

**IN THE
SUPREME COURT OF MISSOURI**

No. 84624

CHERYL THRUSTON, FERN WARD, AND LUANA GIFFORD,

Plaintiffs-Appellants,

v.

JEFFERSON CITY SCHOOL DISTRICT,

Defendant-Respondent.

**Appeal from the Circuit Court of Cole County
Hon. Thomas J. Brown, III**

**On Transfer from the Missouri Court of Appeals,
Western District, Case No. WD60172**

**REPLY BRIEF OF AMICUS CURIAE
MISSOURI NATIONAL EDUCATION ASSOCIATION**

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JURISDICTIONAL STATEMENT

This issue before the Court is whether the Circuit Court properly dismissed Plaintiffs-Appellants' Petition for failure to state a claim. Plaintiffs-Appellants timely appealed to the Missouri Court of Appeals for the Western District. On May 14, 2002, the Court of Appeals dismissed the appeal as moot. Plaintiffs-Appellants sought transfer to this Court on July 16, 2002. This Court granted the Application for Transfer on August 27, 2002. On October 23, 2002, this Court granted the Motion of Missouri National Education Association to File Amicus Curiae Reply Brief in Support of Plaintiffs-Appellants Cheryl Thruston, Fern Ward, and Luana Gifford. This Court has jurisdiction pursuant to Article V, Section 10 of the Missouri Constitution.

STATEMENT OF FACTS

Amicus Curiae Missouri National Education Association adopts the Statement of Facts contained in the Brief of Appellants filed with the Missouri Court of Appeals for the Western District and transferred to the Supreme Court.

INTEREST OF AMICUS CURIAE

Missouri National Education Association (Missouri NEA) has approximately 31,000 members who are teachers and other employees of public school districts in Missouri. Missouri NEA provides representation to its members in legal proceedings, assists them with presenting grievances and negotiation proposals to school districts, and

advocates for their interests before the General Assembly. Missouri NEA's two main competitor teacher associations in Missouri are the Missouri Federation of Teachers (with which Plaintiffs-Appellants are affiliated) and the Missouri State Teachers Association (which filed an Amicus Brief in support of Respondent).

POINTS RELIED ON

**I. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS-
APPELLANTS' CLAIMS THAT THEY WERE DEPRIVED OF THEIR
RIGHT TO BARGAIN COLLECTIVELY UNDER ARTICLE I, SECTION
29 OF THE MISSOURI CONSTITUTION, BECAUSE IT RELIED ON
THIS COURT'S DECISION IN *CITY OF SPRINGFIELD v. CLOUSE*, AND
THE *CLOUSE* DECISION IS ERRONEOUS AS A MATTER OF LAW IN
HOLDING THAT ARTICLE I, SECTION 29 DOES NOT APPLY TO
PUBLIC EMPLOYEES.**

**II THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS-
APPELLANTS' CLAIMS UNDER THE FIRST AND FOURTEENTH
AMENDMENTS TO THE U.S. CONSTITUTION, BECAUSE:**

1. PLAINTIFFS ALLEGED THAT DEFENDANT TOOK ADVERSE ACTION
AGAINST THEM IN RETALIATION FOR THEIR ASSOCIATION WITH
THE MISSOURI FEDERATION OF TEACHERS, AND SUCH
ALLEGATIONS STATE A CLAIM.

2. PLAINTIFF-APPELLANT THRUSTON ALLEGED THAT DEFENDANT

IMPOSED A PRIOR RESTRAINT ON HER EXPRESSION WITHOUT ANY
COMPELLING REASON, AND SUCH ALLEGATION STATES A CLAIM.

ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS-APPELLANTS' CLAIMS THAT THEY WERE DEPRIVED OF THEIR RIGHT TO BARGAIN COLLECTIVELY UNDER ARTICLE I, SECTION 29 OF THE MISSOURI CONSTITUTION, BECAUSE IT RELIED ON THIS COURT'S DECISION IN *CITY OF SPRINGFIELD v. CLOUSE*, AND THE *CLOUSE* DECISION IS ERRONEOUS AS A MATTER OF LAW IN HOLDING THAT ARTICLE I, SECTION 29 DOES NOT APPLY TO PUBLIC EMPLOYEES.

