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CASE NUMBER: 116818

No. 16-116818-S

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-Appellee.

BRIEF OF INTERVENOR

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

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NATURE OF THE CASE

During the 2014 legislative session, the Kansas Legislature amended K.S.A. 2013 Supp. 72-5436 *et seq.* to provide that certain statutory procedures for the nonrenewal or termination of teacher contracts would no longer apply to K-12 teachers. *See* 2014 Senate Substitute for House Bill 2506 ("HB 2506"), §§ 48-54, L. 2014, ch. 93, §§ 48-54.

Plaintiffs are K-12 teachers who were dismissed after HB 2506 took effect. They sued their Board of Education ("Board"), arguing that HB 2506's amendments to the nonrenewal and termination procedures violated the Due Process Clause of the Fourteenth Amendment to the U.S Constitution[1] and that the Board breached their contracts by not following the former procedures. The State intervened solely to defend the constitutionality of HB 2506. (R. Vol. I, 46-49, 134-35.) The parties stipulated to the relevant facts and the district court granted summary judgment to the Board, rejecting Plaintiffs' constitutional challenge. (R. Vol. I, 206-12.)

[1] Plaintiffs' Petition only raised a federal constitutional claim and did not mention the Kansas Constitution. (R. Vol. I, 14.) Plaintiffs now appear to suggest that HB 2506 also violates allegedly similar provisions of the Kansas Constitution. Plaintiffs simply say that the Kansas Constitution provides much the same protection as the federal Due Process Clause, *see* Brief of Appellants at 8-9; they do not argue that the Kansas Constitution provides a broader due process right. Thus, rejection of Plaintiffs' federal due process claim will necessarily resolve any state constitutional claim they may assert, even assuming they properly raised and preserved such a claim below.

STATEMENT OF THE ISSUES

1. Does the legislative process provide all the process required by the Due Process Clause when legislation affects a general class of persons?

2. Did Kansas K-12 teachers have a constitutionally protected "property" interest in the *procedures* contained in prior Kansas law?

STATEMENT OF FACTS

The parties stipulated to the relevant facts in the district court, and the State accepts those stipulated facts as stated in Appellants' brief as the basis for deciding this case.

ARGUMENTS AND AUTHORITIES

In 2014, HB 2506 amended K.S.A. 2013 Supp. 72-5436 *et seq.* to provide that the nonrenewal and termination procedures previously contained in K.S.A. 2013 Supp. 72-5438 *et seq.* would no longer apply to Kansas K-12 teachers. This change in procedure applies prospectively to *all* K-12 teachers, including Plaintiffs here, starting July 1, 2014, and does not violate the Due Process Clause.

I. The Relevant Language of HB 2506 Can Only Be Read to Modify the Applicable Procedures for All K-12 Teachers Whose Contracts Are Not Renewed or Who Are Dismissed After the Law's Effective Date of July 1, 2014. This Is Not a "Retroactive" Effect as Plaintiffs Now Erroneously Claim.

Plaintiffs argue that the language of HB 2506 should be read as not applying to any teachers who satisfied the years of employment requirements in K.S.A. 2013 Supp. 72-5445(a) prior to July 1, 2014, teachers Plaintiffs mistakenly refer to as "tenured." That argument, however, is plainly inconsistent with and unsupported

by any language in the statute itself, and is contrary to the Plaintiffs' interpretation of the statute in their Petition. There simply is no basis for mangling and contorting the statutory language as Plaintiffs now suggest.

Plaintiffs' Petition in the district court recognized that HB 2506 applies to all K-12 teachers whose contracts were not renewed or who were dismissed after July 1, 2014. Plaintiffs explicitly acknowledged that the legal effect of HB 2506 was to "remove *all* elementary and secondary school teachers" from the application of the prior dismissal procedures in K.S.A. 2013 Supp. 72-5438 *et seq.* (R. Vol. I, 56 (Petition ¶ 16) (emphasis added).) And they explicitly admitted that HB 2506 "did not grandfather in those teachers" who were formerly subject to those procedures. (R. Vol. I, 58 (Petition ¶ 25).)

