no preferred status existed for any teachers. From 1937 to 1974, the Tenure of Instructors Act provided tenure for some public school teachers and other

[1] The State of Kansas (Intervenor) argues that it was not true "tenure." Defendant School Board, however, contends that it does not matter in this case whether it is called "tenure" or not.

professional employees in cities with a population of 120,000 or more. Gillett v. U.S.D. 276, 227 Kan. 71, 75-76 (1980). Under the criteria of that law, plaintiffs (employees of a rural school district) would not have had tenure. They would be in the same position they are now.

The Tenure of Instructors Act was repealed in 1974. In that year, the Kansas legislature enacted the original version of K.S.A. 72-5436 *et seq.* (See Session Laws 1974, Ch. 301.) Although the 1974 law has been referred to as the Teacher Due Process Act, one of its statutes (which has never been amended), K.S.A. 72-5444 (quoted above), expressed the clear legislative intent that the entire Act or any part of it could be amended or eliminated by any future legislature. Indeed, the Teacher Act has changed many times in the 43 years since it was first enacted.

Before 2014, the 1974 Teacher Act underwent changes in 19 separate legislative sessions: in 1975 (Session Laws 1975, Ch. 373); in 1976 (Session Laws 1976, Ch. 315); in 1978 (Session Laws 1978, Ch. 292); in 1980 (Session Laws 1980, Ch. 220); in 1984 (Session Laws 1984, Ch. 267); in 1986 (Session Laws 1986, Ch. 271); in 1991 (Session Laws 1991, Ch. 224); in 1992 (Session Laws 1992, Ch. 185); in 1995 (Session Laws 1995, Ch. 263); in 1998 (Session Laws 1998, Ch. 171); in 2001 (Session Laws 2001, Ch. 177); in 2003 (Session Laws 2003, Ch. 52); in 2005 (Session Laws 2005, Ch. 69); in 2006 (Session Laws 2006, Ch. 143); in 2008 (Session Laws 2008, Ch. 125); in 2009 (Session Laws 2009, Ch. 32); in 2010 (Session Laws 2010, Ch. 74); in 2011 (Session Laws 2011, Ch. 93); and in 2012 (Session Laws 2012, Ch. 166).

To argue, as plaintiffs' do now, that they had a "vested right" to certain procedure before their contracts were nonrenewed in 2015 is to ignore or judicially repeal K.S.A. 72-5444 which expressly provides otherwise. That statute utterly destroys plaintiffs' due process theory.

In this appeal, plaintiffs have invented a new argument in an attempt to circumvent K.S.A. 72-5444, an argument not made to the district court. Plaintiffs now want this Court to apply a "ratchet theory" regarding that statute. Plaintiffs argue that procedural protections for teachers can only ratchet up, not down.

According to plaintiffs, during the 40 plus years after the 1974 Teacher Act was first enacted, the legislature kept incrementally providing teachers having preferred status with more and more procedural protection from being terminated or nonrenewed (i.e., the procedural protections were gradually ratcheted up). Thus, plaintiffs argue, K.S.A. 72-5444 does not mean the same today (or in 2014) as it did originally in 1974; the meaning has evolved to essentially prohibit any lessening of procedural protections to teachers already "grandfathered in."

The primary fallacy in plaintiffs' "ratchet" argument is that the legislature during those 40 years could have simply repealed K.S.A. 72-5444 and replaced it with a statute more to plaintiffs' liking (i.e., grandfathering them in to any reduction in procedure). However, the legislature did not do that. The legislative intent behind K.S.A. 72-5444 is still the same today as it was in 1974. The legislature reserves the right to add or eliminate teacher procedural protections at any time without creating a vested right in the

procedure provided. Words have meaning, and K.S.A. 72-5444 means exactly what it says. Plaintiffs had no "vested" right which could not be removed by legislative action.

Plaintiffs also cite a Kansas Attorney General Opinion (No. 95-049) regarding a different statute, K.S.A. 72-5397, which relates to early retirement incentive programs. The Kansas Attorney General opined as to "whether the [retirement incentive] statutes constitute a contractual arrangement subject to the protections of section 10 of article 1 of the United States constitution." In other words, it was a constitutional impairment of contract issue, not a due process issue. In the case at bar, plaintiffs have not made any claim of constitutionally prohibited impairment of contract. Thus, the Kansas Attorney General Opinion which they cite is totally irrelevant to this appeal.

C. THE 2014 AMENDMENTS WERE EFFECTIVE PROSPECTIVELY (NOT RETROACTIVELY).

Plaintiffs raise a "strawman" argument and falsely attempt to make a distinction between what they call "prospective" application of the 2014 amendments (which would not affect their pre-amendment tenured status) and "retroactive" application of the amendments (which would eliminate their tenured status). However, this is just another way to argue that they have been or should have been "grandfathered in" so that the changes in the 2014 amendments did not affect them or the other already-tenured K-12 teachers. It is a "strawman" argument because they admit the 2014 amendments became effective on July 1, 2014, and the new law did not reach backward from that date to make retroactive changes to plaintiffs' tenured status. Retroactive application would only have

occurred if plaintiffs' contracts had not been renewed in May 2014 using procedure from the 2014 amendments not yet in effect.

Plaintiffs were "tenured" through June 30, 2014, based on the teacher statutes in effect up to that date. See K.S.A. 2013 Supp. 72-5436 *et seq*. The 2014 amendments took effect on July 1, 2014, and became the law. The prior statutory provisions which defined and provided special procedures for "tenured" K-12 teachers were repealed as of that date. The prior statutes and provisions did not exist and were no longer the law on and after July 1, 2014. The 2014 amendments were intended to be applied prospectively and have always been so applied. That plaintiffs' preferred teacher status changed on July 1, 2014, to a non-preferred status does not mean that the 2014 amendments were applied retroactively.

The cases which plaintiffs rely upon for their "prospective/retroactive" argument are not relevant or applicable to the issues in the case at bar. In Norris v. Kansas Employment Security Board of Review, 303 Kan. 834 (2016), the Kansas Employment Security Board ("KESB") denied a claim for unemployment benefits brought by the plaintiff in that case. The plaintiff next filed a motion to reconsider which the KESB declined to entertain. The plaintiff in Norris then filed for judicial review in the district court, but the district court deemed the plaintiff's appeal untimely which the court believed stripped it of subject matter jurisdiction. The Kansas Court of Appeals in Norris reversed the district court, and this Court subsequently affirmed the Court of Appeals, albeit for different reasons. Id.

This Court in Norris entered into a discussion of "procedural" statutes vs. "substantive" statutes, and "prospective" vs. "retroactive" statutory application in the context of an appeal from an administrative unemployment benefit hearing. In Norris, the statutory time deadlines for requesting judicial review had been shortened after the appeal had been docketed with the district court. However, because the plaintiff was timely in filing the appeal under the former law, this Court ultimately ruled in Norris that the district court did indeed have subject matter jurisdiction over the appeal. Id.

