

IN THE SUPREME COURT FOR THE STATE OF ALASKA

STATE OF ALASKA; MICHAEL HANLEY,
COMMISSIONER OF ALASKA
DEPARTMENT OF EDUCATION AND
EARLY DEVELOPMENT, in his official
capacity,

Appellants/Cross-Appellees,

v.

KETCHIKAN GATEWAY BOROUGH;
AGNES MORAN, an individual, on her own
behalf and on behalf of her son; JOHN COSS,
a minor; JOHN HARRINGTON, an
individual; and DAVID SPOKELY, an
individual,

Appellees/Cross-Appellants.

Supreme Ct. No. S-15811/S-15841

Superior Court No. 1KE-14-00016 CI

NOTICE OF FILING TRANSCRIPT

Trial Court Case # **1KE-14-00016CI**

In accordance with the Opening Notice dated February 24, 2015, Appellees/Cross-Appellants Ketchikan Gateway Borough, Agnes Moran, John Coss, John Harrington and David Spokely hereby file with the court one unbound condensed copy and one electronic copy of the transcript of the February 20, 2015 oral argument before the Superior Court.

DATED at Anchorage, Alaska this 16th day of March, 2015.

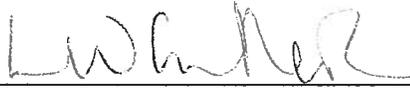
K&L GATES LLP
420 L STREET, SUITE 400
ANCHORAGE, ALASKA 99501-1971
TELEPHONE: (907) 276-1969

NOTICE OF FILING TRANSCRIPT

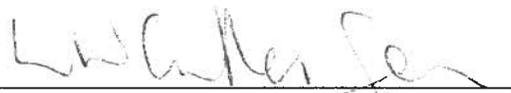
State of Alaska v. Ketchikan Gateway Borough, Supreme Ct. No. S-15811/S-15841

Page 1 of 2

K&L GATES LLP

By: 
Louisiana W. Cutler, ABA #9106028
Jennifer Coughlin, ABA#9306015
Attorneys for Appellees Ketchikan
Gateway Borough, Agnes Moran, John
Coss, John Harrington and David Spokely

KETCHIKAN GATEWAY BOROUGH

By: 
Scott Brandt-Erichsen, ABA #8811175
Attorney for Appellee Ketchikan Gateway
Borough

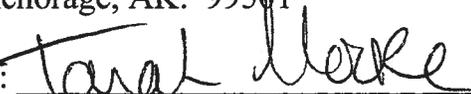
CERTIFICATE OF FONT AND SERVICE

I hereby certify that the font used herein is Point
13, Times New Roman.

I further certify that on March __, 2015, a copy
of the foregoing was served on:

by: hand mail fax

Kathryn R. Vogel
Assistant Attorney General
1031 W. 4th Avenue, Suite 200
Anchorage, AK. 99501

By: 
Tara L. Moore

K&L GATES LLP
420 L STREET, SUITE 400
ANCHORAGE, ALASKA 99501-1971
TELEPHONE: (907) 276-1969

NOTICE OF FILING TRANSCRIPT

State of Alaska v. Ketchikan Gateway Borough, Supreme Ct. No. S-15811

Page 2 of 2

1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

2 FIRST JUDICIAL DISTRICT

3 KETCHIKAN GATEWAY BOROUGH,)
an Alaska municipal corporation))
4 and political subdivision;)
AGNES MORAN, an individual, on)
5 her own behalf and on behalf of)
her minor son; JOHN COSS, a)
6 minor; JOHN HARRINGTON, an)
individual; and DAVID SPOKELY,)
7 an individual;)

8 Plaintiffs,)

9 vs

)No. 1KE-14-00016 CI

10 STATE OF ALASKA;)
MICHAEL HANLEY, COMMISSIONER OF)
11 ALASKA DEPARTMENT OF EDUCATION)
AND EARLY DEVELOPMENT, in his)
12 official capacity;)

13 Defendants.)

14 VOLUME I

15 TRANSCRIPT OF ORAL ARGUMENT
16 BEFORE THE HONORABLE WILLIAM CAREY
Superior Court Judge

17 Ketchikan, Alaska
18 February 20, 2015
11:18 a.m.

19 APPEARANCES:

20 FOR THE PLAINTIFF:

LOUISIANA CUTLER
K & L Gates LLP
420 L Street, Suite 400
Anchorage, Alaska 99501

22 FOR THE DEFENDANT:

KATHRYN VOGEL (TELEPHONIC)
Attorney General's Office
1031 West Fourth Avenue
Suite 200
Anchorage, Alaska 99501

P R O C E E D I N G S

1 Room D-306
 2 11:18:16
 3 THE CLERK: All rise. The Superior Court is now in
 4 session. The Honorable William B. Carey presiding.
 5 THE COURT: Please have a seat, everybody. Well, this is
 6 the time set for oral argument on a motion for stay pending
 7 appeal in the matter of the Ketchikan Gateway Borough, Agnes
 8 Moran, John Coss, John Harrington, and David Spokely versus the
 9 State of Alaska and the Commissioner of the Department of
 10 Education and Early Development, case number 1KE-14-16. Here
 11 in the courtroom is Ms. Cutler on behalf of the Borough.
 12 Welcome back. Mr. Brandt-Erichson is here as well.
 13 MS. CUTLER: I'm just going to say I'm here on behalf of
 14 all the plaintiffs here.
 15 THE COURT: All the plaintiffs. Right.
 16 MS. CUTLER: Thank you.
 17 THE COURT: And I'll note the presence of Ms. Moran,
 18 Mr. Coss and I think Mr. Spokely and Mr. Harrington as here as
 19 well. There he is. Okay. On the line is Ms. Vogel on behalf
 20 of the State. Ms. Vogel, can you hear me okay?
 21 MS. VOGEL: Yes. I can hear you. And with me, Your
 22 Honor, is the Attorney General, Craig Richards.
 23 THE COURT: That's what I understand.
 24 MS. VOGEL: And on the line in Juneau is Rebecca Hattan.

Page 2

1 THE COURT: Sure. I didn't necessarily set time limits.
 2 How much time do you think you need?
 3 MS. VOGEL: I'm not sure, Your Honor. I don't know that I
 4 have more than, say, 15 minutes.
 5 THE COURT: Okay. All right. Well, we'll give you --
 6 certainly you're -- you will be allowed reasonable rebuttal.
 7 So, I'm prepared to hear from you, if you're ready to go.
 8 MS. VOGEL: Fantastic. Thank you. The State is
 9 requesting this stay because this Court's judgment would
 10 require a fee change in the way education is funded in Alaska.
 11 And the State believes Supreme Court review is warranted first.
 12 I think the very first thing to address is the scope of
 13 this Court's judgment, just because there was some disagreement
 14 in the briefing. Then I'll be turning to irreparable harm to
 15 the State, and then adequate protection for the Borough.
 16 But touching briefly on the scope of this Court's
 17 judgment, it is a statewide judgment. And this Court's
 18 judgment affected more than just Ketchikan. This is evidenced
 19 by the presence of Amicus participating in this lawsuit, and
 20 it's -- because the State doesn't do business of requiring
 21 every party individually to sue if a statute has been ruled
 22 invalidated. That's just not the way the State does business.
 23 and I think that's also evidenced by the way Ketchikan
 24 presented the challenge. This was a facial challenge to the
 25 required local contribution and not an as-applied challenge.