The critical issue presented by this case is whether this Court erred as a matter of law when it held in 1947 that Article I, Section 29 of the Missouri State Constitution does not apply to public employees. *City of Springfield v. Clouse*, 206 S.W.2d 539, 542 (Mo. banc 1947).¹

¹ Missouri NEA takes no position as to whether Plaintiffs' claims are moot. As to the justiciability arguments raised by Respondent, Missouri NEA would agree that this case does not involve "collective bargaining" in the sense of negotiations between union and management with the aim of reaching a binding contract. However, "collective bargaining" need not be so narrowly conceived. Grievance processing, which is the focus of this case, unquestionably falls within the scope of "collective bargaining" for purposes of the National Labor Relations Act. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 577-578 & n.4 (1960). Plaintiffs allege that Defendant deprived them of their right to present grievances through their chosen representatives,

and those allegations sufficiently implicate the “right to bargain collectively” to make this case justiciable. If this Court should, however, decide that Plaintiffs never made a demand for collective bargaining, that holding should be strictly limited to the unique facts of this case, particularly the absence of evidence in the record indicating that the grievance procedure was negotiated with the union. As to Defendant-Respondent’s argument that Plaintiff Gifford lacks individual standing, Missouri NEA submits that Gifford is acting in her official capacity as President of the Missouri Federation of Teachers, which unquestionably has associational standing. *See Allee v. Medrano*, 416 U.S. 802, 819 n.13 (1974); *Missouri Outdoor Advertising Association, Inc. v. Missouri*

Plaintiffs-Appellants and Amicus Curiae Missouri NEA maintain that it did, and that *Clouse* should be overruled. Mere disagreement with an earlier Court's construction of a statute does not ordinarily justify a departure from *stare decisis*. *Crabtree v. Bugby*, 967 S.W.2d 66, 71-72 (Mo. banc 1988). However, this case illustrates the "recurring injustice or absurd results" caused by *Clouse* over the years which mandate that the decision be overruled now. *Id.*

State Highways and Transportation Commission, 826 S.W.2d 342, 344 (Mo. banc 1992).

A. CITY OF SPRINGFIELD V. CLOUSE AND ITS PROGENY

Article I, Section 29 of the Missouri Constitution provides that “employees shall have the right to organize and to bargain collectively through representatives of their own choosing.” Mo. Const. Art. I, §29. On its face the provision does not distinguish between private and public sector employees. Notwithstanding the plain language of Article I, Section 29, the City of Springfield in the *Clouse* case sought a declaratory judgment as to whether it had the power to enter into collective bargaining agreements with unions concerning the wages, hours, and conditions of employment of city employees. The trial court held that the language of Article I, Section 29 did apply to municipal employees, but that the City still had no lawful power to enter into collective bargaining agreements. *Clouse*, 206 S.W.2d at 541. The Missouri Supreme Court reached the same result by a different rationale, holding that the City of Springfield had no power to enter into collective bargaining agreements because Article I, Section 29 did not apply to public employees. *Id.* at 542, 547.

This Court first noted that public employees have the right under the First Amendment to the U.S. Constitution and Article I, Sections 8 and 9 of the Missouri Constitution, “to peaceably assemble and organize for any proper purpose, to speak freely and to present their views to any public officer or legislative body.” *Id.* at 542. Public employees had these rights before Article I, Section 29 was enacted. *Id.*

However, the Constitutional right to peaceably assemble and present views to the government was a very different thing from “collective bargaining,” which this Court took to mean the process of reaching a binding contract. *Id.* at 543. The Court believed that a public employer has no power to enter into a binding collective bargaining agreement:

[T]he whole matter of qualifications, tenure, compensation and working conditions for any public service, involves the exercise of legislative powers. Except to the extent that all the people have themselves settled any of these matters by writing them into the Constitution, they must be determined by their chosen representatives who constitute the legislative body. It is a familiar principle of constitutional law that the legislature cannot delegate its legislative powers and any attempted delegation thereof is void.... If such powers cannot be delegated, they surely cannot be bargained or contracted away; and certainly not be any administrative or executive officers who cannot have any legislative powers.

Id. at 545. The Court attempted to accommodate separation of powers principles by reading into Article I, Section 29 an implied exclusion of public sector employees. *Id.* at 542, 545-56.