The Norris case is inapposite to the case at bar. The plaintiff in Norris did not win because the appeal deadlines could never be shortened but rather because her unemployment compensation appeal had already been docketed before the new shorter deadlines went into effect. The Norris case would have come out differently if the new time deadlines had gone into effect before the plaintiff had an adverse KESB decision to appeal. Id. The holding in Norris has no application to the case at bar.

Another case relied upon by plaintiffs, Brennan v. Kansas Insurance Guaranty Ass'n, 293 Kan. 446 (2011), is also inapposite to the issues in the case at bar. The issue in Brennan was an expressly retroactive statutory amendment which permitted the Kansas Insurance Guaranty Association ("KIGA") to offset a medical malpractice patient's personal health insurance benefits received against KIGA's liability on the insolvent malpractice insurer's policy. 293 Kan. at 447-449. The plaintiff in Brennan sued his doctor in 2000 for a 1999 incident of malpractice. Id. While the lawsuit was pending, the doctor's malpractice insurer became insolvent which triggered KIGA's statutory obligation to cover the insurer's obligations. Id. But in 2005, while the lawsuit

was still pending, the Kansas statutes were revised to authorize KIGA to offset its liability with amounts paid by a malpractice claimant's health insurance, something not allowed before. Id. The legislation was expressly made retroactive in that the offset provision was to be applied to all claims pending but not yet paid at the time of the 2005 effective date of the legislation. Id.

In Brennan, this Court stated that "vested rights" describes rights "that cannot be abolished by retroactive legislation." 293 Kan. at 460. The Brennan court held that the retroactive application of the offset to the plaintiff's pending claim against KIGA adversely impacted the plaintiff's "vested right" which thereby violated due process. Id. at 462-463. However, had the plaintiff's claim not yet been pending in Brennan, there would have been no "vested right" and no due process violation. Id. The Brennan holding has no bearing on the issues in the case at bar.

In the appeal at bar, as already discussed, K.S.A. 72-5444 precludes any argument by plaintiffs that they have a "vested right." That statute makes explicitly clear by its express terms that the teacher procedure statutes may be completely abolished or repealed at any time without any recourse by those who previously benefited from those procedures. Id. Unlike in Brennan, the 2014 teacher amendments are not applied retroactively. Retroactive application would mean the 2014 amendments were to be applied backward in time from their effective date of July 1, 2014, to nullify a pre-amendment termination or nonrenewal process which had already begun before July 1, 2014. Changing teacher "tenure" status on and after July 1, 2014, is purely prospective application of the plaintiffs' new status and not retroactive.

Similarly, plaintiffs' reliance on Harding v. K.C. Wall Products, Inc., 250 Kan. 655 (1992), is unavailing to support their theory of retroactivity. In Harding, the central issue was whether the plaintiff's wrongful death action was barred by the applicable statute of limitations. The limitations statute in effect at the time of decedent's death would have barred the lawsuit. Id. at 661. However, a subsequent amendment to the limitations statute retroactively extended the time for filing, and the defendant claimed the retroactive application violated defendant's constitutional due process rights. Id. at 661-662. This Court in Harding followed a prior U.S. Supreme Court ruling and held that retroactively extending the statute of limitations time period does not violate due process under the Fourteenth Amendment. Id. at 667. The Harding court also reached the same conclusion with respect to the Kansas Constitution. Id. at 669. The Harding case is inapposite to the case at bar. Id.

The bottom line is that the 2014 amendments to the teacher statutes were clearly intended to be and are prospective in application. They took effect on July 1, 2014. In the case at bar, notice of contract nonrenewal was given to plaintiffs in May 2015 for the upcoming 2015-2016 school year. Defendant School Board followed the law in effect in May 2015 and did not retroactively apply the 2014 amendments to anything that happened regarding plaintiffs before July 1, 2014. Therefore, plaintiffs' argument that the 2014 amendments were applied retroactively to them is completely without merit.

D. THE 2014 AMENDMENTS DID NOT DEPRIVE PLAINTIFFS OF THEIR CONSTITUTIONAL RIGHT TO DUE PROCESS AS A MATTER OF LAW.

Plaintiffs argue that their constitutional due process rights were violated by the legislature's failure to "grandfather" them in and apply the 2014 teacher amendments only to teachers not yet tenured. There are many courts which have considered this constitutional issue and have rejected the arguments propounded by plaintiffs here.

In Rea v. Matteucci, 121 F.3d 483 (9th Cir. 1997), a new statute reclassified the plaintiff and other state employees so that "just cause" was no longer necessary for their employment termination. The plaintiff in Rea was subsequently terminated and sued claiming that her reclassification to an "at will" status violated her constitutional due process rights. Id. at 484. The federal Ninth Circuit, however, held that the plaintiff's property interest in her employment ended when her job was statutorily reclassified, which the state legislature had the power to do. Id. at 484-485. "[T]he legislative determination provides all the process that is due." Id. (quoting Logan v. Zimmerman Brush Co., 102 S. Ct. 1148, 1156 (1982)). Importantly, the Rea court distinguished Darling v. Kansas Water Office, 245 Kan. 45 (1989), by stating that the plaintiffs in Darling were known individuals specifically targeted for termination by the new legislation. 121 F.3d at 485.

Similarly, in Gattis v. Gravett, 806 F.2d 778 (8th Cir. 1986), new state legislation eliminated civil service protection for certain employees in county sheriff departments having a civil service system. Id. at 779. The plaintiffs in Gattis were employees who were subsequently fired without the civil service notice and hearing procedures to which

they would have been entitled before the legislative change. Id. The Gattis court held that the new legislation had extinguished the plaintiffs' property interest in their employment which had previously been conferred on them by statute. Id. at 780. "However, the legislature which creates a statutory entitlement (or other property interest) is not precluded by having done so from altering or terminating the entitlement by subsequent legislative enactment." Id. (quoting Atkins v. Parker, 105 S. Ct. 2520, 2529-2530 (1985)). Moreover, the legislative process provides citizens with all of the "process" they are "due." Id. (quoting Atkins, 105 S. Ct. at 2530). Thus, the plaintiffs in Gattis were not denied their constitutional right to due process. Id. at 780-781.

Likewise, in McMurtry v. Holladay, 11 F.3d 499 (5th Cir. 1993), former state employees sued because their civil service protection (i.e., notice, a hearing, and termination only for good cause) was removed by new legislation before their dismissals. Id. at 501-502. The McMurtry court upheld summary judgment against the plaintiffs because "the legislature, which creates the property interest in the first place, may also take it away." Id. at 502. Furthermore, "when a legislature extinguishes a property interest via legislation that affects a general class of people, the legislative process provides all of the process that is due." Id. at 504 (citing Logan v. Zimmerman Brush Co., 102 S. Ct. 1148, 1156 (1982)).