But Plaintiffs later changed their view of the statute and now argue that HB 2506 should be read not to apply "retroactively" to teachers who had already satisfied the years of employment requirements in K.S.A. 2013 Supp. 72-5445(a). In other words, Plaintiffs now argue that HB 2506 can and should be read to apply only to teachers hired after July 1, 2014, or who had less than the requisite years of service for the prior procedures to apply on July 1, 2014. Their new position is not credible.

The State is not arguing for a retroactive application of the statutory amendments. To the contrary, the State agrees with Plaintiffs that teachers who were dismissed *before HB 2506 took effect*, were subject to the procedures contained in the prior law and that if any teacher was improperly terminated or dismissed

under the prior law, *i.e.*, prior to July 1, 2014, HB 2506 does not extinguish any legal claim that teacher may have. Rather, the State's position is that *going forward*—after the July 1, 2014, effective date of HB 2506—the termination or nonrenewal of any K-12 teacher contract is governed by HB 2506. This is a purely *prospective* application of the law.

The district court agreed, and explicitly rejected any claim that the statute has a "retroactive" effect. Thus, Plaintiffs mischaracterize the district court's findings and conclusions of law when they claim the district court held the statute applies retroactively. To the contrary, the district court adopted and fully incorporated conclusions of law 1 through 23 submitted jointly by the Board and the State, including the following definitive conclusion: "Contrary to Plaintiffs' claims, [applying HB 2506 to *all* K-12 teachers after July 1, 2014] is not a retroactive application of the statute." (R. Vol. I, 195, 211.)

Plaintiffs' new proposed "interpretation" of HB 2506 as only applying to certain K-12 teachers 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. 72-5438 *et seq.* as applying to any K-12 teachers. For purposes of K.S.A. 72-5437 (which requires school boards to provide written notice of termination or nonrenewal by certain deadlines), and that section alone, HB 2506 defined "teacher" to include K-12 teachers. *See* K.S.A. 72-5437(c)(3)(A) (""Teacher' means any

professional employee who is required to hold a certificate to teach in any school district . . . ."). But this statute (unlike K.S.A. 2013 Supp. 72-5438 *et seq.*) does not require school districts to provide a statement of reasons for nonrenewal or termination, and it does not grant teachers a right to a hearing. This Court properly gives effect to the unambiguous text of statutes, and here must conclude that the 2014 amendments apply to *all* K-12 teachers who are not renewed or who are dismissed after July 1, 2014. *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. An appellate court merely interprets the language as it appears; it is not free to speculate and cannot read into the statute language not readily found there." (quoting *In re Estate of Strader*, 301 Kan. 50, 55, 339 P.3d 769 (2014))).

Nor does the constitutional avoidance canon offer *any* support for Plaintiffs' tortured interpretation of HB 2506 as applying only to certain K-12 teachers not renewed or dismissed after its effective date. For one thing, as discussed below, there are no serious constitutional concerns with HB 2506, and thus nothing to "avoid." Perhaps more fundamentally, the constitutional avoidance canon can be applied only when there is a *plausible* interpretation of a statute that would avoid serious constitutional issues. *See, e.g.*, *Hoesli v. Triplett, Inc.*, 303 Kan. 358, 367, 361 P.3d 504 (2015). The doctrine is not an invitation to courts to rewrite statutes to avoid deciding constitutional issues. Here, the text of the law is clear and unambiguous—the procedures in K.S.A. 2013 Supp. 72-5438 *et seq.* no longer apply

to any K-12 teachers who are not renewed or who are dismissed after July 1, 2014. Plaintiffs' alternative "interpretation" is not even remotely plausible.