Page 4

1 THE COURT: Okay. Ms. Hattan and Ms. Vogel and the
 2 Attorney General, Mr. Richards. You folks are missing a
 3 beautiful day in Ketchikan. Sorry. It wasn't so much earlier
 4 this morning. We were sorry that you're not present. Well --
 5 MS. VOGEL: It was very pretty from the sky.
 6 THE COURT: Okay. And I'm sorry I didn't get the chance
 7 to meet the attorney general, as well. But in any event, we're
 8 here and I assume the parties are ready.
 9 I have reviewed all of the briefing, the affidavits and
 10 the exhibits that have been submitted, digested them to the
 11 extent I have been able to. A couple of observations. I mean,
 12 certainly this -- I don't think there's any dispute. I don't
 13 think Ms. Cutler and Mr. Brandt-Erichson would dispute that the
 14 State certainly has serious and substantial issues raised in
 15 their appeal. So it would seem that the question before the
 16 Court is determining whether the State would suffer irreparable
 17 damage by my decision holding up, while the Supreme Court deals
 18 with these issues, and whether the Borough can be, and the
 19 other defendants can be adequately protected in the meantime.
 20 But, I guess I'll hear from the parties. And Ms. Vogel, I
 21 assume you're going to be arguing for the State.
 22 MS. VOGEL: Yes, Your Honor.
 23 THE COURT: Okay. Are you ready to go?
 24 MS. VOGEL: Yes. And I'd love to reserve five minutes for
 25 rebuttal.

Page 3

1 As a result, the stay is the relief that -- that the State
 2 would seek on the stay is substantial enough to protect the
 3 interests that the State is talking about. In other words,
 4 protected the required local contribution for the coming school
 5 year, not just Ketchikan Gateway Borough's \$4.4 million going
 6 to their schools, but around the state, the \$223 million that
 7 are the required local contributions. And because of that, it
 8 would also -- a stay would also protect the federal impact aid,
 9 which the State gets because we have equalized funding. And
 10 that's another \$70 million. So, just a word on scope; the
 11 State firmly believes that the judgment is a big one for the
 12 State, and that a stay is important for the State.
 13 Turning then to I think the more contested issue of
 14 irreparable harm, there are six different irreparable harms
 15 that I identified. And the first is actually more basic than
 16 what we've discussed in the briefing, which is that any time a
 17 state is enjoined by a court from effectuating statutes enacted
 18 by representatives of its people, it suffers an irreparable
 19 injury. And this is a principle that United States Supreme
 20 Court has reflected upon. And this afternoon I'd like to send
 21 a Rule 77(l) supplemental notice to this Court with Maryland v.
 22 King, which is at 567 U.S. 2012. And it's from Chief Justice
 23 Roberts on a stay, and he is granting the stay to a state and
 24 making this exact point about irreparable injury. It does harm
 25 to a state when the laws passed by its representatives are

Page 5

1 enjoined by a court. And that's the first injury that's done
 2 here. But of course it's not the last.
 3 Secondly, there is the ongoing harm to the education
 4 clause, because this Court's judgment invalidates the
 5 legislatures method of fulfilling its obligation under the
 6 education clause to establish and maintain a system of public
 7 schools in Alaska. And so, it's not just, oh, it's old law
 8 that Alaskans no longer get to have in force, it's also it's
 9 our way of fulfilling the education obligation. And that's
 10 obviously a big deal all by itself, no matter how many people
 11 this judgment affected.
 12 But thirdly, and perhaps most troubling, this invalidation
 13 occurs without either sufficient time or sufficient
 14 information. So, the lack of sufficient time that we're
 15 talking about here is we're 30 days into a 90-day session. The
 16 governor's budget and the governor's revised budget did not
 17 provide for any other source of funding to help fill the gap
 18 that required local contributions currently fill for their
 19 schools. There aren't bills pending that address how else to
 20 come up with the required local contribution or revise the
 21 legislation or to provide a different source of funding. And
 22 so, this is a situation where there really is an emergency
 23 situation and not enough time to fix it.
 24 Other courts, even final judgments from a supreme court
 25 about issues as important as education often delay the impact

Page 6

1 THE COURT: Okay.
 2 MS. VOGEL: It's not directly about, you know, what
 3 happens at this interim stage, but it is sort of this -- the
 4 bigger picture of hey, is this the sort of harm that the State
 5 would be facing down the road anyway, and therefore does it
 6 matter less that the State faces it now. I think -- I think
 7 sort of on the first instance it, you know, this is something
 8 that we would ask the Supreme Court not to do to the State or,
 9 you know, to the legislature. But even more so, it's true in
 10 the case of a decision from the Superior Court where there
 11 haven't been final appellate review. And that's because this
 12 invalidation occurs without sufficient information.
 13 As Your Honor is aware, this was a complicated case.
 14 There were three different constitutional provisions that were
 15 part of the initial challenge. And this Court threaded its
 16 dedicated fund decision and determined that while the required
 17 local contribution doesn't invalidate the appropriation or the
 18 detail clause, is it does have a dedicated fund problem. And I
 19 think a very valid concern that the state has is that the
 20 Supreme Court's decision, even if it re -- even if it affirms
 21 this Court's decision, won't share the contours of this Court's
 22 decision, and might have different things to say about what the
 23 boundaries are of the dedicated fund clause. And as a result,
 24 this requiring the legislature to change the education system
 25 now is really asking them to do so on incomplete information.

Page 8

1 of their judgment. Colorado is a case that comes to mind,
 2 where the Colorado Supreme Court advised that any judgment
 3 invalidating the education formula needs to provide sufficient
 4 time to allow the legislature an opportunity to respond. And
 5 simply put, this isn't enough time. I would say plaintiffs
 6 argued, hey, you know, the problem of lack of time could happen
 7 later on Supreme Court review. And I think the pitch that we
 8 would make to the Supreme Court deciding in the final instance
 9 about education is similar. You know, any court judgment about
 10 something that has this magnitude, should give the State and
 11 the legislature time to implement it in a sound way. Because
 12 these are important issues.
 13 THE COURT: Can I -- can I break --
 14 MS. VOGEL: Here, there's not that time.
 15 THE COURT: -- for just a moment, Ms. Vogel? I'm sorry.
 16 MS. VOGEL: Of course.
 17 THE COURT: You referenced -- you referenced some Colorado
 18 authority just now, and I'm not sure what that was.
 19 MS. VOGEL: Your Honor, it's -- it wasn't a -- it was a
 20 Colorado Court of Appeals decisions. Hold on one second.
 21 THE COURT: Okay. Did you cite it in your brief? Because
 22 I didn't recall that.
 23 MS. VOGEL: No, Your Honor. That, again, was not cited in
 24 the brief. And I'd be happy to supply that in the 77(l) letter
 25 this afternoon.

Page 7

1 Because we don't know what the Alaska Supreme Court is going to
 2 say about the dedicated fund clause in this context. And the
 3 State does feel that this is a different context. There hasn't
 4 been a dedicated fund clause case about the local portion of a
 5 matching grant. There hasn't been a dedicated fund case about
 6 money that's not state revenue that is of a local nature
 7 before. And we think that the Supreme Court may have very
 8 different things to say about what the dedicated fund clause
 9 means in this context.
 10 The fourth irreparable harm that the State's identified is
 11 that enforcement of this judgment is certain to cause
 12 uncertainty among school districts and around the state. There
 13 are 53 school districts. They've had draft budgets prepared.
 14 School districts view basic needs funding as a floor that they
 15 can build upon for their education funding. And the required
 16 local contribution averages out to be 16 percent of that basic
 17 need funding. And so this is money, in other words, that our
 18 school districts have come to believe is foundational. And
 19 already in the process, you know, we're in -- we're at the time
 20 of year where school districts are having hiring job fairs and
 21 are needing to make decisions about employees and what sort of
 22 educational opportunities they're going to be offering next
 23 year. So, even if the, you know, if the stay is not granted,
 24 essentially uncertainty ripples throughout the state, even to
 25 non-parties.

Page 9

1 The fifth irreparable harm is that a legislative change
 2 may moot, in law and in fact, the State's claims. So, if the
 3 legislature does take action to comply with its constitutional
 4 obligation under the education clause and believes that it's
 5 required to act immediately this session -- that would be
 6 before the Supreme Court has had a chance to weigh in on this
 7 issue. And thus, in fact, the Supreme Court would be facing a
 8 situation where the statutory structure that we'd ask them to
 9 review is no longer one that exists. Generally, the Supreme
 10 Court doesn't hear cases like that, that are moot, so there's a
 11 legal mootness problem that the State would face. But equally
 12 importantly for the people who have elected their
 13 representative and who have made the policy choice of a
 14 required local contribution, mooting in fact, by changing the
 15 structure before the Supreme Court has ruled, is an irreparable
 16 injury to the people of Alaska.