For their theory in the case at bar, plaintiffs are relying almost entirely on Darling v. Kansas Water Office, 245 Kan. 45 (1989). In Darling, a group of legislators were unhappy with the Kansas Water Director who had not developed a state water plan despite having served in that position for two years. The Kansas Water Director in turn

blamed the delay on classified employees in his office who were supposed to be preparing the plan. The Director requested more flexibility in hiring and firing his staff. The legislature then passed a law abolishing the positions of most classified employees in the Water Office and terminating their employment. The Director was given the authority to rehire any of the employees he wanted, but the new positions would be unclassified. The Director rehired 10 of the 17 employees affected, but six of the seven employees not rehired brought a lawsuit against the State alleging a violation of constitutional due process. Id. at 45-48.

This Court held that the law which terminated the plaintiffs' employment in Darling did indeed violate their constitutional due process rights. However, the holding was narrow. First, the Darling court noted the "unique set of facts" in which a few employees in a specific state agency were "singled out" and "stripped" of their rights under the Kansas Civil Service Act. Id. at 48. Second, the plaintiffs' employment was also terminated by the legislation itself. Id. Third, the action taken was at the behest of the agency head to give him more flexibility in operating his office. Id. Fourth, the law only applied to 17 known and identifiable individuals. Id. at 50. Fifth, the agency head discouraged the affected employees from discussing their opposition to the proposed legislation with the legislators by reminding them that he would make the decision regarding whether they would be rehired. Id. at 51.

The Darling case is easily distinguishable from the case at bar because of Darling's extreme facts and narrow holding. The 2014 legislation regarding K-12 teachers is applicable to teachers generally in Kansas and is not focused on a few

identifiable individuals. Moreover, the 2014 legislation did not terminate any teacher's employment. In addition, the legislation did not prohibit school districts from providing an administrative hearing before a teacher non-renewal (i.e., procedural due process) as a matter of district policy or by contract.

A federal district court in Kansas has considered and decided the precise issue raised in this appeal and has distinguished Darling. In Cook v. University of Kansas, 2011 WL 6056604 (D. Kan.), a state university employee had originally been hired in a classified civil service position, but her job was later converted to an unclassified position pursuant to a change in state law. A few years later her employment was terminated without any procedural due process safeguards. She sued claiming her constitutional due process rights were violated by the statutory change which had converted her position to unclassified status. Relying on the Darling case, the plaintiff in Cook argued that she should have been "grandfathered in" and not lost her classified status which would have provided her with due process before her dismissal. Id. at 5-6.

The Cook court held, however, that the former classified employee had no constitutional right to stay in that status, and thus had no valid due process claim. Id. at 6-7. The court in Cook distinguished Darling based on the "extraordinary nature of the statute" in that case, as well as its unique facts. Id. The Cook plaintiff was by law an unclassified employee at the time her employment was terminated. Id. As an unclassified employee, the court held that she "did not have a protected property interest in continued employment." Id. Therefore, her constitutional challenge to the statutory change failed as a matter of law. Id.

Other courts have similarly denied due process claims analogous to the plaintiffs' claims in the case at bar. See Board of Education of the City of Chicago, 185 F.3d 770, 779-780 (7th Cir. 1999) (no due process violation by eliminating procedural teacher protections before firing; legislators' motive not relevant); Pittman v. Chicago Board of Education, 64 F.3d 1098 (7th Cir. 1995) (change in state law to eliminate tenure for school principals did not violate constitutional due process).

In the case at bar, plaintiffs also rely for their argument on Resolution Trust Corp. v. Fleischer, 257 Kan. 360, 365-366 (1995). However, that case involved legislation which retroactively eliminated already accrued and pending tort actions. Id. The court there held the legislation unconstitutional because a person injured by a tortuous act in Kansas has a property right to a cause of action protected by the Kansas Constitution. Id. at 376. The Resolution Trust case is inapposite to the case at bar because plaintiffs' "right" to teacher tenure was subject to repeal pursuant to K.S.A. 72-5444 and is not a right found in the Kansas Constitution.

Plaintiffs at bar also erroneously rely on Holt v. Wesley Medical Center, 227 Kan. 536, 543 (2004). In Holt, the legislation at issue again retroactively deprived persons with an accrued and pending tort claim of a remedy which had previously existed. Id. at 539-540. The Kansas Constitution prohibits such legislation. Id. at 548. In the case at bar, however, no provision of the Kansas Constitution guarantees tenure to K-12 teachers.

In addition, plaintiffs' reliance in the case at bar on Rios v. Board of Public Utilities, 256 Kan. 184, 190-192 (1994), is unavailing. In Rios, this Court held that new

legislation could be applied retroactively to preclude judicial review of an administrative order in a workers compensation proceeding. Id. The Rios court so held because the new legislation was procedural in nature. Id. Thus, the retroactive application of the new law was constitutional despite the fact that it eliminated the workers compensation claimant's appeal. Id. Nothing in Rios is relevant to the case at bar.

It is settled Kansas law that a challenged statute shall be presumed to be constitutional:

> The constitutionality of a statute is presumed, and all doubts must be resolved in favor of its validity. Before a statute may be stricken down, it must clearly appear the statute violates the Constitution. Moreover, it is the court's duty to uphold the statute under attack, if possible, rather than defeat it, and, if there is any reasonable way to construe the statute as constitutionally valid, that should be done.

Bair v. Peck, 248 Kan. 824, Syl. 1 (1991).

Furthermore, it is also settled Kansas law that courts in this state will not determine the constitutionality of a statute based on the court's agreement or disagreement with the legislation:

> The judiciary interprets, explains, and applies the law to controversies concerning rights, wrongs, duties, and obligations arising under the law and has had imposed upon it the obligations of interpreting the Constitution and of safeguarding the basic rights reserved thereby to the people. In this sphere of responsibility, courts have no power to overturn a law enacted by the legislature within constitutional limitations, even though the law may be unwise, impolite, or unjust. The remedy in such a case lies with the people through the political process.

U.S.D. No. 380 v. McMillen, 252 Kan. 451, Syl. 5 (1993).

In the case at bar, plaintiffs seek to have this Court ignore the presumption of constitutionality to which the 2014 teacher amendments are entitled. Bair. Plaintiffs also seek to have the Court decide this matter based on whether the 2014 amendments were wise or unwise from a policy standpoint. McMillen. Neither of these approaches are proper. Id.

In summary, the 2014 amendments to the teacher statutes are constitutional and do not violate plaintiffs' right to due process. Plaintiffs did not have a vested property interest in their employment which could not be repealed. See K.S.A. 72-5444. Therefore, defendant School Board was entitled to summary judgment as to all of plaintiffs' claims. See Rea, Gattis, and McMurtry, supra.

