No. S 25-26

IN THE NEBRASKA SUPREME COURT

NEBRASKA ASSOCIATION OF PUBLIC EMPLOYEES LOCAL 61,

Appellant,

v.

STATE OF NEBRASKA,

Appellee.

On Appeal from the
Commission of Industrial Relations

Honorable Commissioners
Gregory M. Neuhaus, Dallas D. Jones, William G. Blake

SUPPLEMENTAL BRIEF OF APPELLANT

Dated: February 17, 2026

Respectfully submitted:

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PROPOSITIONS OF LAW

1. An employer commits a prohibited labor practice when it refuses to negotiate in good faith with respect to a mandatory topic of bargaining. *Pub. Ass'n of Gov't Emps. v. City of Lincoln*, 24 Neb. App. 703, 708 (2017). *See also* Neb. Rev. Stat. § 48-824(1).

2. Mandatory topics of bargaining are those subjects that relate to "wages, hours, and other terms and conditions of employment or any question arising thereunder." Neb. Rev. Stat. § 48-816(1)(a).

3. The phrase "conditions of employment" encompasses far more than just "working conditions." *Omaha Police Union Loc. 101 v. City of Omaha*, 15 CIR 292, 2007 WL 5114425, at *4 (2007).

4. "An employer has a duty to not change past practices for employees who are represented by a union until it has bargained to impasse on that subject with the union." *SEIU Loc. 226 v. Douglas Cnty. Sch. Dist. 001*, No. 1466, 2019 WL 5064676, at *7 (C.I.R. Sept. 25, 2019) (quoting *NLRB v. Katz*, 369 U.S. 736, 745–47 (1962)).

5. "To establish past practice, the practice must have occurred with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis." *Id.* (citations omitted).

6. It is well-established that the economic impacts of a change to a condition of employment are in themselves a mandatory subject of bargaining. *Cent. City Educ. Ass'n v. Merrick Cnty. Sch. Dist. No. 61-0004*, 280 Neb. 27, 32 (2010).

7. Employers are required to bargain even over seemingly minor economic impacts. *Omaha Police Union Loc. 101 v. City of Omaha*, 15 CIR 292, 2007 WL 5114425, at *5 (2007).

8. An appellate court must decline to consider a challenge raised by the appellee if that party has not properly designated a

cross-appeal pursuant to Neb. Ct. R. App. P. § 2-109(D)(4). *See Prinz v. Omaha Operations LLC*, 317 Neb. 744, 750–51 (2024) (citing *Fentress v. Westin, Inc.*, 304 Neb. 619, 627 (2019)).

9. "[D]ecisions under the [NLRA] are helpful in interpreting the IRA, but are not binding." *Scottsbluff Police Officers Ass'n v. City of Scottsbluff*, 282 Neb. 676, 681 (2011) (citation omitted).

10. Even where a decision is left to management prerogatives, the employer must bargain with the union over the effects and/or impact and implementation of the decision. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 677 n.15 (1981); *Dep't of Navy, Marine Corps Logistics Base v. FLRA*, 962 F.2d 48, 50 n.1 (D.C. Cir. 1992).

SUMMARY OF ARGUMENT

On January 15, 2026, this Court directed the parties in this case to file supplemental briefs on "[w]hether Nebraska law imposes an obligation on the State of Nebraska to engage in 'impact and implementation bargaining,' *see Department of Navy*, *Marine Corps Logistics Base v. FLRA*, 962 F.2d 48 (D.C. Cir. 1992), and, if so, the statutory or other authority establishing such an obligation." Order for Suppl. Briefing 1.

Appellant Nebraska Association of Public Employees ("NAPE") files this brief in response to the Court's Order and answers the Court's questions as follows: a) Nebraska law imposes an obligation on the State to engage in impact and implementation bargaining where the implementation in question is a mandatory subject of bargaining, and b) the source of the bargaining obligation is the Nebraska law's requirement that the State bargain over mandatory subjects of bargaining, as mandatory subjects have been interpreted by the decisions of the Commission on Industrial Relations ("CIR") and Nebraska courts.