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

Plaintiffs argue that if HB 2506 applies to all K-12 teachers, then it deprived the Plaintiffs of a property interest without due process of law in violation of the U.S. Constitution. This argument is wrong for at least two reasons. First, even assuming teachers somehow had a constitutionally protected property interest in the *procedures* contained in K.S.A. 2013 Supp. 72-5436 *et seq.*, the legislative process in enacting HB 2506 provided all the process that was due with respect to eliminating that interest. Second, K.S.A. 2013 Supp. 72-5436 *et seq.* did not confer a constitutionally protected, substantive property interest, so HB 2506 cannot violate the Due Process Clause.[2] The State raised both these arguments below, but the district court only addressed the first, which is sufficient to reject Plaintiffs' constitutional challenge. (R. Vol. I, 141-49, 211.)

[2] Yet another reason for rejecting Plaintiffs' claim is that the Constitution does not require that due process procedures be specified in state statute, and so HB 2506 does not violate the Due Process Clause by repealing the former statutory procedures and allowing local school districts to determine the procedures they deem most appropriate. 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 should apply. Thus, even if this Court determines that some K-12 teachers have a protected property interest in continued employment, any procedural due process violation is attributable to the local school board, not to HB 2506.

A. HB 2506 clearly is constitutional under the foundational rule of constitutional law that the legislative process provides all the process required under the Due Process Clause when the legislation affects a general class of people.

Even if this Court were to determine that K.S.A. 2013 Supp. 72-5436 *et seq.* somehow created a protected property interest for certain teachers (which it did not, for the reasons explained below), the Due Process Clause does not prevent the Legislature from modifying or eliminating that interest. Rather, uniform case law from the U.S. Supreme Court and throughout the States expressly rejects such a claim.

It is bedrock, black-letter law that when legislation affects a general class of people, the legislative process provides all the process that is constitutionally due. This rule traces back more than 100 years 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. In the century since *Bi-Metallic*, the Supreme Court and lower courts have repeatedly reaffirmed this basic principle. *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); *Onyx Properties LLC v. Board of County Comm'rs of Elbert County*, 838 F.3d 1039,

1044-45 (10th Cir. 2016); *Price ex rel. Price v. Western Res., Inc.*, 232 F.3d 779, 789-90 (10th Cir. 2000). Any other rule is simply unworkable.

Federal and state courts across the country have uniformly applied this foundational rule to hold 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, Inc. v. Tirozzi*, 554 A.2d 1065, 1071-72 (Conn. 1989).

As an illustrative example, in *McMurtray v. Holladay*, 11 F.3d 499 (5th Cir. 1993), the Mississippi Legislature temporarily eliminated civil service protections for employees of a particular state agency, and several state employees lost their jobs. *Id.* at 501-02, 504. The Fifth Circuit rejected a due process challenge to the legislation, observing: "The Supreme Court long ago established that, when a legislature extinguishes a property interest via legislation that affects a general class of people, the legislative process provides all the process that is due." *Id.* at 504. Even though some public employees lost their jobs, the court emphasized that the law affected *all* employees of the agency, "which qualifies as a general class of people." *Id.*

Predictably, Plaintiffs here criticize the legislative process used to enact HB 2506 because the Legislature did not hold a hearing on the provisions Plaintiffs are

challenging. 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 Due Process Clause as requiring a state legislature to hold hearings or follow any other particular, federally-mandated procedures when acting on proposed legislation.

In fact, "the Supreme Court long ago established that the federal Constitution does not require a hearing on the adoption of legislation." *Onyx Properties*, 838 F.3d at 1044-45. The century-old *Bi-Metallic* decision 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.*

The Supreme Court reiterated and justified this bedrock principle almost 70 years later in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984):

> Policymaking organs in our system of government have never operated under a constitutional constraint requiring them to afford every interested member of the public an opportunity to present testimony before any policy is adopted. *Legislatures throughout the nation, including Congress, frequently enact bills on which no hearings have been held* or on which testimony has been received from only a select

> group. . . . To recognize a constitutional right to participate directly in government policymaking would work a revolution in existing government practices.