E. THE 2014 LEGISLATIVE PROCESS WAS NOT "DEFECTIVE" AND PROVIDED ALL THE PROCESS DUE.

Plaintiffs argue that the 2014 amendments to the teacher statutes were enacted with "defective" legislative process. According to plaintiffs, the deficiency in the process arises from the following facts: a) no committee hearings were held on these specific amendments, b) the amendments were enacted toward the end of the legislative session, and c) plaintiffs were not personally provided notice of the proposed amendments and given a chance to "voice" their opinion to the legislators. The only authority which plaintiffs cite for this argument is Darling, which is easily distinguishable from the case at bar.

To defendant's knowledge, there is no case which holds that legislation is constitutionally null and void if a) committee hearings are not held, b) the statute is adopted or amended toward the end of the legislative session, and c) the persons directly affected by the new law are not notified and given a chance to speak against it. That is not the law, and plaintiffs do not cite any authority which so holds.

There are, however, numerous cases (including U.S. Supreme Court controlling authority) which have held that the legislative process provides all the process required to satisfy constitutional due process when the legislation affects a general class of people. See, e.g., Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 445 (1915); Minnesota State Board for Community Colleges v. Knight, 465 U.S. 271, 284 (1984); Dibble v. Quinn, 793 F.3d 803, 809-810 (7th Cir. 2015); Price v. Western Resources, Inc., 232 F.3d 779, 789-790 (10th Cir. 2000). See also Rea, Gattis, McMurtry, supra. There is no question in this case that the 2014 amendments affected a general class of people (i.e., all tenured K-12 teachers).

"[T]he Supreme Court long ago established that the federal constitution does not require a hearing on the adoption of legislation." Onyx Properties, LLC v. Board of County Commissioners of Elbert County, 838 F.3d 1039, 1044-1045 (10th Cir. 2016). See also Knight, 465 U.S. at 284 (Supreme Court has never held that the Constitution requires hearings with public participation before legislation is enacted). The plaintiffs in this appeal cannot legitimately contend the 2014 legislative process was "defective" when there is no constitutional right to a legislative hearing before legislation is passed. Id.

In making their "defective process" argument, plaintiffs ignore the following stipulated facts as set forth in their own brief. First, the 2014 amendments (as proposed by Senator Arpke) were approved by the Senate (i.e., by the majority of senators voting) on April 3, 2014, after debate. That vote was 23 to 17. Plaintiffs' elected senator or senators had a voice and a vote in that decision. (See Stip. Fact Nos. 18-19 and 22.)

Moreover, the second conference committee (consisting of three senators and three House representatives) voted in favor of the proposed legislation (which included the teacher amendments) and reported its recommendation for approval to the full Senate and House of Representatives on April 6, 2014. (See Stip. Fact No. 26.) The House then debated the matter and voted 63 to 57 to enact the legislation, including the teacher amendments. (See Stip. Fact No. 27.) Again, plaintiffs had a voice through their elected House representative or representatives. The Senate also debated the matter and voted 22 to 16 to enact the legislation, including the teacher amendments. (See Stip. Fact No. 28.) Plaintiffs' elected senator or senators had notice, a right to speak, and a vote regarding the legislation.

If the legislative process was constitutionally "defective" in this case, then virtually all legislation enacted toward the end of a legislative session every year could be deemed to violate some citizen's due process rights. In a representative democracy, legislation is debated and enacted by elected legislators. The enacted legislation, however, can be repealed or amended by the same or different legislators in future years. The fact that plaintiffs and other K-12 teachers did not persuade their legislators to propose and pass legislation in 2015 or 2016 to repeal the 2014 teacher amendments

refutes the alleged "deficiency" of the 2014 legislative process. In short, the legislative process in 2014 was not constitutionally "defective." Thus, defendant School Board was entitled to summary judgment which should be upheld by this Court. Bi-Metallic, Knight, Onyx.

II. THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT ON PLAINTIFFS' BREACH OF CONTRACT THEORY.

A. STANDARD OF REVIEW.

The School District concurs with plaintiffs' standard of review statement and citation.

B. PLAINTIFFS' BREACH OF CONTRACT CLAIM FAILS AS A MATTER OF LAW.

It is undisputed that both plaintiffs had annual employment contracts which, if not renewed, would expire at the end of the 2014-2015 school year (June 30, 2015). Plaintiffs do not claim that the contracts themselves were breached by the School District's notice of nonrenewal on May 12, 2015. Rather, plaintiffs again try to challenge the constitutionality of the 2014 teacher amendments. Under the prior law (K.S.A. 2013 Supp. 72-5437(a)), the K-12 teachers with preferred status were to be employed by year-to-year contracts which would automatically renew per statute unless the local school board gave notice of nonrenewal by the third Friday of May each year. In addition to the notice, a school board under the old law would provide its reasons for nonrenewal, and the teacher could request an administrative hearing with a hearing officer. See K.S.A. 2013 Supp. 72-5438(a).

Plaintiffs' breach of contract theory is based on the entirely unsupported assumption that the defendant School Board in this case should have applied the old law (prior to the 2014 amendments) to plaintiffs when their contracts were not renewed in May 2015. This is merely another "retroactive" argument under the guise of Kansas contract law.

Plaintiffs essentially argue that defendant School District "breached" plaintiffs' contracts when the School Board applied the teacher statutes as they existed in May 2015. This "breach of contract" theory is nonsensical because the School Board had (and still has) a legal duty to comply with state law as it exists when the Board's decisions are made. Plaintiffs' theory of recovery for alleged contract breach would have required the School Board to disregard the 2014 teacher amendments and apply prior law to plaintiffs, even though the prior law no longer legally existed. See also K.S.A. 72-5444.

It was not for the School Board to question the validity of the 2014 teacher amendments; the School Board's duty was to apply them as written. The School Board cannot have "breached" plaintiffs' employment contracts by following the law in place at the time.

In summary, plaintiffs' "breach of contract" claim is facially without any validity as a matter of law. Plaintiffs are not basing this claim on their actual employment contracts. They are also not basing this claim on the teacher nonrenewal law which existed when their contracts were not renewed. Instead, they are basing this purported claim on a prior teacher nonrenewal law which did not even exist at the time that their contracts were not renewed. However, K.S.A. 72-5444 (part of the old and new teacher

law) explicitly states that no legislative amendment or repeal of the teacher statutes "shall be construed to constitute an impairment of any existing contractual right." Plaintiffs' "breach of contract" claim is expressly foreclosed by K.S.A. 72-5444, as well as the fact that the School Board followed the law as it existed in May 2015 (and as it still exists). Therefore, defendant School District was entitled to summary judgment as to plaintiffs' "breach of contract" claim as a matter of law and that ruling should be upheld by this Court.