These answers are consistent with long-standing, well-established precedent under the Federal Service Labor-Management Relations Statute ("FSLMRS") and the National Labor Relations Act ("NLRA"), precedent of the type this Court has previously consulted for guidance in interpreting analogous questions arising under Nebraska public sector labor-management relations law. That federal precedent holds that even where management unquestionably has the unilateral authority to make a decision, such as to direct employees to return to the office for work, the law still will require bargaining over the procedures for the decision's implementation and the amelioration of adverse impacts on employees. And, to address any concern that a bargaining obligation will tie the State's hands unnecessarily, Nebraska law is clear that what is required of the State is to bargain in good faith, not to agree or acquiesce to a union's demands.

The Nebraska public sector labor-management relations laws do not have explicit language tracking the "impact and implementation" bargaining obligation of the FSLMRS or requiring the effects bargaining mandated by NLRA precedent. Rather, the Industrial Relations Act and the State Employees Collective Bargaining Act obligate the State to bargain over mandatory terms and conditions of employment, described as "wages, hours, and other terms and conditions of employment or any question arising thereunder." Neb. Rev. Stat. § 48-816(1)(a). The established test under Nebraska law for whether a matter involves a mandatory subject of bargaining includes whether that matter involves a change to an established past practice that has an adverse economic impact on employees. The obligation to bargain over the impact and implementation and/or effects of a management decision comes from this obligation to bargain over mandatory subjects.

Here, when Governor Pillen issued Executive Order 23-17 ("the EO") requiring State employees to return to the office to perform their jobs, the State was required to bargain with NAPE over the aspects of

the decision's implementation as to which NAPE requested bargaining, particularly in light of the EO's five exceptions to the return-to-the-office directive, and the EO's grant of discretion to the various State agencies to determine when those enumerated exceptions would apply. The State was so required because the aspects of the implementation over which NAPE sought bargaining met the Nebraska test for mandatory subjects: there was a change to an established past practice on remote work and that change had demonstrated adverse economic impacts on State employees represented by NAPE.

The CIR, in the underlying decision now before this Court on appeal, implicitly found that the implementation of the EO was a mandatory subject because the CIR applied the "contract coverage" doctrine to determine whether the State was relieved from its obligation to bargain. That doctrine provides the employer with an exception to its obligation to bargain over mandatory subjects if the parties have previously bargained over the subject and memorialized their bargain on the issue in their agreement—the terms of the existing agreement then apply to the matter and the State has no further obligation to bargain. Had the CIR determined that the EO implementation was a permissive bargaining subject, the State would have had no obligation to bargain in the first place, and the CIR would not have had occasion to consider the contract coverage issue.

The State agreed that "[t]he CIR's decision below assumed that remote work was subject to mandatory bargaining." Appellee Br. 27 (citing T269, 270). The State alternatively argued the CIR had erred by not finding the implementation to be a permissive subject; however, the State waived that alternative argument since the State failed to file a cross-appeal under Neb. Ct. R. App. P. § 2-109(D)(4) challenging the CIR's failure to make a permissive subject determination.

In sum, while the Nebraska statute does not contain the explicit "impact and implementation" language found in the FSLMRS, Nebraska law, consistent with the well-established law on mandatory

subjects of bargaining that has developed under both the FSLMRS and NLRA, obligates the State to bargain over the impact and implementation of decisions, like the EO here, otherwise committed to the State's discretion when that implementation will change an established past practice and have an adverse economic effect on employees.

ARGUMENT

I. Federal precedent of the type the Court has previously found instructive in interpreting the Nebraska public sector labor-management relations statutes requires bargaining over the implementation of decisions otherwise committed to the employer's discretion.

The long-standing, well-established federal law under both private and federal sector labor-management relations statutes supports the requirement that the State bargain over the return-to-the-office implementation issues here. Whether characterized as "impact and implementation" bargaining (FSLMRS) or "effects" bargaining (NLRA), the precedent under both statutes requires management to bargain with the union representing its employees over implementation issues arising from management decisions otherwise committed to management's unilateral discretion.