17 And lastly, there is the possibility that the legislature
 18 either won't act or the funding won't be replaced. And so
 19 there will be a funding gap, which presents the possibility of
 20 harm to educational opportunities. And, you know, there is no
 21 re-do button on a year of school for Alaska's children. And
 22 this is about the funding that happens for next school year.
 23 So, that, too, is irreparable injury that isn't solved by this
 24 -- of the State getting a reversal, you know, down the road.

25 So, with that in mind, unless the Court has questions,

Page 10

1 required local contribution costs. What we don't know is how
 2 much the stay costs. So, in other words, yes, under the status
 3 quo they pay a required local contribution. But if a stay is
 4 -- or by status quo I mean under the required local
 5 contribution system, that's how much they would pay next year.
 6 But the big question mark is would they pay even a dollar less
 7 if this Court denied the stay? And the answer is, we don't
 8 know. We don't know if there would be a property tax imposed
 9 by the state that would charge 2.65 mils to the people of
 10 Ketchikan. We don't know if there would be -- and this would
 11 be new for the State of Alaska -- a tax on boroughs, such that
 12 the borough was paying the exact same amount of money. We
 13 don't know if Ketchikan would voluntarily pay that amount of
 14 money, if the state was showing no signs of raising revenue to
 15 pay for the required local contribution itself. And we don't
 16 know if there was some other solution for raising revenue, how
 17 much it would cost the people of Ketchikan or borough. So,
 18 yes, we know what they pay right now. We don't know what they
 19 would pay if a stay was denied.

20 And I think that this would be a different analysis if
 21 there was a showing that Ketchikan was paying money that the
 22 state was somehow obligated to pay, and therefore it really
 23 would be, you know, the equivalent of paying a bond. But in
 24 fact, what the court found is that right now, Ketchikan pays
 25 money to the school districts. And they're paying to educate

Page 12

1 I'll turn to adequate protection for the Borough.

2 THE COURT: Go ahead.

3 MS. VOGEL: So, I think the first point is that the
 4 Borough hasn't shown even a dollar of measurable cost to them
 5 from the granting of a stay. And that's because it is simply
 6 unclear what they would pay in the alternative.

7 THE COURT: Well, don't you --

8 MS. VOGEL: Partially, it's a simple question --

9 THE COURT: -- don't they have a set --

10 MS. VOGEL: -- that would be decided by the legislature,
 11 partially it's a local question. I think that was reflected in
 12 their own affidavit where they indicated, you know, they might
 13 choose to spend the tax payers' money differently or more
 14 towards the voluntary contribution portion if a stay was denied
 15 and hypothesizing that the State had also supplied the money
 16 separately.

17 THE COURT: Don't we know -- excuse me, Ms. Vogel. Don't
 18 we know -- I mean, I've reviewed the affidavits of the Borough
 19 manager and the school superintendent. And don't we know that
 20 the RLC is going to roughly be 2.65 mils on the value of the
 21 property here? And last year it was \$4 million, some odd.

22 MS. VOGEL: Yes. So we currently know how much --

23 THE COURT: Don't we know -- don't we pretty much know
 24 that?

25 MS. VOGEL: -- the re -- yes. We know how much the

Page 11

1 their students. And in return, they receive a return. The
 2 return is a more educated populous. This isn't done just
 3 enrichment. It isn't a bond. It's local responsibility. The
 4 legal harm that comes from a dedicated fund problem is about
 5 freedom of appropriation. We argue that the freedom of
 6 appropriation that the dedicated fund clause is about is the
 7 state legislature. And that the borough simply doesn't suffer
 8 any harm from the state legislature being able to maintain the
 9 option this year to continue to expect the required local
 10 contribution. And we also argue that it's an adequate solution
 11 for a dedicated fund problem to allow the solution to wait for
 12 Supreme Court review and to hear what the Supreme Court has to
 13 say about the dedicated fund and to have the problem in a
 14 statute, if there indeed is a problem in the statute, fixed
 15 under that climate of finality. And understanding what the
 16 Supreme Court has to say about the dedicated fund problem.

17 Given that, that there's no -- there's no -- not even a
 18 dollar of measurable cost caused by a stay, and that there's
 19 been no other legal harm to the borough or the parties
 20 demonstrated, the state maintains that the balancing is fairly
 21 easy. There's irreparable harm to the state, the borough's
 22 adequately protected, and the questions are certainly
 23 substantial. I think the state also feels that it has a
 24 likelihood of success on the merits because this will be the
 25 Supreme Court's first time at looking at this, and we think

Page 13

1 it's a road that they're not going to want to go down, inter --
 2 invalidating local funding of public schools.
 3 THE COURT: Well, maybe they might want --
 4 MS. VOGEL: But I don't --
 5 THE COURT: -- you know, maybe it's not a road I may have
 6 wanted to go down, but I had to look at the legal issue. And
 7 that was -- that was my determination. So --
 8 MS. VOGEL: Absolutely, Your Honor. And certainly the
 9 Supreme Court is in a different posture than the Superior Court
 10 in terms of looking at its precedence. And if it decides that,
 11 you know, State v. Alex, looking at a different situation,
 12 worded it's ruling a particular way, you know, it's less bound
 13 to the words of State v. Alex than Your Honor, was.
 14 THE COURT: I suppose that's true.
 15 MS. VOGEL: Just because of its position of the highest
 16 court. I guess just to wrap up, the state's feeling is that
 17 school districts around the state, and believes that, you know,
 18 the borough concedes this, view basic need as a floor for how
 19 much a school district has to spend. And if this judgment goes
 20 into immediate effect, school districts are going to discover
 21 that the floor of spending that they have been standing on is
 22 at imminent risk of collapse. So, the state's asking the Court
 23 to stay its judgment pending Supreme Court review to allow the
 24 chance for more reasons decision making should -- should there
 25 need to be a change in education based on final appellate

Page 14

1 case. Including the fact that the governor introduced the
 2 budget that they originally claimed was the emergency, long
 3 before this ruling has been issued, and of course long before
 4 the Supreme Court ruled.
 5 THE COURT: All right. So leaving alone whether it's an
 6 emergency, we can all agree it's a urgent issue that probably
 7 it would behoove everyone to get it all settled as soon as
 8 possible, by the Supreme Court or otherwise. I mean, that --
 9 MS. CUTLER: That's not -- we don't have any problem with
 10 the Supreme Court ruling quickly. In fact, as I believe I
 11 mentioned at the status conference, we made that offer to the
 12 state. And they have not taken us up on that offer, because
 13 what they want to do is get a stay and then slow roll in front
 14 of the Supreme Court. We've already made that offer to them,
 15 and they did not accept it.
 16 THE COURT: Okay. I don't know what --
 17 MS. CUTLER: And if you --
 18 THE COURT: -- I have no idea how long the Supreme Court
 19 will take. Last time I had an issue of statewide import, they
 20 decided it in about three weeks, the decision I made. So --
 21 MS. CUTLER: I certainly believe -- agree with you that
 22 first of all --
 23 THE COURT: That maybe was a little less complicated.
 24 MS. CUTLER: -- the Supreme Court -- I'm sorry?
 25 THE COURT: That was maybe a little less complicated than