CONCLUSION

For the reasons stated herein, defendant School District respectfully requests that this Court uphold and affirm defendant's summary judgment in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June, 2017, I electronically filed the foregoing with the Clerk of the Court by using the Kansas Courts Electronic Filing System and served a copy by e-mail to the following:

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APPENDIX

Journal Entry of Judgment

Defendants' Proposed Conclusions of Law which Journal Entry Incorporated

IN THE THIRTEENTH JUDICIAL DISTRICT
DISTRICT COURT, BUTLER COUNTY, KANSAS
CIVIL DEPARTMENT

SALLE A. SCRIBNER AND MARK E. MCNEMEE Plaintiffs, vs. BOARD OF EDUCATION OF USD NO. 492, FLINTHILLS, BUTLER COUNTY, KANSAS, Defendant, and THE STATE OF KANSAS, Intervenor/Defendant	Division 2 Case No. 15-CV-243

JOURNAL ENTRY OF JUDGMENT

NOW, on this 29th day of August, 2016, the above-entitled matter comes on for the Court's findings and conclusions regarding summary judgment motions filed by both the plaintiffs and the defendant. These motions were orally argued on April 18, 2016. Plaintiffs appear today by their counsel, David M. Schauner. Defendant appears by its counsel, Edward L. Keeley. The intervenor, State of Kansas, appears by its counsel, Dwight R. Carswell.

THEREUPON, the Court announces that it has adopted the following stipulated facts (previously agreed and filed by the parties) as the Court's findings of fact regarding the motions:

1. The Defendant Board of Education of Unified School District No. 492, Flinthills, Butler County, KS (Board or School District), is duly organized pursuant to Article 6, Section 5 of the Kansas Constitution and Chapter 72 of the Kansas Statutes Annotated.

2. Plaintiff Sallie A. Scribner was first employed as a teacher by the defendant U.S.D. No. 492 beginning with the 1997-1998 school year.

3. Ms. Scribner had been continuously employed as a teacher by the School District for 18 consecutive years, from the beginning of the 1997-1998 school year through the end of the 2014-2015 school year.

4. Plaintiff Mark E. McNemee was first employed as a teacher by U.S.D. No. 492 beginning with the 1999-2000 school year.

5. Mr. McNemee had been continuously employed as a teacher by the School District for 16 consecutive years, from the beginning of the 1999-2000 school year through the end of the 2014-2015 school year.

6. May 15, 2015, was the third Friday in May 2015.

7. At the May 12, 2015, meeting of the Board of Education of U.S.D. No. 492, the Board adopted resolutions directing that Plaintiffs be given notice of the Board's intent to not renew their employment contracts for the 2015-2016 school year.

8. The Board served Plaintiffs with written notices of its intent to not renew their contracts for the 2015-2016 school year in notice letters from Stephanie Girty, the Clerk of the Board, on May 12, 2015.

9. House Bill 2506 (H.B. 2506) was introduced into the state House of Representatives on January 27, 2014. (2014 House Journal, p. 1621.)

10. H.B. 2506 was an act to repeal K.S.A. 72-60b03 relating to the expiration provision of the Midwestern Higher Education Compact Act. (2014 House Journal, p. 1621.)

11. On January 28, 2014, H.B. 2506 was referred to the House Education Budget Committee. (2014 House Journal, p. 1626.)

12. A hearing on H.B. 2506 was held in the House Education Budget Committee on February 19, 2014. (House Actions Report, p. 211.)

13. H.B. 2506 was passed without amendment by the House by a 122-1 vote on February 26, 2014. (2014 House Journal, p. 1791; House Actions Report, p. 211.)

14. That same day, February 26, 2014, H.B. 2506 was introduced into the Senate. (2014 Senate Journal, p. 1641; House Actions Report, p. 211.)

15. On February 27, 2014, H.B. 2506 was referred to the Senate Committee on Ways and Means. (2014 Senate Journal, p. 1661; House Actions Report, p. 211.)

16. At the April 1, 2014, meeting of the Senate Committee on Ways and Means, the committee voted to remove the contents of H.B. 2506 and replace it with the contents of S.B. 452, creating Senate Substitute for H.B. 2506. (Minutes of the Committee on Ways and Means, Tuesday, April 1, 2014, p. 5.)

17. The original version of Senate Substitute for H.B. 2506 which was passed by the Senate Ways and Means Committee on April 1, 2014, contained no provisions that amended the Teacher Due Process Act, K.S.A. 2013 Supp. 72-5436 *et seq.* (2014 Senate Journal, p. 1942.)

18. On Thursday, April 3, 2014, the Senate, having resolved itself into the Committee of the Whole, voted multiple times to amend S. Sub. for H.B. 2506. (2014 Senate Journal, pp. 1986-2006.)

19. The last of the amendments to S. Sub. for H.B. 2506 approved by the Senate on Thursday, April 3, 2014, was a proposal by Senator Arpke which made amendments to the Teacher Due Process Act, K.S.A. 2013 Supp. 72-5436 *et seq*. (2014 Senate Journal, pp. 1994-2006.)

20. No committee hearings were held in the Senate regarding Senator Arpke's amendments to Senate Sub. for H.B. 2506. (House Actions Report, pp. 211-212.)

21. Senator Arpke's amendments had not been considered by either house of the Kansas legislature before they were added to S. Sub. for H.B. 2506 on April 3, 2014.

22. After debate, Senate Substitute for H.B. 2506, as amended, was passed by the Senate on April 3, 2014, by a vote of 23 to 17. (2014 Senate Journal, p. 2005.)

23. On Friday, April 4, 2014, the House voted to nonconcur to S. Sub. for H.B. 2506, as amended, and requested that a conference committee be appointed. (2014 House Journal, p. 2185.)

24. A conference committee consisting of three members of each legislative body was appointed on Friday, April 4, 2014, to reconcile the version of H.B. 2506, which had been passed by the House and S. Sub. for H.B. 2506, as amended, which had been passed by the Senate. (2014 House Journal, pp. 2185; 2014 Senate Journal, p. 2010.)

25. On Saturday, April 5, 2014, the conference committee failed to reach agreement on S. Sub. for H.B. 2506, as amended. On Sunday, April 6, 2014, the conference committee report to agree to disagree was adopted by both legislative bodies and a second conference committee was appointed. (2014 House Journal, p. 2294; 2014 Senate Journal, p. 2243.)

26. Later on Sunday, April 6, 2014, the second conference committee reached agreement on S. Sub. for H.B. 2506, as amended, when the House acceded to all Senate amendments. The second conference committee issued its conference committee report.

27. After debate, the House voted to adopt the second conference committee report on S. Sub. for H.B. 2506 later on April 6, 2014, by the vote of Yeas 63 to Nays 57. (2014 House Journal, pp. 2294, 2342.) That vote approved S. Sub. for H.B. 2506, as amended, including Senator Arpke's amendments.