The NLRA is the primary federal statute governing private sector labor-management relations, and the FSLMRS is the federal statute governing federal sector labor-management relations. This Court has historically consulted decisions interpreting the NLRA and the FSLMRS to assist it in interpreting analogous provisions of Nebraska law. In that regard, NLRA precedent, while not binding on this Court, has proven helpful in interpreting Nebraska's Industrial Relations Act. *Scottsbluff Police Officers Ass'n v. City of Scottsbluff*, 282 Neb. 676, 681 (2011). And, in its request for supplemental briefing, the Court specifically referenced the FSLMRS's requirement for "impact and implementation" bargaining, and cited a case, *Department*

of Navy, Marine Corps Logistics Base v. FLRA, 962 F.2d 48 (D.C. Cir. 1992), that the Court previously relied on in adopting the "contract coverage" doctrine. As the Court referenced precedent under the FSLMRS in its Order, we start with a brief review of the FSLMRS's requirements and then move to a discussion of the analogous obligations under the NLRA.

A. The FSLMRS requires bargaining over the "impact and implementation" of decisions committed to management control; in the context of a return-to-the-office directive this bargaining obligation requires that federal agencies give notice to unions representing their employees and an opportunity to bargain over procedures and appropriate arrangements consistent with 5 U.S.C. § 7106(b).

As described in *Department of Navy*, the FSLMRS, in statutory text, explicitly lists decisions committed to management discretion over which federal government agencies do not have to bargain with the unions representing federal employees. "[T]he Statute specifically excludes certain 'management rights' from the duty to bargain. These include matters such as hiring decisions, the assignment of work and the establishment of performance standards." *Id.* at 50 (citing 5 U.S.C. § 7106(a)(2)). However, under the FSLMRS, federal agency management is obligated to bargain over the "impact and implementation" of the decisions the statute otherwise commits to management discretion.

> Although an agency is not required to bargain with respect to its management rights *per se*, it is required to negotiate about the "impact and implementation" of those rights—that is, the "procedures which management officials of the agency will observe in exercising" management rights and "appropriate arrangements for employees adversely affected by the exercise" of such rights.

Id. (citing 5 U.S.C. § 7106(b)(2), (3) and *U.S. Dep't of the Air Force v. FLRA*, 949 F.2d 475, 477 & n.2 (D.C. Cir. 1991)).

In his *Department of Navy* opinion for the D.C. Circuit, Judge Edwards described some observable tension between, on the one hand, the FSLMRS's reservation of certain management prerogatives to agency discretion and, on the other hand, the statute's requirement that agencies bargain with employee unions over the procedures the agencies will follow in exercising their reserved discretion. He then noted that:

> By ascribing certain management rights to agencies, but tempering those rights through the requirement of impact and implementation bargaining, Congress sought to strike a compromise between the agency's need to manage itself efficiently and the employees' right to participate in the decisions that affect them.

Id. at 50 n.1 (citation omitted).

As an example of the compromise Judge Edwards described, historically, the Federal Labor Relations Authority ("FLRA"), in interpreting the FSLMRS, has held that while federal agency decisions to move offices are not negotiable, the agency has a duty to bargain over union proposals regarding the procedures to be used to implement the move and any appropriate arrangements for adversely affected employees. *See generally* FLRA, Off. of the Gen. Couns., *Office Moves and the Duty to Bargain* and the FLRA decisions cited at 10 (n.d.), available at
https://www.flra.gov/system/files?file=webfm/OGC/Training/Bargaining%20%20Office%20Moves%20-%20FLRA%20%282%29.pdf.

More recently, there has been considerable back and forth between federal agencies and federal employee unions over President Trump's January 20, 2025 *Return to In-Person Work* Presidential Memorandum and agency actions in response. *See, e.g.*, Jory Heckman, *Trump's return-to-office memo doesn't override telework protections in union contract, arbitrator tells HHS*, Fed. News Network (Jan. 21, 2026), https://federalnewsnetwork.com/workforce/2026/01/trumps-return-to-office-memo-doesnt-override-telework-protections-in-union-

contract-arbitrator-tells-hhs/ (discussing recent arbitrators' awards). Significantly, however, on February 3, 2025, the federal Office of Personnel Management ("OPM") issued a memorandum entitled "Guidance on Collective Bargaining Obligations in Connection with *Return to In-Person Work*." OPM, *Guidance on Collective Bargaining Obligations in Connection with Return to In-Person Work* (Feb. 3, 2025), available at https://www.opm.gov/media/ckjioszr/guidance-on-collective-bargaining-obligations-in-connection-with-return-to-office-2-3-25-final-1.pdf. In that memorandum, OPM noted that: "Agencies should, however, provide notice of the change in telework policy and an opportunity to bargain with unions over procedures and appropriate arrangements consistent with 5 U.S.C. § 7106(b)." *Id.* at n.9. Notably, bargaining over "procedures and appropriate arrangements" tracks the types of matters NAPE requested that the State bargain over in the context of the implementation of EO 23-17 here.