This Court has reaffirmed *Clouse* on several other occasions. In *State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35, 41 (Mo. 1969), the Court reiterated that public employees have a right under the federal and state constitutions to peaceably assemble and present their views to any public officer or legislative body.² The Court went a step further than it had in *Clouse* and held that a public employer had a concomitant *duty* under the federal and state constitutions to respond to such communications. *Id.*³ The so-called “Public Sector Labor Relations Act,” Mo.

² The plaintiffs in the *Cabool* case were a group of public employees who had been laid off in retaliation for their union activities.

³ The United States Supreme Court may have overruled this holding with respect

Rev. Stat. §§105.500, *et seq.*, did no more than codify a procedure for certain public employees (not teachers or police officers) to exercise these **constitutionally**-mandated rights and duties to “meet, confer and discuss.” *Id.* (emphasis added). The Public Sector Labor Relations Act did not unconstitutionally delegate legislative power or give public employees the right to “collectively bargain” in violation of *Clouse*, the Court concluded, because the statute required only that a public employer meet, confer, and discuss, which it already was constitutionally obligated to do; the public employer was not required to reach agreement. *Id.* The Court reversed the trial court, which had erroneously dismissed the plaintiff-employees’ petition for writ of mandamus and wrongfully denied their petition for permanent injunction requiring the city to recognize and bargain with their union. *Id.* at 44-45.

This Court held in *State ex rel. O’Leary v. Missouri State Board of Mediation*, 509 S.W.2d 84, 89-90 (Mo. 1974), that it would not violate the separation of powers provision of the

to the U.S. Constitution. *See Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 464 (1979). To the extent that *Clouse* and *Cabool* rely on an older and broader view of the First Amendment, as guaranteeing public employees the right to union representation in grievance proceedings, there is even more reason for this Court to reconsider the *Clouse* Court’s crabbed interpretation of Article I, Section 29 of the Missouri Constitution. In any event, the holdings of *Clouse* and *Cabool* still stand with respect to Article I, §§8, 9 of the Missouri Constitution, which are not pleaded in this case.

Missouri Constitution (Article II, Section 1) to allow the State Board of Mediation to determine the proper unit within the juvenile court for meet and confer discussions under Mo. Rev. Stat. §§105.500, *et seq.* In reaching that conclusion, the Court reiterated that the Public Sector Labor Law simply codified the right of public employees and duty of public employers under the federal and state constitutions to meet and confer regarding terms and conditions of employment. *Id.* at 87-88. It did not invade the province of the judiciary. *Id.* at 89-90. *See also Curators of the University of Missouri v. Public Service Employees Local No. 45*, 520 S.W.2d 54, 58 (1975) (Mo. Rev. Stat. §§105.500, *et seq.* merely provides “a procedural vehicle for assertion” by university employees of their “constitutional rights to peaceably assemble and to petition for redress of grievances.... [The law does] not encroach upon the power of the board of curators to govern the State university.”).

The case of *Sumpter v. City of Moberly*, 645 S.W.2d 359 (Mo. 1982), presented this Court with its first occasion to decide whether the Public Sector Labor Law permitted a public employer to enter into a binding collective bargaining agreement which could be enforced through injunction. According to *Clouse*, the Court held, it would violate the Constitutional requirement of separation of powers to give binding effect to a collective bargaining agreement. *Id.* at 363. For that reason, the legislature could not have intended the Public Sector Labor Law to authorize binding collective bargaining agreements. *Id.* The Court affirmed the trial court’s order dismissing the claims of the plaintiff-employees who sought to enjoin the City Manager from making unilateral changes to a Memorandum of Understanding that had been approved by the City Council. *Id.* at 364. On rehearing the plaintiffs argued that the Court had erred by permitting an executive official to nullify a legislative enactment (the approval of the

Memorandum of Understanding by passage of an ordinance). *Id.* at 366. The Court responded that an agreement approved by legislative enactment remains binding until and unless it is legislatively altered. *Id.* at 363 n.4, 366. The Court read the record on appeal as establishing that the City Council had approved of the City Manager’s unilateral changes to the Memorandum of Understanding. *Id.* at 366.