Page 16

1 review, not in this time crunch, and not with this incomplete
 2 level of information that currently exists.
 3 THE COURT: Thank you, Ms. Vogel. Ms. Cutler?
 4 MS. VOGEL: Thank you.
 5 MS. CUTLER: Yes. Thank you, Your Honor. Did I
 6 understand that I do not have a time limit? I mean, I'm not
 7 going to go on endlessly, but if I have a time limit, I'd like
 8 to know about it.
 9 THE COURT: No, there's not specifically a time limit. I
 10 hope you'd be able to present your argument in 20 minutes or
 11 so.
 12 MS. CUTLER: Okay. I'll do my best.
 13 THE COURT: Okay.
 14 MS. CUTLER: And I'll also try to respond to some of the
 15 comments that Ms. Vogel made that I don't have prepared remarks
 16 for as well.
 17 THE COURT: Yeah. Sure.
 18 MS. CUTLER: Okay. So, first of all, I think it is really
 19 important to again focus on the fact that there is no emergency
 20 at issue here. In the original motion, the state argued that
 21 the source of the state's alleged emergency was the statute
 22 that provided that the, quote/unquote, deadline for the
 23 governor to introduce his amended budget. And of course, we
 24 pointed out in our opposition, which I know you've read so I'll
 25 try to keep this short, several reasons why that was not the

Page 15

1 this case.
 2 MS. CUTLER: Well, the Supreme Court's already evidenced
 3 interest. They've already indicated that they're going to make
 4 a ruling after you make your ruling. So I don't think --
 5 THE COURT: On the stay.
 6 MS. CUTLER: -- we're going to have a problem getting the
 7 Supreme Court to focus on this case. My point is, they've said
 8 there's an emergency, which does not exist, which has
 9 completely evaporated since they filed their motion. And they
 10 have not had any desire to actually get the Supreme Court to
 11 rule quickly. Not with respect to the stay; I'm talking about
 12 the underlying --
 13 THE COURT: And that --
 14 MS. CUTLER: -- issue here. What they want to do is get
 15 the victory that plaintiffs have so far received. They want to
 16 put that on hold so that nobody has to do anything and we all
 17 wait around for a few years for the Supreme Court to rule. We
 18 don't believe that's in the public interest. However, I just
 19 did really want to point out that there is no emergency. I
 20 mean, they -- they knew what your ruling was before
 21 Thanksgiving. Nothing changed. Your ruling at -- your final
 22 judgment actually quotes to what you said before Thanksgiving.
 23 And so the idea that they were surprised by the final judgment
 24 and all of a sudden, you know, a crisis has occurred because
 25 you issued a final judgment just really doesn't hold up under

Page 17

1 the facts.
2 That said, our goal here is to apply the law to the facts.
3 There is a set of law that applies to when you can get a stay
4 and when you cannot. And all we ask, we just respectfully ask
5 that you apply that law to these facts. Just like you did when
6 you ruled at summary judgment. That's all you did. And that's
7 all we're asking for here. And you've said what the standard
8 is; irreparable harm, adequately protected. If we can't be
9 adequately protected, then they have to show clear likelihood
10 of success on the merits. And we are also firmly of the belief
11 that the public interest comes in here as well, and that the
12 public interest is not in favor of a stay. And I'm going to
13 talk about that and then I'll go back to additional points that
14 she made, such as new law that obviously we've never seen, that
15 we have partial cites to, that we obviously can't respond to
16 today.
17 With respect to irreparable harm, and I want to spend a
18 substantial amount of time on this, if you don't mind, because
19 I understood from your opening comment that this is really
20 where you're at. It's, you know --
21 THE COURT: These two issues, irreparable harm and --
22 MS. CUTLER: Irreparable harm and --
23 THE COURT: -- adequate protect --
24 MS. CUTLER: -- adequate protection. And I will focus on
25 those.

Page 18

1 Nor is irreparable harm established by the state's duties
2 under the education clause. Again, for the same reason. The
3 legislature has full flexibility to increase or decrease
4 education funding in light of your ruling. And as the state
5 loves to point out, and they pointed out again today, the
6 required local contribution is not a major portion of education
7 funding to begin with. They made that point repeatedly below.
8 And --
9 THE COURT: So you're saying that the -- well, I guess
10 part of my concern is, as Ms. Vogel pointed out, we have a
11 90-day legislative session. We're over 30 days into it.
12 Doesn't the legislature have to do something --
13 MS. CUTLER: The legislature --
14 THE COURT: -- in light of the decision to --
15 MS. CUTLER: Sorry.
16 THE COURT: -- to make sure that -- well, there are issues
17 as to what the constitutional mandate is for the state, as far
18 as fully funding or not. But don't they have to do something
19 to --
20 MS. CUTLER: No.
21 THE COURT: -- to go forward?
22 MS. CUTLER: They don't have to do anything. It's a
23 statute. You've declared it unconstitutional. You've enjoined
24 that from taking place. Whether or not they decide to choose
25 to make up for that lost funding is totally up to the

Page 20

1 THE COURT: Okay.
2 MS. CUTLER: Absolute legislative discretion over
3 education funding, which we all agree exists here, trumps any
4 argument that the state is irreparably harmed by your final
5 judgment. The governor can propose, and the legislature can
6 provide as much or as little funding for education or any other
7 program. That's the whole purpose of the anti-dedication
8 clause. The legislature gets to decide. And the fact that you
9 issued a final judgment which impacts a statute simply doesn't
10 change that. Given that reality, the state can't establish
11 that it's irreparably harmed. To the contrary, it's got
12 complete flexibility to decide how to react to this ruling.
13 Not only statutorily, but financially. And that's a harm that
14 they're claiming exists.
15 The request for a stay amounts to a request that this
16 Court make a legislative decision instead of making a legal
17 decision as to whether the elements necessary for a stay have
18 been established by the defendants. The legislature is
19 ultimately responsible for deciding how much funding to provide
20 for education, not this Court. The legislature legislates.
21 The Court makes legal decisions. And you've already made a
22 difficult one, and you've got to make another difficult one
23 after you hear our arguments. But plaintiff -- excuse me,
24 defendants have not met their burden to establish that a stay
25 is necessary just because there's a lot of money at stake.

Page 19

1 legislature. That is the point of the anti-dedication clause.
2 It is not up to you. You are not responsible for this supposed
3 crisis that the state has manufactured. They do this every
4 year. Every year there are competing needs for funding. Every
5 year some things have to be short funded and some things are
6 over funded. Every year we talk about a gas line, or we talk
7 about this, or we talk about that. Those are choices that are
8 up to the legislature. They deal with court orders all the
9 time. That's the whole point of the anti-dedication clause and
10 the appropriations clause. They get to decide whether or not
11 they're going to make up for this funding or not. That's
12 irregardless of whether or not you think this is a \$220 million
13 problem or a \$300 million problem that they asserted later on.
14 Now they're saying several hundred million dollars. It doesn't
15 matter whether or not you think it's a statewide problem or
16 it's a Ketchikan problem. They get to decide. That's the
17 whole point of the separation of powers. It's up to them.
18 They don't have to do anything in the next 90 days. And
19 they're fully capable of having a special session. They do it
20 all the time. There is no reason why a stay needs to be put in
21 place just because a statute has been declared
22 unconstitutional.
23 Now, I understand that Ms. Vogel has cited to some U.S.
24 Supreme Court case that I've never looked at, which I don't
25 even know what year it was enacted, that apparently stands for

Page 21

1 that proposition. But I assume that if you are at all going to
2 rely on that case, you're going to give us an opportunity to
3 respond to that before you do.
4 THE COURT: Sure. We're going to have a look at it for
5 sure. And --
6 MS. CUTLER: Well, I certainly hope we will --
7 THE COURT: -- the Maryland v. King.
8 MS. CUTLER: -- you'll give us an opportunity to give you
9 our view of that case, and you'll give us some time to do that.
10 And whatever time you give us, we'll live with that.
11 THE COURT: Okay.
12 MS. CUTLER: But I certainly hope you'll let us do that.
13 The other thing that -- well, one of the other things that I
14 want to really emphasize with respect to irreparable harm is
15 that the cases that we could find are clear that you do not
16 establish irreparable harm by speculating about what the
17 legislature might do, or by speculating about how school
18 districts react, or by speculating about how children are going
19 to be impacted. That is not the law. There is nothing that
20 the state's lawyers -- they haven't even proven that the
21 legislature will act too quickly or make the wrong decision.
22 They've just asserted that. There's no proof in the record
23 that says that. There's no evidence in the record to even
24 suggest a time frame for how long they would need, if they were
25 going to decide to change the statute. They haven't done any