B. The NLRA requires bargaining over many employer decisions; where the particular type of decision is committed to management's unilateral discretion, the employer is still obligated to bargain over the decision's effects.

Unlike the FSLMRS, the NLRA does not contain a statutory list of subjects committed solely to management discretion.

> Although parties are free to bargain about any legal subject, Congress has limited the mandate or duty to bargain to matters of "wages, hours, and other terms and conditions of employment." . . . . Congress deliberately left the words "wages, hours, and other terms and conditions of employment" without further definition, for it did not intend to deprive the Board of the power to further define those terms in light of specific industrial practices.

First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 674–75 (1981) (omitting citations and footnotes); *see also id.*, at n.14 (discussing Congressional rejection of an amendment designed to specify and limit NLRA subjects of bargaining).

Pursuant to the Congressional design, in a series of cases decided over many years, the National Labor Relations Board ("NLRB" or "Board") and the courts reviewing the NLRB's decision have developed extensive precedent concerning mandatory subjects of bargaining. Many employer decisions, like the "replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment," are mandatory subjects requiring bargaining. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 215 (1964). Other decisions, like the termination of an employer's operation at one facility at issue in *First National Maintenance*, are not. However, without regard to whether the employer is obligated to bargain over the *decision*, for a very long time the NLRB has required bargaining over the *effects* of such decisions, and the courts have endorsed that long-standing view. *See, e.g.*, *Transmarine Navigation Corp.*, 170 NLRB 389 (1968) (establishing the standard remedy for an effects bargaining violation); *First Nat'l Maint.*, 452 U.S. at 677 n.15; *see also Kirkwood Fabricators, Inc. v. NLRB*, 862 F.2d 1303, 1306 (8th Cir. 1988) ("Requiring effects bargaining maintains an appropriate balance between an employer's right to close its business and an employee's need for some protection from arbitrary action." (citing *Morrison Cafeterias Consol. v. NLRB*, 431 F.2d 254, 257–58 (8th Cir. 1970))).

The NLRB has held that effects bargaining can include such topics as layoffs, severance pay, health insurance coverage and conversion rights, preferential hiring at other of the employer's operations, and reference letters for jobs with other employers. *See Allison Corp.*, 330 NLRB 1363, 1365 n.14 (2000). In *Kirkwood*, the Eighth Circuit, in the context of a sale and complete business closing, listed potential effects bargaining topics such as "pension fund payments, vacation pay, reference letters, extended health care benefits and severance pay." 862 F.2d at 1307.

Thus, to the extent that this Court has found precedent under the NLRA helpful—even if not binding or dispositive—in interpreting

analogous questions under Nebraska public employee labor-management relations statutes, *see City of Scottsbluff*, 282 Neb. at 681, the NLRB's effects bargaining jurisprudence, as approved by the courts, counsels requiring bargaining with NAPE over the effects on Nebraska state employees of the EO's implementation. With that clear federal precedent as helpful confirmatory background, we turn now to the Nebraska law on mandatory subjects of bargaining to provide the source of authority for NAPE's answer to the Court's questions.

II. Nebraska precedent on mandatory subjects of bargaining requires the State to bargain over changes in established past practices that have an adverse impact on employees; the implementation of the EO meets that test and thus the State was obligated to bargain over the implementation in response to NAPE's bargaining request.

The Nebraska Industrial Relations Act and the State Employees Collective Bargaining Act do not have a specific list of subjects committed to management discretion, nor do they have explicit "impact and implementation" or "effects" bargaining statutory language. Rather, similar to the NLRA, the Industrial Relations Act requires bargaining "with respect to wages, hours, and other terms and conditions of employment or any question arising thereunder." Neb. Rev. Stat. § 48-816(1)(a). The Industrial Labor Relations Act, at Neb. Rev. Stat. § 48-824(1), and the State Employees Collective Bargaining Act, at Neb. Rev. Stat. § 81-1386(1), both provide that failure to bargain over mandatory subjects constitutes a prohibited practice. As interpreted by the CIR and the Nebraska courts, this broad language includes, as a mandatory subject, the type of implementation bargaining NAPE requested here.