28. After debate, the Senate also voted to adopt the second conference committee report on S. Sub. for H.B. 2506 on April 6, 2014, by the vote of Yeas 22 to Nays 16. (2014 Senate Journal, p. 2292.) That vote approved S. Sub. for H.B. 2506, as amended, including Senator Arpke's amendments.

29. Governor Brownback signed S. Sub. for H.B. 2506, as amended, on April 21, 2014. (2014 House Journal, p. 2347.)

30. Senate Sub. for H.B. 2506, as amended, took effect and was in force from and after its publication in the Kansas Register. (2014 Kansas Session Laws, Ch. 93, § 68.)

31. Senate Sub. for H.B. 2506 was published in the Kansas Register on May 1, 2014. (33 Kansas Register, No. 18, May 1, 2014, pp. 438-455.)

32. K.S.A. 2013 Supp. 72-5436, 72-5437, 72-5438, 72-5439, 72-5445, and 72-5446 of the Teacher Due Process Act were amended by S. Sub. for H.B. 2506 effective July 1, 2014. (2014 Kansas Session Laws, Ch. 93, § 67.)

WHEREUPON, the Court announces that it finds and adopts the conclusions of law Nos. 1-23 as proposed and previously filed jointly by the defendant and the intervenor, State of Kansas, as the Court's conclusions of law regarding the parties' dispositive motions. Those conclusions of law are fully incorporated herein by reference.

WHEREUPON, the Court summarizes its findings and conclusions of law with respect to the constitutional due process issue in this case as follows. The text of the state law is clear and unambiguous. After July 1, 2014, the procedures in K.S.A. Supp. 72-5438, et seq., no longer apply to any K-12 teachers. It is black-letter law that when legislation affects a general class of people, the legislative process provides all the process that is due. In precisely the circumstances presented before this Court, courts across the country uniformly have applied this rule and have held that when a state legislature eliminates civil service or tenure protections for public employees, the legislative process is all that is required to satisfy the Due Process Clause. Plaintiffs do not dispute that House Bill 2506 was duly and properly enacted as a matter of state law; nor do plaintiffs cite any case law interpreting the federal Due Process Clause as requiring a state legislature to hold formal hearings or follow any other particular federally mandated procedures where acting on proposed legislation. The "unique set of facts" and unusual situation in Darling v. Kansas Water Office, 245 Kan. 45, 48 (1989), is not present here. Instead, the foundational general rule that the legislative process provides all the process that is due controls in this case. Plaintiffs are requesting this Court do exactly what K.S.A. 72-5444 expressly prohibits: declare plaintiffs had a "vested right" which was not subject to amendments or nullification by the legislature. However, K.S.A. 72-5444 makes clear plaintiffs had no such right. HB 2506 does not violate the Due Process Clause.

WHEREUPON, the Court makes the following findings and conclusions of law with respect to plaintiff's breach of contract claim. That claim fails as a matter of law for reasons

previously enumerated. HB 2506's amendments to the teacher dismissal provisions of K.S.A. 72-5436, et seq., took effect on July 1, 2014. Plaintiffs' annual employment contracts were not renewed on May 12, 2015, and plaintiffs were given written notice the same day. At that time, and currently, K.S.A. 2014 Supp. 72-5437 mandated that the school district give plaintiffs written notice of nonrenewal of their annual employment contracts by May 15, 2015. There is no factual dispute in this case whether the school board complied with this statute. It did. Plaintiffs have stipulated to that fact. Compliance with K.S.A. 72-5437 was all the school board was required to do to nonrenew plaintiffs' contracts under existing Kansas law. Plaintiffs' theory of recovery for alleged contract breach would have required the school board to disregard the 2014 teacher amendments and apply prior law to plaintiffs, even though the prior law no longer existed. The school board cannot have breached plaintiffs' employment contracts by following the law in place at the time. The plaintiffs' breach of contract claim is without merit.

IT IS THEREFORE BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED that summary judgment be granted to defendant with respect to all of plaintiffs' claims in this case.

IT IS FURTHER ORDERED that plaintiffs' motion for summary judgment be overruled.

IT IS SO ORDERED.

Honorable Charles M. Hart
District Court Judge

APPROVED:

McDonald Tinker PA

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ELECTRONICALLY FILED
2016 Oct 28 PM 1:16
CLERK OF THE BUTLER COUNTY DISTRICT COURT
CASE NUMBER: 2015-CV-000243

IN THE DISTRICT COURT OF BUTLER COUNTY, KANSAS
13TH JUDICIAL DISTRICT, DIVISION 2

SALLIE A. SCRIBNER AND MARK E. MCNEMEE, Plaintiffs-Appellants	)	
vs.	)	District Court Case No. 15-CV-243
BOARD OF EDUCATION OF U.S. D. NO. 492, FLINTHILLS, BUTLER COUNTY, KANSAS, Defendant-Appellee.	)	

NOTICE OF APPEAL

The Kansas National Education Association appeals from the judgment of the district court entered on September 29, 2016, on all issues to the Court of Appeals of the State of Kansas.

KANSAS NATIONAL EDUCATION ASSOCIATION

BY _____

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I certify that a copy of the above NOTICE OF APPEAL was filed electronically and e-mailed on October 28, 2016, addressed to the following:

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BUTLER COUNTY JUDICIAL CENTER
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Appellate Case No. 16-116818-A
District Court Case No. 15CV243

SALLIE A. SCRIBNER AND
MARK E. MCNEMEE, APPELLANT,
V.
BOARD OF EDUCATION OF
USD NO. 492, FLINTHILLS,
BUTLER COUNTY, KANSAS, APPELLEE,
AND
THE STATE OF KANSAS, INTERVENOR.

PLEASE BE ADVISED THAT THE FOLLOWING ACTIVITY HAS BEEN NOTED FOR THE CASE ABOVE:

NOTICE OF APPEAL FILED
NOTICE OF APPEAL (10/28/16) Sallie Scribner, et al.

Court: Court of Appeals of Kansas Case No.: 16-116818-A

EFILED
Date: November 17, 2016

Douglas T. Shima
Clerk of the Appellate Courts

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2016 Jun 03 PM 4:32
CLERK OF THE BUTLER COUNTY DISTRICT COURT
CASE NUMBER: 2015-CV-000243

IN THE DISTRICT COURT OF BUTLER COUNTY, KANSAS
13TH JUDICIAL DISTRICT

SALLIE A. SCRIBNER AND MARK E. MCNEMEE,	)	
Plaintiffs,	)	Division 2
v.	)	Case No. 2015-CV-243
BOARD OF EDUCATION OF U.S.D. NO. 492, FLINTHILLS, BUTLER COUNTY, KANSAS,	)	
Defendant,	)	
and	)	
THE STATE OF KANSAS,	)	
Intervenor/Defendant.	)	

DEFENDANTS' PROPOSED CONCLUSIONS OF LAW

COMES NOW, Defendant Board of Education of U.S.D. No. 492 (Flinthills School District) and Intervenor/Defendant State of Kansas and hereby submit the following proposed conclusions of law. The Court has previously accepted the parties' joint stipulations of facts.