Id. at 284 (emphasis added). For a variety of reasons the Court explained at length in *Knight*, the Court emphatically concluded: "However wise or practicable various levels of public participation in various kinds of policy decisions may be, this Court has never held, and nothing in the Constitution suggests it should hold, that government must provide for such participation." *Id.* at 285; *see also Rogin v. Bensalem Township*, 616 F.2d 680, 694 (3d Cir. 1980) ("[T]he general theory of republican government is not due process through individual hearings and the application of standards of behavior, but through elective representation, partisan politics, and the ultimate sovereignty of the people to vote out of office those legislators who are unfaithful to the public will."). Plaintiffs' claim that the Legislature violated the Due Process Clause by not holding a hearing or otherwise following additional procedures when it enacted HB 2506 is dead wrong.

Plaintiffs' reliance on *Darling v. Kansas Water Office*, 245 Kan. 45, 774 P.2d 941 (1989), is equally 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, this 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. In other words, the situation in *Darling* was like *Londoner v. Denver*, 210 U.S. 373 (1908), where a "relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds." *Bi-Metallic*, 239 U.S. at 446 (distinguishing *Londoner*); *see also Onyx Properties*, 838 F.3d at 1046 ("When the action has a limited focus (only a few people or properties are affected) and is based on grounds that are individually assessed, it may be more adjudicative than legislative and therefore subject to traditional procedural requirements of notice and hearing.").[3]

Unlike the law in *Darling*, HB 2506 affected a general and very large class of people (*all* Kansas K-12 teachers, from the Colorado to the Missouri and the Nebraska to the Oklahoma borders, numbering approximately 35,000 individuals), not a small number of identifiable persons. HB 2506 also did not direct that any adverse action be taken against any individual, or even group of individuals, 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

[3] Arguably, *Darling* presented a situation akin to a civil version of a constitutionally prohibited bill of attainder, where an individual, or small and identifiable group of individuals, were targeted for adverse action by a legislative enactment. *Cf.* U.S. Const. art. I, §§ 9, 10. HB 2506 is not even remotely similar to that type of situation.

the foundational, bedrock rule that the legislative process provides all the constitutionally required process controls.

B. K.S.A. 2013 Supp. 72-5436 *et seq.* did not provide teachers a protected property interest in continued employment.

The district court correctly held that the legislative process provided Plaintiffs with all the process that was due in order to change the statutory procedures, but Plaintiffs' due process claim also fails for another fundamental reason: they never had a constitutionally protected "property" interest in the pre-2014 procedures. Absent a protected interest, procedural due process principles do not even come into play. *See, e.g.*, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985); *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972).

The State recognizes that this Court has previously held that the pre-2014 provisions of K.S.A. 72-5436 *et seq.* created a constitutionally protected property interest for certain teachers, *see, e.g.*, *McMillen v. U.S.D. No. 380*, 253 Kan. 259, 263-64, 855 P.2d 896 (1993), but those cases were wrongly decided and should be overruled.

Academic "tenure"—an "entitlement to continued employment unless sufficient 'cause' is shown" in the context of employment by an academic institution—is an example of a protected property interest. *See Perry v. Sindermann*, 408 U.S. 593, 601 (1972); *Bunger v. Univ. of Okla. Bd. of Regents*, 95 F.3d 987, 991 (10th Cir. 1996). But, contrary to Plaintiffs' claims, K.S.A. 2013 Supp. 72-5436 *et seq.* did not establish such a constitutionally protected form of "tenure."

Looking at history, Kansas law never has provided such "tenure" for all K-12 teachers. From 1937 to 1974, the Tenure of Instructors Act granted tenure to certain teachers working for school systems in cities with a population of more than 120,000 inhabitants. G.S. 1949, 72-5401 *et seq*. The Act provided that after a three-year probationary period, "such instructors as are thereupon reemployed shall continue in service in such public-school system during good behavior and efficient and competent service, and shall not be discharged or demoted except for one or more of the causes specified in [G.S. 1949, 72-5406] and after a notice and hearing as specified in [G.S. 1949, 72-5407]." G.S. 1949, 72-5404. The Act also specified the grounds for discharge. *See* G.S. 1949, 72-5406. But that Act had very limited scope, given its limitation to large Kansas cities.