This holding would appear to leave intact the earlier ruling of the Missouri Court of Appeals in *Roberts v. City of St. Joseph*, 637 S.W.2d 98 (Mo. Ct. App. 1982), affirming a writ of mandamus ordering a mayor to submit an employee’s grievance to binding arbitration as provided by ordinance. The Court of Appeals rejected the mayor’s argument that submission of a dispute to binding arbitration would amount to an unconstitutional delegation of legislative power to a private person. *Id.* at 103. Cases from other jurisdictions on this point reasoned that “the vesting of arbitration power in the arbitrators constitutes the arbitration panel as in fact a public body.” *Id.*, citing Annot., 68 A.L.R.3d 885 (1976).⁴

⁴ Depending on the specific facts of the present case, which are not clear from the parties’ Briefs, *Roberts* may have provided all the authority Plaintiffs Thruston and Ward

B. THE RISE AND FALL OF THE NON-DELEGATION DOCTRINE

The common theme linking *Clouse*, *Cabool*, and *Sumpter* is a fundamentally flawed conception of separation of powers. This Court handed down *Clouse* not long after the U.S. Supreme Court had issued two decisions striking down New Deal legislation on the grounds that it unconstitutionally delegated legislative power to executive agencies. See *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). The U.S. Supreme Court quickly retreated from the non-delegation doctrine, finding it unworkable for Congress to legislate detailed standards. See *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *Yakus v. United States*, 321 U.S. 414 (1944); *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946). See also *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001) (Justice Scalia, writing for majority of Court, rejects non-delegation challenge to section of Clean Air Act). Since the New Deal era, not one statute has

needed to force Defendant to hear their grievances. If Defendant enacted a grievance procedure and then failed or refused to follow it (but did not rescind it by formal Board action), then Plaintiffs Thruston and Ward could have simply sought mandamus under the authority of *Sumpter* and *Roberts*.

been struck down under the non-delegation doctrine. *Id.* at 474.

Outside of the labor law area, the Missouri courts have, like the federal courts, retreated from their earlier embracing of the non-delegation doctrine. See *Board of Public Buildings v. Crowe*, 363 S.W.2d 598 (Mo. banc 1962) (rejecting delegation challenge to statute establishing board of public buildings and authorizing it to construct buildings for rental to state agencies); *Milgram Food Stores, Inc. v. Ketchum*, 384 S.W.2d 510 (Mo. 1964) (Liquor Control Act did not unconstitutionally delegate authority to State Supervisor of Liquor Control), *cert. dismissed*, 382 U.S. 801 (1965); *ABC Security Service, Inc. v. Miller*, 514 S.W.2d 521 (Mo. 1974) (rejecting delegation challenge to statute empowering Board of Police Commissioners to regulate private watchmen); *Menorah Medical Center v. Health and Educational Facilities Authority of the State of Missouri*, 584 S.W.2d 73, 83-86 (Mo. 1979) (statute creating a Health and Educational Facilities Authority to help nonprofit health and educational institutions to finance capital improvements or refinance existing indebtedness was not an unconstitutional delegation of legislative power); *Murray v. Missouri Highway and Transportation Commission*, 37 S.W.3d 228 (Mo. 2001) (rejecting separation of powers and delegation challenge to statute directing Missouri Highway and Transportation Commission to submit to arbitration upon the request of a plaintiff with a negligence claim against the Commission).

Yet in *Cabool* and *Sumpter* this Court continued to embrace the non-delegation theory announced in *Clouse*. The time has come for a critical re-examination of the separation of powers and non-delegation doctrines underlying *Clouse*.⁵

⁵ Defendant-Respondent argues that Plaintiffs-Appellants' claims for a declaration

of their right to engage in collective bargaining are foreclosed by the Public Sector Labor Law which excludes teachers and police officers. (Substitute Brief for Respondent at 20). According to Defendant, the only way Plaintiffs-Appellants could establish their right to collective bargaining would be to challenge the Constitutionality of their exclusion from the Public Sector Labor Law, which they have not done. (*Id.* at 22). Defendant's argument ignores the *Cabool* and *O'Leary* decisions, which state that public employees have a right under the Missouri **Constitution** to meet and confer, and public employers have a **Constitutional** duty to participate. *Cabool*, 441 S.W.2d at 41; *O'Leary*, 509 S.W.2d at 87-88. Defendant's argument also assumes that *Clouse* correctly held that Article I, Section 29 of the Missouri Constitution does not apply to public employees -- the very issue before the Court in this case.