I. HB 2506's Teacher Dismissal Provisions Apply to All K-12 Teachers.

1. Before July 1, 2014, a school district that did not wish to renew or wished to terminate the employment contract of a teacher who had completed the years of employment specified in K.S.A. 2013 Supp. 72-5445 was required to provide the teacher a statement of reasons for the nonrenewal or termination. *See* K.S.A. 2013 Supp. 72-5438(a). The teacher could then request a hearing on the matter, and the hearing procedures were governed by K.S.A. 2013 Supp. 72-5438 *et seq.*

2. 2014 Senate Substitute for House Bill 2506 ("HB 2506") amended K.S.A. 2013 Supp. 72-5436 *et seq.* to provide that these prior procedures would no longer apply to K-12 teachers.

3. This change applies prospectively to *all* K-12 teachers, including Plaintiffs here, as of July 1, 2014.

4. Plaintiffs erroneously argue that even after the enactment of HB 2506, the former provisions of K.S.A. 2013 Supp. 72-5438 *et seq.* continue to apply to K-12 teachers who were subject to those procedures before July 1, 2014. Plaintiffs' arguments cannot be squared with the plain language of the relevant statutes. HB 2506 modified the definitions of "teacher" and "board" in K.S.A. 2013 Supp. 72-5436 to exclude K-12 teachers and local school boards. As a result, it is impossible to read the termination and nonrenewal provisions now articulated in K.S.A. 2015 Supp. 72-5438 *et seq.* as applying to any K-12 teachers.

5. This Court is obligated to give effect to the unambiguous text of HB 2506, and thus to hold that the 2014 amendments apply to all K-12 teachers. *See Neighbor v. Westar Energy, Inc.*, 301 Kan. 916, 918, 349 P.3d 469 (2015) ("When language is plain and unambiguous, there is no need to resort to statutory construction. [A] court merely interprets the language as it appears . . . .") (quoting *In re Estate of Stradler*, 301 Kan. 50, 55, 339 P.3d 769 (2015)).

6. Contrary to Plaintiffs' claims, this is not a retroactive application of the statute. Teachers who were dismissed before HB 2506 took effect were subject to the procedures specified in K.S.A. 2013 Supp. 72-5436 *et seq.*, but *going forward*, after HB 2506 took effect on July 1, 2014, the termination or nonrenewal of K-12 teacher contracts is governed by HB 2506. This is a purely *prospective* application of the law.

7. The constitutional avoidance canon does not offer any support for Plaintiffs' implausible interpretation of the statutory language. For the reasons discussed below, there are no serious constitutional concerns with HB 2506. Even if there were, the constitutional avoidance canon applies only when there is a *plausible* interpretation of the statute that avoids the constitutional issues. *See, e.g., Hoesli v. Triplett, Inc.*, 303 Kan. 358, 367, 361 P.3d 504, 511-12 (2015). Here, the text of the law is clear and unambiguous—after July 1, 2014, the procedures in K.S.A. 2013 Supp. 72-5438 *et seq.* no longer apply to *any* K-12 teachers.

II. HB 2506 Does Not Violate the Due Process Clause.

8. Plaintiffs next incorrectly argue that HB 2506 deprives them of property without due process of law in violation of the Due Process Clause of the Fourteenth Amendment.

9. It is well-settled Kansas law that the "constitutionality of a statute is presumed, and all doubts must be resolved in favor of its validity. Before a statute may be stricken down, it must clearly appear the statute violates the Constitution." *Bair v. Peck*, 248 Kan. 824, Syl. 1, 811 P.2d 1176 (1991).

10. Assuming, without deciding, that K.S.A. 2013 Supp. 72-5436 *et seq.* created a protected property interest for certain teachers, the Due Process Clause does not prevent the Legislature from modifying or eliminating that interest. Rather, the Constitution only requires that the Legislature provide due process when doing so.

11. It is black-letter law that when legislation affects a general class of people, the legislative process provides all the process that is due. This rule traces back to the Supreme Court's decision in *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915). In rejecting a due process challenge to a tax assessment order, *Bi-Metallic* held:

> Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not

> require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.

Id. at 445.

12. In the century since *Bi-Metallic*, the Supreme Court and the lower federal courts repeatedly have reaffirmed that when legislation affects a general class of people, the legislative process provides all the process that is due. *See, e.g.*, *United States v. Locke*, 471 U.S. 84, 108 (1985); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-33 (1982); *Price ex rel. Price v. W. Res., Inc.*, 232 F.3d 779, 789-90 (10th Cir. 2000).

13. In precisely the circumstances presented here, courts across the country uniformly have applied this rule and held that when a state legislature eliminates civil service or tenure protections for public employees, the *legislative process* is all that is required to satisfy the Due Process Clause. *See, e.g.*, *Dibble v. Quinn*, 793 F.3d 803, 809-14 (7th Cir. 2015); *Rea v. Matteucci*, 121 F.3d 483, 485 (9th Cir. 1997); *McMurtray v. Holladay*, 11 F.3d 499, 504 (5th Cir. 1993); *Gattis v. Gravett*, 806 F.2d 778, 781 (8th Cir. 1986); *Fumarolo v. Chicago Bd. of Educ.*, 566 N.E.2d 1283, 1307 (Ill. 1990); *Conn. Educ. Ass'n v. Tirozzi*, 554 A.3d 1065, 1071-72 (Conn. 1989).

14. Because the legislative process used to enact HB 2506 provided Plaintiffs all the process that was due, their due process challenge to HB 2506 is without merit.

15. Plaintiffs criticize the legislative process used to enact HB 2506 because the Legislature did not hold a formal hearing on the law's teacher dismissal provisions. But Plaintiffs do not dispute that HB 2506 was duly and properly enacted as a matter of state law, nor do they cite any case law interpreting the federal Due Process Clause as requiring a state legislature to

hold formal hearings or follow any other particular, federally-mandated procedures when acting on proposed legislation. In fact, any argument along those lines is foreclosed completely by the century-old *Bi-Metallic* decision, which held that when legislation affects more than a small number of people, it would be "impracticable" to provide notice and an opportunity for a hearing to every affected person. *Bi-Metallic*, 239 U.S. at 445 ("If the result in this case had been reached, as it might have been by the state's doubling the rate of taxation, no one would suggest that the 14th Amendment was violated unless every person affected had been allowed an opportunity to raise his voice against it before the body intrusted by the state Constitution with the power."). Under the Constitution, affected individuals' "rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." *Id.*

16. Plaintiffs' reliance on *Darling v. Kansas Water Office*, 245 Kan. 45, 774 P.2d 941 (1989), is misplaced. *Darling* involved a "unique set of facts" in that "a handful of employees in a specific state agency were singled out by the legislature to be stripped of their rights under the Kansas Civil Service Act and terminated." *Id.* at 48. In rejecting the State's argument that the legislative process provided all the process that was due, the Kansas Supreme Court quoted the following passage from the district court's opinion:

> The Court acknowledges that the contentions made by the Defendants might be appropriate if this was an ordinary piece of legislation. But SB 501 was not an ordinary piece of legislation, by any standard. The bill, urged by Defendant Harkins, specifically provides for the termination of seventeen employees within the [Kansas Water Office]. The case support utilized by Defendants on this issue, speak to 'generally-applicable legislation.' This bill was not generally applicable and provided instead for the loss of a constitutionally-recognized property interest by seventeen known and identifiable individuals.