Page 22

1 of that. The legislature hasn't asked to intervene and tell
2 Your Honor, not to issue a stay because it's worried about not
3 having enough time or what decisions it might make this year.
4 You don't have any affidavit from any person who can speak for
5 the legislature here to tell you that. And nor, for that
6 matter, is anybody else who the state claims is irreparably
7 harmed by the order, such as the school districts, the public,
8 the this person, the that person. There is nothing in the
9 record to support any of those statements. This is nothing
10 more than Chicken Little tactics and it's based solely on rank
11 speculation about non-parties to this litigation. That
12 wouldn't get you a stay at the U.S. Supreme Court. It wouldn't
13 get you a stay at the Ninth Circuit, and it wouldn't get you a
14 stay at any of the ca -- in any of the cases that we brought
15 forward in our opposition at page 14.
16 And I understand that the state is doing everything they
17 can to make you feel personally responsible for this problem.
18 But all this is, with all due respect to you and to Ms. Vogel
19 and to their ability to make their arguments, this is just a
20 massive guilt trip. There is no evidence in the record that
21 suggests irreparable harm.
22 THE COURT: I don't feel guilty at all for doing my job.
23 MS. CUTLER: Well, good. I'm glad to hear that. I don't
24 either. And again, I just want to talk a little bit about --
25 more about school districts. And you might think, well, maybe

Page 23

1 this is a little inconsistent with me saying you're not
2 supposed to think about them, but they're bringing it up. And
3 I just want to talk about what actually is in the record. They
4 said that school -- the state has put nothing in the record to
5 support its claim that school districts have not taken the
6 final judgment into account. And they -- to make that point,
7 they put this article from the Frontiersman into the record.
8 Well, what the article actually says, is that the Mat-Su
9 Borough School District officials have said that the ruling
10 could result -- this is quote. Sorry. This is a quote from
11 the article. Mat-Su Borough School District officials have
12 said the ruling could result in the state being forced to make
13 up the difference if the ruling isn't put on hold. These same
14 officials also are clearly anticipating that the RLC might,
15 quote, from the article, become a responsibility of the state
16 leading to a proportionate reduction of state funding across
17 all school districts if there is no stay. So not only are they
18 aware of your ruling, they're actually counting on the RLC
19 being enforced this year, despite -- I'm sorry, they're not
20 counting on that, despite what the state is claiming; all
21 school districts in the state are just running around crazy,
22 worried about what's going to happen. The very evidence that
23 they put in the record doesn't support that.
24 And again, they complain about Mr. Boyles' affidavit, the
25 Ketchikan Borough School District, as suggesting that the RLC

Page 24

1 is significant. Actually, that's not at all what Mr. Boyles
2 said. He said that he clear -- even though he clearly states
3 that the RLC is not a factor in calculating basic need. He
4 said that in paragraph 10 of his affidavit. And he also said
5 that basic need is the minimum amount that the district counts
6 on. Basic need is not the RLC. The RLC is the different
7 component form basic need.
8 THE COURT: I understand that.
9 MS. CUTLER: I won't bother to read you the -- what his
10 affidavit -- the key portions, because you've said you've
11 already read it.
12 THE COURT: I've read it.
13 MS. CUTLER: But I just want to point out, the evidence
14 that's in the record as opposed to the speculation that the sky
15 is falling, does not support irreparable harm.
16 Now, let me talk about mootness, because they keep
17 bringing up that mootness equals irreparable harm. Again,
18 there's no support in the record for their claim that the
19 legislature will change the law such that plaintiffs will have
20 to provide the same amount of funding as what they have had to
21 provide before your order. The truth is, one could just as
22 easily speculate that the legislature will make up the funding
23 somehow. We could all speculate to that. But the point is, we
24 can't speculate and they can't speculate. That's not how you
25 decide whether or not there's a stay. And while the court may

Page 25

1 have said in the one case that they cited to, that it usually
 2 doesn't address legal issues when facts render them moot, the
 3 court does not hesitate to address constitutional issues.
 4 That's exactly what happened in the ARCO case. Years after the
 5 legislature changed the system, the court still came in and
 6 ruled on whether or not the statute that they had changed long
 7 ago was constitutional or not. And in fact, in the United Cook
 8 Inlet Drift Association case, again, it's not -- it's not a
 9 similar set of facts as ARCO is, in terms of a constitutional
 10 ruling long afterwards, the court held that the superior court
 11 had not applied the test for issue of an injunction, went ahead
 12 and ruled on that, even though it found that the case was moot.
 13 So it's just not accurate to say that the court doesn't make
 14 rulings after the legislature changes a statute. That just is
 15 not correct. And that's Alaska Supreme Court case, not a
 16 United States Supreme Court case that none of us have even had
 17 a chance to read.
 18 Finally, they poo-poo our argument that the plaintiffs --
 19 the attorney fee motion will require the state -- the Supreme
 20 Court to reach the merits. So, it doesn't matter whether or
 21 not you re -- you issue the stay or not. But that's really not
 22 true, because one way or the other you're going to rule on our
 23 motion. And one way or the other you're going to decide
 24 whether or not we're the prevailing party or not. And probably
 25 whatever you decide, somebody's going to appeal it, and so the

Page 26

1 which plaintiffs cannot be adequately protected. The state
 2 speculates that plaintiffs aren't harmed because the
 3 legislature might replace it with something; we've heard that
 4 repeatedly. But again, you can't speculate about that. The
 5 case law does not allow you to do that. You cannot assume that
 6 the legislature is going to change the law. You can't assume
 7 they're going to come with funding; you can't assume they won't
 8 come up with funding. That is simply not part of the calculus
 9 of what you're supposed to consider when you decide whether or
 10 not to issue a stay. What you have to do is figure out whether
 11 or not the plaintiffs are going to continue to fund and make
 12 millions of dollars in payments that you've ruled are
 13 unconstitutional. You need to decide whether or not that means
 14 they can be adequately protected.
 15 Now, the state focuses in on whether or not the borough is
 16 adequately protected, as opposed to the other plaintiffs. I
 17 want to talk about that for a second. They argued that the
 18 borough could seek restitution from the school district through
 19 a lawsuit. Well, once again, that totally glosses over the
 20 difficulties inherent in doing that. And I won't spend a lot
 21 of time on this, but again, just talking about what's in the
 22 record. Mr. Bockhorst, in his affidavit, at paragraphs 5
 23 through 9, explains the interplay between total local
 24 contributions, i.e., you know, the voluntary and the required
 25 local contributions, and the cap on voluntary contributions.