C. DECISIONS OF OTHER STATE COURTS ON WHETHER PUBLIC SECTOR COLLECTIVE BARGAINING IS CONSTITUTIONAL

The highest courts of many states have rejected separation of powers and non-delegation challenges to statutes requiring public employers to submit to binding grievance and/or interest arbitration. *Municipality of Anchorage v. Anchorage Police Department Employees Association*, 839 P.2d 1080, 1085 (Alaska 1992); *City and County of Denver v. Denver Firefighters Local No. 858*, 663 P.2d 1032, 1038-1039 (Col. 1983) (binding grievance arbitration not an unconstitutional delegation of legislative power, although binding interest arbitration would be); *West Hartford Education Ass'n v. DeCourcy*, 295 A.2d 526 (Conn. 1972); *Town of Arlington v. Board of Conciliation and Arbitration*, 352 N.E.2d 914 (Mass. 1976); *City of Biddeford v. Biddeford Teachers Ass'n*, 304 A.2d 387 (Me. 1973); *City of Detroit v. Detroit Police Officers Ass'n*, 294 N.W.2d 68 (Mich. 1980), *appeal dismissed*, 450 U.S. 903 (1981); *City of Richfield v. Local No. 1215, Int'l Ass'n of Fire Fighters*, 276 N.W.2d 42 (Minn. 1979); *City of Amsterdam v. Helsby*, 332 N.E.2d 290 (N.Y. 1975); *City of Rocky River v. State Employment Relations Board*, 539 N.E.2d 103, 111 (Ohio 1989); *Warwick v. Warwick Regular Firemen's Ass'n*, 256 A.2d 206 (R.I. 1969); *City of Spokane v. Spokane Police Guild*, 553 P.2d 1316 (Wash. banc 1976); *Local 1226, Rhinelander City Employees v. City of Rhinelander*, 151 N.W.2d 30 (Wis. 1967). *See also Chiles v. United Faculty of Florida*, 615 So.2d 671, 673 (Fla. 1993) (legislature could enter into binding collective agreement enforceable by the court without violating separation of powers doctrine).

It is true that public sector bargaining is not coextensive with private sector bargaining. Constitutional separation of powers principles preclude a legislative body from delegating to an

arbitrator or an executive officer the authority to appropriate funds or raise taxes. *See State of Florida v. Florida Police Benevolent Ass'n*, 613 So.2d 415, 421 (Fla. 1992) (legislature has power under constitution to refuse to fully fund a collective bargaining agreement negotiated by the governor); *Suffolk County v. Labor Relations Comm'n*, 444 N.E.2d 953 (Mass. App. Ct.) (refusing to compel funding of negotiated raises), *review denied*, 447 N.E.2d 670 (Mass. 1983); *Minnesota Education Ass'n v. State*, 282 N.W.2d 915 (Minn. 1979) (legislature had right to reduce pay increase), *appeal dismissed*, 444 U.S. 1062 (1980); *State v. State Troopers Fraternal Association*, 453 A.2d 176 (N.J. 1982) (legislature lawfully modified negotiated prescription drug co-pays through exercise of appropriations power). Similarly, several state courts have held “that the determination of salaries is a legislative function which is not delegable to an arbitrator.” *Municipality of Anchorage*, 839 P.2d at 1085 n.8, citing *Greeley Police Union v. City Council of Greeley*, 553 P.2d 790 (Colo. 1976); *Salt Lake City v. Int'l Ass'n of Firefighters, Locals 1645, 593, 1654, and 2064*, 563 P.2d 786 (Utah 1977); and *City of Sioux Falls v. Sioux Falls Firefighters*, 234 N.W.2d 35 (S.D. 1975).

Some public employee labor relations statutes explicitly preserve the legislature's appropriations power as against a collective bargaining agreement or otherwise binding arbitration award. *American Federation of State, County & Municipal Employees, Council 4 v. Department of Corrections*, 2001 Conn. Super. LEXIS 2890 (Super. Ct. Conn. October 3, 2001) (either house of the legislature by a two-thirds vote may reject an otherwise binding interest arbitration award upon a finding of insufficient funds); *Florida Police Benevolent Ass'n v. State of Florida*, 818 So. 2d 584 (Fla. Ct. App. 2002) (legislature may appropriate less than amount requested in collective bargaining agreement); *Superintending School Committee v. Bangor Education Ass'n*,