NAPE sought bargaining over: the definition of remote work and remote location; the assignment procedures, criteria, and expenses if an office arrangement is not possible; the assignment procedures, criteria and expenses if an office is at full capacity; the definition,

criteria, and duration for exceptions to sustain critical operations; the definition and requirements to declare a workforce shortfall to allow remote work; remote work options in lieu of using leave during severe weather or other emergencies; the criteria for an agency head to make exceptions on an individual basis; the procedures for measuring and confirming productivity in remote assignments; parking availability and assignments. (E3, p. 5, Vol. IV). The NAPE-Nebraska collective bargaining agreement did not address any of these topics in contrast, for example, to the extensive detail found at Article 5 of the agreement concerning the procedures to be followed when State agencies exercise their authority to decide when a layoff is necessary. (E1, p.17–21, Vol. III).

In its initial brief, NAPE reviewed, at pages 25–26, the Nebraska law on mandatory subjects of bargaining as applicable to the instant dispute. To recap briefly, the statutory phrase "conditions of employment" encompasses far more than just "working conditions." *Omaha Police Union Loc. 101 v. City of Omaha*, 15 CIR 292, 2007 WL 5114425, at *3–4 (2007) (citing decisions on, inter alia, dress codes, dues to professional organizations, noon duty, and grievance procedures). Moreover, "[a]n employer has a duty to not change past practices for employees who are represented by a union until it has bargained to impasse on that subject with the union." *SEIU Loc. 226 v. Douglas Cnty. Sch. Dist. 001*, No. 1466, 2019 WL 5064676, at *7 (C.I.R. Sept. 25, 2019) (quoting *NLRB v. Katz*, 369 U.S. 736, 745–47 (1962)). "To establish past practice, the practice must have occurred with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis." *Id.* (citations omitted). It is also well established that the economic impacts of a change to a condition of employment are in themselves a mandatory subject of bargaining. *Cent. City Educ. Ass'n v. Merrick Cnty. Sch. Dist. No. 61-0004*, 280 Neb. 27, 32 (2010). Employers are required to bargain even over seemingly minor economic impacts. *Omaha Police Union Loc. 101*, 15 CIR 292, 2007 WL 5114425, at *5. To

summarize, mandatory subjects include changes to established past practices which have adverse economic impacts on employees.

At pages 26–27 of its initial brief, NAPE next reviewed the application of the mandatory subject standard to the facts here. In that regard, the evidence demonstrated that the elimination of remote work both changed an established past practice and had an adverse economic impact on employees. The evidence of pre-EO revocation of telework, such as it was, involved individualized cause, such as work performance issues, for revoking particular employees' individual telework agreements. (175:10–16, 192:1–13, 206:15–18, 245:22–246:1, Vol. I). The established past practice, as determined by the CIR in its initial orders to maintain the status quo and then defining that status quo, was to continue remote work absent a particularized cause-related basis for terminating a particular individual's agreement. Thus, employees working remotely could anticipate to continue to do so absent an individualized, cause-based determination that they had to return to the office. The EO clearly changed that past practice.

The record also contained numerous examples of adverse economic impacts on employees as a direct result of the elimination of remote work, ranging from commuting costs to purchase of office attire to an increased need for sick leave, flex time, and other paid time off. (T229–32; 187:1–10, 190:17–191:13, 199:17–25, 213:7–14, 226:7–13, 239:8–240:8, 244:6–22, Vol. I; 316:14–317:7, Vol. II). Thus, implementation of the EO was a mandatory subject of bargaining, since it changed the State's established practice with respect to remote work and that change had adverse economic impacts on State employees.