Page 28

1 Court is going to have to make a determination as to who the
 2 prevailing party is, so they're going to have to reach whether
 3 or not the RLC was constitutional or not. It just -- it
 4 doesn't hold up under the law and the facts, the argument that
 5 you say in the abstract, that mootness can sometimes be irre --
 6 be irreparable harm. It is not in this particular case.
 7 And finally, I just want to also underscore something, an
 8 argument that we made in our opposition to which they have
 9 absolutely no response. With respect to irreparable harm. And
 10 that is that they argued and you agreed with them on -- you
 11 know, it wasn't our position, but you agreed with them, that
 12 they receive no benefit from the required local contribution.
 13 Well, if they receive no benefit from it, they can't possible
 14 be irreparably harmed by the absence of it. It's just not
 15 logical to argue now that you're irreparably harmed by
 16 something, not only that you argued, but that became the law of
 17 the case, that you receive no benefit from it.
 18 I'm going to go on to adequate protection. It is
 19 illogical for the state to argue that the only injury caused by
 20 a dedicated fund violation is harm to the legislatures freedom
 21 to appropriate in the very same case in which they're asking
 22 plaintiffs to continue to fund and pay millions of dollars in
 23 payments that have been declared unconstitutional. Obviously,
 24 there's a harm. It's not just some amorphous harm to the
 25 legislature, there is an actual harm at issue in this case from

Page 27

1 He goes through that analysis and explains it, and makes it
 2 clear that the borough will never recover any required local
 3 contribution payments from the district or the state because
 4 they'll just get recouped back through the system, either to
 5 the school district in the form of voluntary contribution, or
 6 back through the state as an overpayment for state aid. So,
 7 it's not a viable option to seek restitution. That's not an
 8 option.
 9 And in contrast, it's certainly not equivalent as the
 10 state tried to argue to already having a law on the books;
 11 i.e., AS 14.17.610(b), which allows you to take back any money
 12 that the district shouldn't have gotten, or as I keep harping
 13 on, and I'm sorry, the ability of the legislature to decide not
 14 to do anything. Or to make up the payment or whatever they
 15 want to do. That is their choice.
 16 So, again with respect to this notion of a restitution
 17 claim, let's say I'm wrong. It could succeed. I don't know
 18 what I'm talking about. It could go forward. What does that
 19 do to protect the private plaintiffs? Absolutely nothing.
 20 Because they can't be protected because the borough cannot
 21 refund them the money that they've already contributed to it.
 22 Now, the state and the Ms. -- the commissioner, the
 23 defendants in this case would really like you to just forget
 24 about the fact that there even are private plaintiffs in this
 25 case. I understand that. But I want you to just focus on that

Page 29

1 for a minute, because that's what the law requires you to do.
 2 And frankly, it's not an inconsiderable sum. We're not talking
 3 about a nominal amount of money. We're talking about, as I
 4 understand it, about half of everyone's property tax goes to
 5 pay the required local contribution. And again, what happens
 6 if you don't make your tax payments? Well, the guy sitting
 7 next to me tries to foreclose on your house, or otherwise
 8 collect those tax payments. It's not insignificant. Just
 9 because they're the private parties here, the harm that exists
 10 to them is not insignificant.

11 The reality is that making the borough and the private
 12 plaintiffs continue to fund and make RLC payments, despite your
 13 finding that they're unconstitutional, when you cannot make the
 14 state put up a bond. You can't do that. It means they just
 15 literally cannot be adequately protected.

16 And finally, just on this issue, because I know it's
 17 important to you, I did want to mention another case that the
 18 state brought up in their briefing, because I actually think it
 19 supports our point of view, not theirs. And that's the
 20 Alsworths case. I think it's cited at note 2 of their reply
 21 brief.

22 THE COURT: Right.

23 MS. CUTLER: This is one of the Pebble Mine cases --

24 THE COURT: Right. I read it right before I came in.

25 MS. CUTLER: Okay. Well then you know, if you read it,

Page 30

1 or not education funding and a required local contribution did
 2 or did not violate the anti-dedication clause. Well, they
 3 certainly didn't sit around and think about whether or not the
 4 procedure for aquiculture funding at issue in Alex was a
 5 violation of the anti-dedication clause, and you could probably
 6 go through most of the other anti-dedication clause cases. The
 7 point is, that the Supreme Court has held for a long, long time
 8 that it needs to be broadly construed. And you can go back and
 9 argue all you want to, and they have every right to make the
 10 argument, that it shouldn't be applied here. But that -- but
 11 when you have to overrule Supreme Court precedent, you are not
 12 demonstrating clear likelihood of success on the merits. And
 13 to me, the same is true with respect to the emphasis that
 14 they're now trying to put on the fact that the required local
 15 contribution is an exempted local state cooperative effort.
 16 Let's put aside whether or not they're right or they're wrong
 17 about that. We don't think they're right about that, but fine.
 18 Let's just put that aside. How hard is it going to be to
 19 convince the Supreme Court that this is a voluntary state local
 20 cooperative effort when it is a required local contribution?
 21 That if it isn't made, school districts get penalized. That is
 22 not a matching grant program that you voluntarily decide to
 23 participate in. They are -- have a very steep, uphill climb to
 24 get the supremes to overturn that. So to conclude that it is,
 25 quote/unquote, quite likely, which is what they say in their

Page 32

1 that what happened there was that the Supreme Court held that
 2 the Superior Court had not adequately weighed adequate
 3 protection. And, in my view, for a very similar reason to what
 4 the state is arguing here. Basically, the Supreme Court said,
 5 just because they have to follow the law doesn't mean that
 6 they're adequately protected. Here, plaintiffs go -- excuse
 7 me, defendants go even further, and they say, just because you
 8 have to follow an unconstitutional law, just because you've
 9 been doing it for a long time, so how could you possibly, you
 10 know, that's no big deal to you. I think the Alsworths case
 11 stands for the proposition that the Supreme Court has rejected
 12 that analysis. And of course, as you know, because you just
 13 read it, obviously there was a constitutional right at stake
 14 there; freedom of speech, similar to the constitutional right
 15 that we assert here.

16 So, I do not believe that plaintiffs are adequately
 17 protected. And I think the law supports me in that conclusion.
 18 And so therefore, if I'm right about that, they have to show
 19 clear likelihood of success on the merits. And I don't see how
 20 you can ever do that when you admit, in your own briefing, that
 21 you're asking the Supreme Court to overrule their earlier
 22 precedent and take, quote/unquote, a fresh look at the facts
 23 here because somehow they're so different. At one point they
 24 make an argument that, well, you know, the constitutional
 25 framers, you know, never sat around and thought about whether

Page 31

1 brief at page 10, that the Supreme Court will overrule earlier
 2 precedent, or find that the RLC is accepted from the reach of
 3 the anti-dedication clause, in my view is just as overblown as
 4 its claim that your final judgment has created an emergency,
 5 and that dire consequences will result if you don't issue a
 6 stay.

7 So, let me just spend a couple minutes talking about the
 8 public interest. The state doesn't deny that it has plenty of
 9 money to increase state education funding if it wants to. It
 10 can't deny that. Of course it can't deny that. It doesn't
 11 deny that the legislature has unfettered discretion to fund
 12 education at any level, if it so chooses. State can do either
 13 one of those things. So if that's the case, why wouldn't it be
 14 in the public interest for policy makers to begin grappling now
 15 with an unconstitutional funding mechanism. If the Supreme
 16 Court does overrule its earlier cases, and changes the
 17 applicable law, then they won't have to worry about it. But
 18 given the clear legal landscape --

19 THE COURT: Well, what if --

20 MS. CUTLER: -- that presently --

21 THE COURT: -- what if in the meantime the legislature
 22 enacts an entirely different scheme? That goes back to the
 23 mootness issue.

24 MS. CUTLER: I would -- I don't know if you've had a
 25 chance to read the ARCO case. That is exactly what happened

Page 33

1 there. And the court went ahead and ruled on it. And
2 furthermore, there's going to be attorneys fees, which they're
3 going to have to make a decision anyways, so they could, you
4 know, they could decide years from now. It's just simply not
5 something that has to be done right away, in terms of the stay.
6 They can change the legal landscape if they want to, but really
7 what are the chances that they're going to do that? I mean, I
8 -- I'm not saying they can't make those arguments, but we're
9 talking about a situation where plaintiffs can't be adequately
10 protected, and they can't demonstrate a clear likelihood of
11 success on the merits, given the uphill battle. So why
12 wouldn't it be in the public interest to just let Your Honor's
13 ruling go forth and let the chips fall with the -- where they
14 may. And figure out -- let the legislature start grappling
15 with this. Maybe encourage the Supreme Court to rule quickly.
16 There is no reason why it is not in the public interest to let
17 this sleeping dogs lie, as opposed to just assume that
18 something has been done wrong here, and therefore we all have
19 to put the brakes on, on it, just because Your Honor followed
20 the law.
21 I know I'm running out of time, so I'm going to -- I would
22 -- I just want to talk about a few other points that she made
23 in her -- in her remarks this morning.
24 Again, we made an argument in our brief for why, from a
25 technical standpoint, and again we'd ask you to apply the law,