433 A.2d 383 (Me. 1981) (arbitrator’s findings are merely advisory with respect to salaries, pensions, and insurance); *Franklin County Prison Board v. Pennsylvania Labor Relations Board*, 417 A.2d 1138 (Pa. 1980) (interest arbitration award is binding unless it would require legislative enactment to be effective). However, just because an arbitration award may cost money does not mean that the legislature’s appropriations power is abridged. *Superintending School Committee*, 433 A.2d at 386 (interest arbitration award permitting subcontracting as long as no bargaining unit member is laid off is binding even though it may involve money costs); *Franklin County Prison Board*, 417 A.2d at 1143-1144 (county prison board committed unfair labor practice by refusing to comply with interest arbitration award increasing salaries; the authority of county salary board to perform administrative function of “fixing” salaries did not amount to legislative authority to appropriate funds or raise taxes).

Underlying all of the foregoing cases is the notion that public sector collective bargaining does not *per se* involve an unconstitutional delegation of legislative authority. States have had no difficulty authorizing public sector collective bargaining while still safeguarding the legislature’s appropriations power through statutes, judicial caselaw,⁶ or executive order.⁷ It is possible to

⁶ See *Dade County Classroom Teachers Ass’n v. Legislature*, 269 So.2d 684, 686-688 (Fla. 1972) (noting that if legislature failed to enact legislation governing public employees’ constitutional right to engage in collective bargaining, court would issue judicial guidelines).

⁷ See *McCulloch v. Glendening*, 701 A.2d 99, 108-110 (Md. 1997) (Governor

protect the public employer in other ways as well, without totally depriving public employees of the opportunity to engage in bargaining. The Michigan Public Employment Relations Act, for example, excludes certain topics from bargaining. *Michigan State AFL-CIO v. Michigan Employment Relations Commission*, 538 N.W.2d 433, 439-440 (Mich. Ct. App. 1995). The Florida statute specifies that the legislature's refusal to appropriate funds does not constitute an unfair labor practice. *Florida Police Benevolent Ass'n*, 818 So.2d at 585 n.2. And the Florida Supreme Court has held that public employees' right to engage in collective bargaining, safeguarded by the Florida Constitution, may nonetheless be abridged if necessary to accomplish a compelling state interest. *Hillsborough County Governmental Employees Ass'n v. Hillsborough County Aviation Auth.*, 522 So.2d 358, 362 (Fla. 1988).

The *Clouse* case appears to be at odds with most other state supreme courts that have reviewed the issue of whether separation of powers or non-delegation principles preclude a public employer from engaging in collective bargaining. Defendant-Respondent and its Amici Curiae urge that the decision whether to authorize public sector collective bargaining properly lies with the legislature. However, “it is emphatically the province and duty of the judicial department to say what the law is.” *Missouri Coalition for the Environment v. Joint Committee on Legislative Rules*, 948 S.W.2d 125, 132 (Mo. 1997), quoting *Marbury v. Madison*, 5 U.S. 137 (1803). If *Clouse* was incorrectly decided as a matter of state constitutional law, it is this Court's duty to

issued executive order requiring executive agencies to engage in meet and confer negotiations, after state legislature repeatedly rejected public sector collective bargaining bills).

overrule it.

D. IMPACT OF ARTICLE I, SECTION 29 OF THE MISSOURI CONSTITUTION ON DELEGATION ANALYSIS

That Missouri forbids public sector collective bargaining (in the sense of negotiating binding agreements) is particularly remarkable given that Article I, Section 29 of the Missouri Constitution on its face **guarantees** all employees -- not just private sector employees -- “the right to organize and to bargain collectively through representatives of their own choosing.” Mo. Const. Art. I, §29. Numerous state courts have held that a public employer has the authority, inherent in its enabling legislation, to engage in collective bargaining **even in the absence of** a constitutional or statutory provision affirmatively authorizing it. *See Littleton Education Ass’n v. Arapahoe County School District, No. 6*, 553 P.2d 793, 796-797 (Colo. 1976); *Chicago Division v. Board of Education*, 222 N.E.2d 243 (Ill. 1966); *Gary Teachers Union Local No. 4 v. School District of Gary*, 284 N.E.2d 108 (Ind. 1972); *Louisiana Teachers’ Ass’n v. New Orleans Parish School Board*, 303 So.2d 564 (La. Ct. App. 1974), *cert. denied*, 305 So.2d 541 (La. 1975); *Dayton Classroom Teachers v. Dayton Board of Education*, 323 N.E.2d 714 (Ohio 1975).