Id. at 50.

17. Unlike the law in *Darling*, HB 2506 affected a general and very large class of people (*all* K-12 teachers in Kansas, numbering approximately 35,000), not a small number of identifiable individuals. HB 2506 also did not direct that any adverse action be taken against anyone in the class (such as having their employment terminated), very unlike the law in *Darling*. Thus, *Darling*'s "unique set of facts" and unusual situation is not present here, and the foundational, general rule that the legislative process provides all the process that is due controls.

18. Plaintiffs' due process challenge to HB 2506 fails for a second reason. Even assuming Plaintiffs had a constitutionally protected property interest in their continued employment, the Constitution does not require that due process procedures be spelled out in a state statute. The Due Process Clause only requires that such process actually be provided when the government in fact takes a protected property interest.

19. The Legislature therefore did not violate the Due Process Clause when it provided that the procedures in K.S.A. 2013 Supp. 72-5438 *et seq.* would no longer be required as a matter of state statute and, instead, left the determination of what procedures will be provided to local school districts.

20. Due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). It is "flexible and calls for such procedural protections as the particular situation demands." *Id.*

21. By amending K.S.A. 2013 Supp. 72-5436 *et seq.* to exclude K-12 teachers from certain *statutory* procedures, the Legislature simply allowed local school boards to determine what procedures they deem most appropriate for the termination or nonrenewal of teacher contracts, consistent with the Constitution.

22. Plaintiffs' due process arguments also ignore the text of K.S.A. 72-5444, which since 1974 (when K.S.A. 72-5436 *et seq.* was first adopted) has provided:

> Nothing in this act shall be construed to create any right, or to authorize the creation of any right, which is not subject to amendment or nullification by act of the legislature. Nothing in this act and no amendment or repeal of this act or any part thereof shall be construed to constitute an impairment of any existing contractual right.

K.S.A. 72-5444; Session Laws 1974, Ch. 301.

23. Plaintiffs are requesting this Court do exactly what K.S.A. 72-5444 expressly prohibits—declare that they had a "vested right" which was not subject to amendment or nullification by the Legislature. K.S.A. 72-5444 makes clear they had no such right.

24. For all of these reasons, HB 2506 does not violate the Due Process Clause.

III. Plaintiffs' Breach of Contract Claim Also Fails As a Matter of Law.

25. Plaintiffs' breach of contract claim is premised on their assertion that they remained subject to the former provisions of K.S.A. 2013 Supp. 72-5438 *et seq.* This assertion is false, for the reasons discussed above.

26. HB 2506's amendments to the teacher dismissal provisions of K.S.A. 72-5436 *et seq.* took effect July 1, 2014.

27. Plaintiffs' annual employment contracts were not renewed on May 12, 2015, and Plaintiffs were given written notice the same day. At that time (and currently), K.S.A. 2014 Supp. 72-5437 mandated that the School District give Plaintiffs written notice of nonrenewal of their annual employment contracts by May 15, 2015. There is no factual dispute in this case whether the School Board complied with this statute. It did. Plaintiffs have stipulated to that fact. (See Stip. Fact, Nos. 6-8.)

28. Compliance with K.S.A. 2014 Supp. 72-5437 was all that the School Board was required to do to nonrenew Plaintiffs' contracts under existing Kansas law.

29. Plaintiffs' theory of recovery for alleged contract breach would have required the School Board to disregard the 2014 teacher amendments and apply prior law to Plaintiffs, even though the prior law no longer legally existed.

30. The School Board cannot have "breached" Plaintiffs' employment contracts by following the law in place at the time. Plaintiffs' breach of contract claim is without legal merit.

CONCLUSION

In light of the joint stipulations of fact and the above conclusions of law, the Motion for Summary Judgment filed by Defendant Board of Education for U.S.D. No. 492 should be granted, and Plaintiffs' Motion for Summary Judgment should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2016, the above Proposed Conclusions of Law were filed with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to registered participants, and copies were electronically mailed to:

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2016 Jul 15 AM 9:32
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CASE NUMBER: 2015-CV-000243

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

SALLE A. SCRIBNER AND MARK E. MCNEMEE Plaintiffs, vs. BOARD OF EDUCATION OF USD NO. 492, FLINTHILLS, BUTLER COUNTY, KANSAS, Defendant.	)	Case No. 15-CV-243

NOTICE OF CHANGE OF LAW FIRM NAME

COMES NOW Edward L. Keeley and notifies the Court and all parties that effective July 1, 2016, McDonald, Tinker, Skaer, Quinn & Herrington, P.A. has changed its name to McDonald Tinker PA. The contact information remains the same but is listed below.

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I hereby certify that on this 15th day of July, 2016, I electronically filed the foregoing **Notice of Change of Law Firm Name** with the Clerk of the Court by using the Kansas Courts Electronic Filing System which will send electronic notice to the following:

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IN THE DISTRICT COURT OF BUTLER COUNTY, KANSAS

SALLIE A. SCRIBNER AND MARK E. MCNEMEE, Plaintiffs,

vs.

BOARD OF EDUCATION OF USD NO. 492, FLINTHILLS, BUTLER COUNTY, KANSAS, Defendants.

Case No. 2015-CV-243

CERTIFICATE OF COMPLETION OF TRANSCRIPT

I, Rhonda L. Landsverk, CSR, CRI, CCR, Official Court Reporter for the 13th Judicial District of Kansas, certify that pursuant to the request for transcript of Edward Keeley, counsel for defendant, I have completed the transcript and filed same this date with the Clerk of the Butler County District Court as follows:

Proceedings	Hearing Date	#Pages	Filed w/Clerk
Opinion Ruling	08/29/16	10	09/01/16

/s/ RHONDA L. LANDSVERK, CSR, CRI, CCR
CERTIFIED SHORTHAND REPORTER #1006

CERTIFICATE OF SERVICE

I, Rhonda L. Landsverk, CSR, CRI, CCR, hereby certify that I filed the original of the above and foregoing CERTIFICATE OF COMPLETION with the Clerk of the Butler County District Court, and that I served a true and correct copy of the above on 09/01/16, to:

1. Mr. David Schauner
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