Page 34

1 the -- really, at the end of the day, the final judgment is not
2 about hundreds of millions of dollars, it's really just about
3 Ketchikan. I know that's a technical argument. It is true,
4 though. And there's plenty case law which we cite to where
5 other courts have held that something continues to have
6 precedential effect, binding effect, even if it is stayed. And
7 I know they focus on the Huron case. I actually think the
8 Huron case is totally on point, because it is a separate
9 judgment. And that's -- but that's not the only thing we cited
10 to. We also cited to the Restatement of Judgments.
11 Again, you can't -- but even if it is hundreds of millions
12 of dollars, you can't control what the legislature is going to
13 do. That's not your role. And it's not irreparable harm, no
14 matter how much money it is. Because they get the right to
15 decide how they're going to react to it, regardless of whether
16 or not you impose a stay or not.
17 I've already made my point about the two cases we've never
18 seen before. I assume we'll get an opportunity to respond to
19 those. So I won't even talk about either one of those cases.
20 I won't take up your time now for that.
21 Again, the mooted in fact argument, as opposed to the
22 mooted in law argument, I'm frankly not sure that's a legal
23 doctrine. But if it is, again, now we're talking about the
24 people of Alaska. Now we're talking about a more educated
25 populous. You have not one shred of evidence in the record

Page 35

1 that suggests that the people of Alaska are concerned about
2 this. You have not one shred of evidence in the record that
3 suggests that there will not be a more educated populous if you
4 do not impose a stay. Again, all the legislature has to do is
5 write a check, if it truly has a concern about that. And if it
6 doesn't have a concern about that, it doesn't have to do
7 anything.
8 The bottom line is the balance of harms clearly harms my
9 clients, and not the State of Alaska that's got more money than
10 it knows what to do with and can solve this problem if it wants
11 to, or not choose to solve it. It can do whatever it wants to
12 do.
13 Thank you very much for giving me enough time to address
14 you today.
15 THE COURT: Okay. Thanks, Ms. Cutler. Well, Ms. Vogel?
16 If you go over five minutes, that's fine.
17 MS. CUTLER: Is she hearing you?
18 THE COURT: Hello out there? Do we have Ms. Vogel on the
19 line?
20 THE CLERK: (Indiscernible). I think so.
21 (Indiscernible). Ms. Vogel?
22 (Whispered conversation)
23 THE COURT: I've got one of them, Ms. Cutler. The Supreme
24 Court case.
25 MS. CUTLER: Okay.

Page 36

1 THE COURT: Maryland v. King.
2 MS. CUTLER: Okay.
3 THE COURT: 567 U.S. -- I thought she said 2012, 2012.
4 Maybe that wasn't -- maybe I misheard. Maybe that's the year.
5 MR. BRANDT-ERICHSON: That's what I had also, Your Honor.
6 THE COURT: Okay.
7 MS. CUTLER: Thank you.
8 (Whispered conversation)
9 THE COURT: Why don't you go ahead. Why don't -- let's
10 put her on the speaker.
11 THE CLERK: (Indiscernible). I have her one.
12 THE COURT: Okay. Ms. Vogel --
13 MS. VOGEL: Hello, Your Honor.
14 THE COURT: -- are you there? This is Judge Carey.
15 MS. VOGEL: Yes, I am.
16 THE COURT: It's unclear when we lost you.
17 MS. VOGEL: Yeah. I don't think it was more than four
18 minutes ago. Might have been slightly less.
19 THE COURT: Okay. Why don't we go back about five minutes
20 or so, Jackie, and play it back. If you think we need to go
21 back further, just butt in and let us know. Ms. Cutler has
22 otherwise finished her remarks.
23 MS. VOGEL: Thank you.
24 THE COURT: Ms. Vogel, are the three of you there on a
25 speaker phone, so you all got cut off?

Page 37

1 MS. VOGEL: Also Juneau.
2 THE COURT: Oh, Juneau. Okay.
3 MS. VOGEL: Yeah. So, both Seattle and Juneau have --
4 were cut off. And -- but we remained connected to each other.
5 THE COURT: Okay. We're going to go ahead and play --
6 we've gone back about five minutes before Ms. Cutler was done,
7 is that right, Jackie? Okay. Hopefully the first part will
8 sound familiar to you. And then --
9 MS. VOGEL: Thank you.
10 THE COURT: -- that will be your chance to respond. Go
11 ahead.
12 MS. VOGEL: Great. Thank you.
13 12:12:42
14 (Audio replayed)
15 12:13:06
16 (Pause)
17 12:13:43
18 (Audio continues replay)
19 12:14:12
20 MS. VOGEL: Your Honor, I'm prepared to give a rebuttal.
21 I found that there's plenty to respond to in the first portion,
22 if --
23 THE COURT: Okay.
24 MS. VOGEL: -- these technical difficulties are proving
25 difficult.

Page 38

1 to the contrary.
2 I think that Ms. Cutler spoke a lot about complete
3 flexibility that's been given to the legislature on the subject
4 of education. I would say in the absence of this stay, that
5 complete flexibility has the glaring exception of the one
6 decision that the people of Alaska, through their duly elected
7 representatives, came to about how to fund education. And
8 that's through a system of local contributions. Ms. Cutler
9 would encourage the legislators right now to be re-imagining
10 education without the one way of funding education that they've
11 chosen, and that the people of Alaska have chosen. Certainly
12 it's not new that certain places in Alaska don't like required
13 local contributions. There has not been the political will to
14 change that. If it changes now in the absence of a stay, it's
15 because of a court order. And that is -- that is an
16 irreparable harm. That's not the legislative process at work.
17 That's about responding to a court order under pressure. It
18 happens that the circumstances facing the state this year make
19 it a particularly terrible time for that to happen. There's
20 not sufficient time for the legislature to respond, and they
21 haven't begun to respond. Even with budget being given to the
22 legislature before their technical deadlines, the state is
23 facing a situation in which it is scrambling to come up with
24 cuts to meet goals. And this, figuring out what happens with
25 basic need, because it's missing 16 percent of it that was

Page 40

1 12:14:26
2 (Audio continues replay)
3 12:14:31
4 THE COURT: Okay. Let's just go back, start it over,
5 we'll make the best of it. I'm going to play -- I'd rather
6 hear you -- I'd rather have you hear the whole thing. And I
7 think we're ready to go ahead.
8 MS. VOGEL: Okay.
9 THE COURT: It may not be perfect, but let's give it a
10 shot.
11 12:14:47
12 (Audio continues replay)
13 12:19:02
14 THE COURT: Ms. Vogel?
15 MS. VOGEL: Thank you, Your Honor.
16 THE COURT: There. Thank you. Okay. Ms. Vogel, are you
17 ready to go ahead?
18 MS. VOGEL: Yes, I am. Thank you, Your Honor.
19 THE COURT: All right. Sorry. I have no idea what
20 happened, but I'm --
21 MS. VOGEL: Oh, no. I appreciate it.
22 THE COURT: -- certainly ready to hear from you.
23 MS. VOGEL: And that last line, about the state has more
24 money than it knows what to do with is certainly a relief to
25 hear, as a state employee has been reading newspaper articles

Page 39

1 supplied by required local contributions, that hasn't even
2 begun to happen at the legislature. And that's why a stay is
3 needed; there isn't time. There's also insufficient
4 information.
5 Again, as this Court remarked, this was a complicated
6 issue. It's very unlikely that the Supreme Court is going to
7 view the dedicated fund clause exactly with the same emphasis
8 and interpretation that this Court applied, just because it is
9 such a complicated issue. And yes, the state is confident that
10 it will, you know, receive reversal in the Supreme Court. But
11 even if there is an affirmance, it's likely that it has
12 slightly different contours than this Court's ruling. The
13 solution to a dedicated fund problem is allowing the
14 legislature to make a change with a full understanding of what
15 the appellate opinion is on what the contours of that new
16 regime needs to be. Otherwise, the state risks having to do
17 this twice.
18 I would also say that there was a talk about a lot of
19 uncertainty. But the irreparable harms that the state
20 mentioned didn't involve uncertainty, and the first four had no
21 uncertainty. Certainly, there's no uncertainty that's to the
22 fact that the state was enjoined by a court from effectuating a
23 statute. And that is something that the United States Supreme
24 Court pointed out is always irreparable harm. And obviously we
25 Will supply that later this afternoon in the 77(l) letter. I