Also in its initial brief, at 24–25, NAPE reviewed how the CIR handled the mandatory subject issue in its underlying decision. After describing the legal standards for determining whether a particular matter was a mandatory subject, the CIR implicitly determined that the case involved a mandatory subject by skipping to the issue of whether the dispute was "covered by" the parties' collective bargaining

agreement. Because the contract coverage doctrine relieves an employer of bargaining over mandatory subjects that the parties have already covered in their agreement, by applying that doctrine, the CIR implicitly found that the elimination of remote work was a mandatory subject. *See Douglas Cnty. Health Ctr. Sec. Union v. Douglas Cnty.*, 284 Neb. 109, at 116 (2012) ("Where the contract fully defines the parties' rights *as to what would otherwise be a mandatory subject of bargaining*, it is incorrect to say the union has 'waived' its statutory right to bargain; rather, the contract will control and the 'clear and unmistakable' intent standard is irrelevant." (emphasis supplied) (citing *Dep't of Navy*, 962 F.2d at 57))).

In its responsive brief, the State agreed that "[t]he CIR's decision below assumed that remote work was subject to mandatory bargaining," Appellee Br. 27 (citing T269, 270), and defended the CIR decision on that assumption, arguing the matter was already covered by the contract and that NAPE had waived its right to bargain. The State alternatively argued the CIR had erred by not finding the implementation to be a permissive subject; however, the State waived that alternative argument since the State did not properly designate a cross-appeal pursuant to Neb. Ct. R. App. P. § 2-109(D)(4). *See Prinz v. Omaha Operations LLC*, 317 Neb. 744, 750–51 (2024) (citing *Fentress v. Westin, Inc.*, 304 Neb. 619, 627 (2019)); Appellant Reply Br. 14–15. Thus, there is no disagreement here between NAPE and the State on whether the CIR determined, if implicitly, that implementation of the EO was a mandatory subject of bargaining.

Finally, two additional reasons support a mandatory subject determination. First, the record in this case demonstrates the substantial disruption of both employees' lives and agency operations wrought by the return-to-office directive. Particularly for those State employees who had never previously worked in an office, and for those agencies that did not have adequate office space for returning employees and lacked budget authority to acquire such, negotiations over the "procedures which management officials of the agency will

observe in exercising" management rights and "appropriate arrangements for employees adversely affected by the exercise," would have fulfilled the State Employees Collective Bargaining Act's legislative purpose: "to promote harmonious, peaceful, and cooperative relationships between state government and its employees and to protect the public by assuring effective and orderly operations of government." Neb. Rev. Stat. § 81-1370. And, any concern that State agencies' hands would somehow be tied if they were required to bargain is misplaced; the law requires only that the State bargain in good faith, "but such obligation does not compel either party to agree to a proposal or require the making of a concession." Neb. Rev. Stat. § 48-816(1)(a).

And, second, such a determination would place Nebraska in the mainstream of other state public employee collective bargaining laws. "[A]s in the private sector, public-sector rules typically provide that even if a substantive decision by management is not a mandatory subject of bargaining, the *effects* of that decision on employees may still be a mandatory subject." Seth Harris, Joseph E. Slater, Anne Marie Lofaso, Charlotte Garden, and Richard F. Griffin, Jr., *Modern Labor Law in the Private and Public Sectors: Cases and Materials* 780 (3d ed. 2021).

CONCLUSION

For the reasons stated above, and in answer to the Court's questions, the Nebraska law on mandatory subjects of bargaining, in comfortable agreement with established federal precedent, is the source of the State's obligation to bargain with the union representatives of its employees over the impact and implementation and/or effects of a decision otherwise committed to the State's discretion, where the decision changes an established past practice and that change has an adverse economic impact on employees. Application of this straightforward principle here means the State was obligated to bargain with NAPE over the aspects of the implementation of EO

23-17 on which NAPE sought bargaining: essentially, the procedures Nebraska agency officials would observe in implementing the return-to-office directive and its exceptions and appropriate arrangements for employees adversely affected by the implementation. This Court should reverse the CIR's contrary decision and direct the parties to bargain.

Dated: February 17, 2026

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CERTIFICATE OF COMPLIANCE

The undersigned certified that the foregoing Reply Brief of Appellant complies with Neb. Ct. R. App. P. § 2-103. It was generated on Microsoft Word Version 2601 and contains 4,969 words in Century 12 pt. font.

/s/*Abby Osborn*