Defendant-Respondent would not and cannot dispute that it is empowered by Missouri statutes to make necessary contracts to carry out its function of providing public education. Mo. Rev. Stat. §162.301. A contract that is in writing and authorized by a board of education is enforceable against the board. Mo. Rev. Stat. §432.070; *Velting v. City of Kansas City*, 901 S.W.2d 119, 121 (Mo. Ct. App. 1995). Surely Defendant would not argue that it could unilaterally abrogate an individual employment contract or a contract for the purchase of real estate or educational supplies. Why, then, should a school district be able to unilaterally abrogate

a collective bargaining agreement, which is merely a ““master contract which sets the terms and conditions of employment for individual employees without requiring formal negotiation of these matters with each employee””? *Littleton Education Ass’n*, 553 P.2d at 797, quoting from Dole, *State & Local Public Employee Collective Bargaining in the Absence of Specific Legislative Authority*, 54 Iowa L. Rev. 539 (1969). ““To say that standardized individual contracts are permissible, but a master contract is not, is to exalt form over substance.”” *Id.* This Court in *Clouse* applied an antiquated and overbroad non-delegation theory in order to reach an untenable construction of Article I, Section 29 of the Missouri Constitution. The Court ignored the plain language of Section 29 and held that it meant something totally different – that only private sector employees have the right to engage in collective bargaining. Despite the absence of any ambiguity, the Court conducted a detailed analysis of the legislative history of Section 29. Yet this Court has held that where the language of a statute is clear, testimony of supporters or opponents concerning its meaning is not relevant. *Pipe Fabricators, Inc. v. Director of Revenue*, 654 S.W.2d 74 (Mo. banc 1983). Presumably the same applies to the construction of Constitutional provisions. *Cf. Potts v. Hay*, 318 S.W.2d 826, 830 n.2 (Ark. 1958) (rule of construction that a statute excludes the sovereign unless expressly included is inapplicable where language of Constitutional right to work provision is plain). The Florida Supreme Court in *Dade County Classroom Teachers’ Association v. Ryan*, 225 So.2d 903, 905 (Fla. 1969), held that Article I, Section 6 of the Florida Constitution entitling “employees, by and through a labor organization, to bargain collectively,” meant exactly what it said – that private and public sector employees alike have the fundamental right to engage in collective bargaining. The same result is compelled in this case.

The non-delegation analysis employed by the Court in *Clouse* to narrowly construe the Article I, Section 29 right to bargain collectively is simply wrong and ought to be overruled. Unlike the Missouri State Teachers Association, Amicus Curiae Missouri NEA passionately believes that public sector collective bargaining will benefit teachers, school districts, students, and the community at large.⁸ However, this Court is not the proper place to urge policy arguments.⁹ The question before the Court is whether *Clouse* correctly held that Article I, Section 29 of the Missouri Constitution does not apply to public employees. It did not. This Court should overrule *Clouse* and hold that Article I, Section 29 of the Missouri Constitution entitles public and private sector employees alike to engage in collective bargaining. At that point

⁸ MSTTA claims to be worried about the effects of binding collective bargaining on education. Yet it is not shown that school districts suffer because they are bound by contracts they negotiate with suppliers or contractors.

⁹ Virtually the entire Brief of Amicus Curiae Missouri State Teachers Association (MSTA) consists of policy arguments which ought to be directed to the Legislature, not the Court. One of the few legal arguments presented by MSTTA, that collective bargaining would deprive teachers of their First Amendment right to free association because it would make one organization the exclusive representative by majority vote, was squarely rejected by the U.S. Supreme Court in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984).

the Legislature through statute or the Courts through decisions can establish a framework which would preserve public employees' Constitutional right to collective bargaining. The Court should remand this case to the Circuit Court for trial on the issue of whether Defendant violated Plaintiffs' rights under Article I, Section 29 of the Missouri Constitution.