Page 41

1 believe the rule on Rule 77(l) allows them to supplement if
2 they've got alternative authority. It's not about a brief,
3 it's about providing you with the authority to read. It's
4 also, I think, three pages long, so I don't think it'll be a
5 long read.
6 In addition, the -- there's certainty that what law was
7 invalidated was the legislature's solution for how to fulfill
8 its mandate under the constitution to satisfy the education
9 clause. There's certainty that the invalidation occurs at this
10 point in the legislative session and before a Supreme Court
11 ruling has been issued. And there's certainty that the lack of
12 a stay will throw school budgets statewide, including many non-
13 parties, into a state of uncertainty. And that's bad for
14 schools. We've gotten affidavit from Commissioner Hanley in the
15 record talking about uncertainty being bad for schools.
16 They're talking about how basic need hasn't historically, you
17 know, caused any big, you know -- they're talk -- they have an
18 affidavit saying that the required local contribution has not
19 historically been a huge factor in the mind of school
20 districts' planners. But that's because it wasn't under
21 (indiscernible). Certainly, school districts who looked at
22 basic need of the floor that they could stand on were operating
23 at a different time than right now when there's a superior
24 court ruling that says that a big piece of the foundation of
25 their floor, 16 percent, is unconstitutional. And so, that's

Page 42

1 why it's suddenly becoming on the agenda, and there is
2 certainty that lack of a stay will cause uncertainty in school
3 districts.
4 And then finally, yes, there are some unknowns. But the
5 unknowns, no matter how you cut it, lead to irreparable harm.
6 Either the money is found somehow through a new statutory
7 change, in which case there is a mooted in fact of what the
8 will of the people was, in terms of how schools are funding,
9 right? Or there's no money found, in which case there is harm
10 to educational opportunities. So, I really don't think that
11 there's a ton of uncertainty here. I think that it's quite
12 clear, no matter how you cut it, there's irreparable harm to
13 the state of allowing this Court's judgment to go into effect
14 before the Supreme Court has had a chance to review.
15 And in terms of adequate protection, I think we didn't
16 hear anything that shows that the borough can establish that
17 their tax payers, the individuals, are even a dollar worse off
18 by this Court granting the stay than they would be without it.
19 The borough, for example, doesn't pay a school -- doesn't
20 charge a school tax to their individuals. We've heard it's a
21 property tax and a sales tax. But you don't have an affidavit
22 from the borough saying that they plan to not charge the money
23 this year. In fact, you have something to the contrary,
24 something saying maybe they would charge some of the money and
25 put it -- put some more towards the voluntary portion of

Page 43

1 education. It's simply unclear what would happen to the tax
2 burdens of those individuals, both from the side of the
3 legislature and if they were trying to come up with revenue,
4 but also from the side of the borough. So, you do have a
5 situation where the injury that they are electing is relatively
6 slight in comparison to the injury which the person seeking the
7 stay will suffer. And for those reasons, the state urges this
8 Court to grant the stay and allow the Supreme Court to weigh
9 in.
10 THE COURT: Okay. Thank you, Ms. Vogel. Well, Rule 77(l)
11 just does provide for, you know, any additional citation, no
12 argument, in response. So, I wouldn't expect a brief.
13 MS. CUTLER: Excuse me?
14 THE COURT: A brie -- I wouldn't expect a brief on the
15 subject, but maybe any other citation that you might have.
16 MS. CUTLER: Well, normally when this type of Rule 77(l)
17 motion is made, it's done in advance.
18 THE COURT: True.
19 MS. CUTLER: So that the opposing party can respond at
20 oral argument, if they so choose. That wasn't done here.
21 Again, the state seems to be suggesting that we should not be
22 able to respond to their citation, which seems to me completely
23 inappropriate. And I still have no idea what Colorado Court of
24 Appeals case they're talking about.
25 Again, at every stage in this litigation, you know, they

Page 44

1 try to get an unfair advantage. I mean, if they're so proud of
2 this case, why can't we have an opportunity to respond to it?
3 THE COURT: Are you going to be submitting the Colorado
4 case citation as well?
5 MS. VOGEL: Your Honor, I will submit both of those by
6 email this afternoon. I think Rule 77(l) actually allows you
7 to supplement post-oral argument, just before court's ruled.
8 Though I don't think that there's an inherent right to brief in
9 response. And additionally, Your Honor, I think if this Court
10 feels that it's not needing to rely on that in order to issue a
11 ruling, we encourage the Court not to wait. I think the
12 Supreme Court indicated that they were hoping for a response by
13 the 23rd, which I recognize is just Monday.
14 MS. CUTLER: Your Honor, may I just briefly respond to
15 that? It may not be literally stated in the rule. Again,
16 they've completely surprised us, so I don't have the rule in
17 front of me. But it's common courtesy to give the other side
18 an opportunity to respond.
19 THE COURT: I'm going to have a look at what they submit,
20 and the cases, and then I'll fashion a short order.
21 MS. CUTLER: Okay.
22 THE COURT: Saying the -- setting out the scope of any
23 response that I'd expect from the borough.
24 MS. CUTLER: Thank you, Your Honor.
25 THE COURT: And the plaintiffs. Well, as far as time -- I

Page 45

1 mean, that -- I wouldn't expect to get that until -- your
2 response until Monday, at this point. We don't have the
3 citation submitted on the record. So, I'm not sure if -- I'll
4 be working on this case certainly over the weekend. I have to
5 go to Petersburg on Monday for my -- or Sunday, actually, for
6 my court week. But I'll be -- other than being in the air,
7 I'll be working then. But I will be in Petersburg for a full
8 day of hearings on Monday and Tuesday, and in Kake for trial on
9 Wednesday. But --
10 MS. VOGEL: Your Honor, just to put the Maryland v. King
11 cite on for the rec -- into the record --
12 THE COURT: Go ahead.
13 MS. VOGEL: It's 133 S.Ct. 1, 2012. And it's at 2 to 3.
14 The other citation I've seen for it is 567 U.S., but they
15 haven't filled out the pin cite on that. Also 212.
16 THE COURT: Okay. So 133 Supreme Court 1. It's a 2012 --
17 MS. VOGEL: Yes.
18 THE COURT: -- case.
19 MS. VOGEL: Yeah. It's just a -- it's just a three-page
20 order on a stay.
21 THE COURT: Okay. All right. Well, we'll all have a look
22 at that. I'm just -- I want to get a decision done on this,
23 obviously, as soon as possible. I'll shoot for Monday, is all
24 I can say. Well, anything else, Ms. Vogel?
25 MS. VOGEL: No. Thank you, Your Honor.

Page 46

1 THE COURT: Ms. Cutler?
2 MS. CUTLER: No. Thank you, Your Honor --
3 THE COURT: Okay.
4 MS. CUTLER: -- for listening to us.
5 THE COURT: All right. Well, thank you, Counsel. Back to
6 work. Thank you. Safe travels back home, to everyone. So,
7 all right. We'll be off record. Thanks, everybody.
8 (Off record)
9 12:30:48
10 END OF REQUESTED PORTION
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Page 47

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

TRANSCRIBER'S CERTIFICATE

I, Richell E. Boyd, hereby certify that the foregoing pages numbered 2 through 47 are a true, accurate, and complete transcription of proceedings in Case No. 1KE-14-00016 CI, Ketchikan Gateway Borough versus State of Alaska, transcribed by me from a copy of the electronic sound recording to the best of my knowledge and ability.

3/13/15

Date

Richell E. Boyd, Transcriber