In 1974, the Legislature repealed the Tenure of Instructors Act and replaced it with statutes that specified only the *procedure* for the termination or nonrenewal of teacher contracts generally. L. 1974, ch. 301. If the Legislature had intended to confer "academic tenure" more broadly on K-12 teachers, the Legislature readily could have amended the Tenure of Instructors Act to make clear its intent to accomplish that result. But instead, the Legislature pointedly and completely *repealed* the 1937 Act.

Notably, the 1974 statutes that replaced the Tenure of Instructors Act never used the term "tenure." *See* K.S.A. 2013 Supp. 72-5436 *et seq*. Unlike the 1937 Tenure of Instructors Act, the 1974 statutes also did not guarantee continued employment to K-12 teachers unless cause is shown, nor did they provide any

substantive limitation on the ability of school districts to terminate or not renew teacher contracts. The Legislature also made clear that it did not intend these statutes to create any vested, substantive rights (such as "tenure"). *See* K.S.A. 72-5444 ("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."). Thus, K.S.A. 2013 Supp. 72-5436 *et seq.* cannot be read—plausibly, reasonably, or consistently with Kansas history—as granting academic "tenure" to Kansas K-12 teachers.

In previous cases (post-1974 and pre-2014) in which this Court concluded the former provisions of K.S.A. 72-5436 *et seq.* created a property interest, this Court incorrectly interpreted those statutes as providing that "tenured" teachers may only be fired for "good cause." *See Gillett v. U.S.D. No. 276*, 227 Kan. 71, 77-78, 605 P.2d 105 (1980). But absolutely nothing in the text of K.S.A. 2013 Supp. 72-5436 *et seq.* imposed a "good cause" standard for the termination or nonrenewal of teacher contracts. *See id.* (acknowledging that "[w]hen the legislature adopted the present due process procedure in 1974, it did not specify with particularity any causes as justification for the termination or nonrenewal of a teacher's contract," but nevertheless reading a "good cause" requirement into the law).

This Court's decisions reading a "good cause" standard into the former provisions of K.S.A. 72-5436 *et seq.* unfortunately and inadvertently violated the well-established rule that a "statute should not be read to add that which is not contained in the language of the statute." *See Casco v. Armour Swift-Eckrich*, 283

Kan. 508, 521, 154 P.3d 494 (2007). The provisions of K.S.A. 2013 Supp. 72-5436 *et seq.*, as written, were purely procedural, and did not grant "tenure" or otherwise create a protected property interest.

In claiming that K.S.A. 2013 Supp. 72-5436 *et seq.* created a property interest, Plaintiffs are trying to "construct a property interest out of procedural timber, an undertaking which the Supreme Court warned against in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985)." *Bunger*, 95 F.3d at 990-91. There is no such thing as a property interest in *procedures* alone. *See Loudermill*, 470 U.S. at 541 ("The categories of substance and procedure are distinct. . . . 'Property' cannot be defined by the procedures provided for its deprivation . . . ."). As Justice Souter correctly explained in *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), "a State [does not] create a property right merely by ordaining [a] beneficial procedure unconnected to some articulable substantive guarantee." *Id.* at 771 (Souter, J., concurring); *see also Ripley v. Wyoming Medical Center, Inc.*, 559 F.3d 1119, 1125 (10th Cir. 2009) ("'[A]n entitlement to nothing but procedure' cannot serve as the basis for a property right protected by the Due Process Clause."). Here, K.S.A. 2013 Supp. 72-5436 *et seq.* did not provide any substantive guarantee of continued employment; it only created procedures (not constitutionally required) for the termination or nonrenewal of teacher contracts. Plaintiffs thus had no constitutionally protected property interest in the unending perpetuation of those procedures.

CONCLUSION

HB 2506 applies prospectively to *all* K-12 teachers subject to nonrenewal or dismissal after July 1, 2014, including the Plaintiffs here. Plaintiffs may disagree with the *policy* the Legislature adopted in HB 2506, but the law does not violate the Due Process Clause. The State respectfully requests that this Court affirm the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 3rd day of May 2017, the above brief was electronically 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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