**II THE TRIAL COURT ERRED IN DISMISSING THE CLAIMS OF PLAINTIFF-
APPELLANTS THRUSTON AND WARD UNDER THE FIRST AND
FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION, BECAUSE:**

1. PLAINTIFFS THRUSTON AND WARD ALLEGED THAT DEFENDANT
TOOK ADVERSE ACTION AGAINST THEM IN RETALIATION FOR THEIR
ASSOCIATION WITH THE MISSOURI FEDERATION OF TEACHERS, AND
SUCH ALLEGATIONS STATE A CLAIM.

Plaintiff Cheryl Thruston alleges that Defendant retaliated against her because of her union activities (specifically her association with a union representative at two meetings with administrators) by giving her job targets, threatening her job, and asking repeatedly if she wanted to resign. (Brief of Appellants before the Western District Court of Appeals at 5). Plaintiff Fern Ward alleges that Defendant retaliated against her by stripping her of certain duties and transferring her after she attempted to file a grievance through her union representative. (Brief of Appellants before the Western District at 9). The trial court failed to rule on these claims. It held only that Plaintiffs Thruston and Ward failed to state a claim for violation of their free speech rights, because they failed to allege that they spoke out on matters of public concern. (Findings of

Fact and Conclusions of Law, Judgment, Decree and Order ¶¶5-9).

“The First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances. And it protects the right of associations to engage in advocacy on behalf of their members.” *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464 (1979). “The government is prohibited from infringing upon these guarantees either by a general prohibition against certain forms of advocacy..., or by imposing sanctions for the expression of particular views it opposes.” *Id.* “The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so.” *Id.* at 465. *Accord Missouri National Education Association v. New Madrid County R-1 Enlarged School District*, 810 F.2d 164, 167 (8th Cir. 1987); *Roberts v. Van Buren Public Schools*, 773 F.2d 949, 957 (8th Cir. 1985).

The Eighth Circuit in *Roberts* cited with approval a Sixth Circuit decision which held that a reprimand in retaliation for zealous representation by a union representative of a member’s grievance violates the member’s freedom of association. 773 F.2d at 957 (citing *Columbus Education Association v. Columbus City School District*, 623 F.2d 1155, 1159 (6th Cir. 1980)). According to this authority, Plaintiffs Thruston and Ward plainly stated First and Fourteenth Amendment claims for violation of their rights of free association. The trial court erred by dismissing these claims. Plaintiffs’ free association claims should be remanded to the Circuit Court for trial.

2. PLAINTIFF-APPELLANT THRUSTON ALLEGED THAT DEFENDANT IMPOSED A PRIOR RESTRAINT ON HER EXPRESSION WITHOUT ANY

COMPELLING REASON, AND SUCH ALLEGATION STATES A CLAIM.

Plaintiff Cheryl Thruston also alleges that Defendant abridged and chilled her right to free speech by prohibiting her from discussing her “behavior-disordered classroom with anyone outside of the school,” including her union representative. (Brief of Appellants before the Western District at 4). The trial court summarily disposed of this claim by holding that the speech in question did not touch on a matter of public concern. (Findings of Fact and Conclusions of Law, Judgment, Decree and Order ¶¶5-7).

The Court applied the wrong analysis to this claim. Ms. Thruston is not alleging that the District retaliated against her for having spoken to her union representative or others about her behavior-disordered classroom.¹⁰ Ms. Thruston is claiming instead that the District imposed a gag order or prior restraint on her without a compelling justification. Prior restraint claims must be analyzed according to the framework announced in *United States v. NTEU*, 513 U.S. 454, 115 S.Ct. 1003 (1995). Where a restriction on speech is content-based and “chills potential speech before it happens... the Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression’s ‘necessary impact on the actual operation’ of the Government.” *NTEU*, 115 S.Ct. at 1014. This Court should remand this claim so the trial court may apply the correct analysis.

¹⁰ It would have been proper to apply *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), to such a claim.

CONCLUSION

For the foregoing reasons, Amicus Curiae Missouri NEA urges this Court to overrule *City of Springfield v. Clouse*, hold that Article I, Section 29 of the Missouri Constitution does apply to public employees, and remand to the Circuit Court for trial on this claim. This Court should reverse the trial court's dismissal of the free association claims of Plaintiffs Thruston and Ward and the prior restraint claim of Plaintiff Thruston, and remand these claims for trial.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief includes the information required by Supreme Court Rule 55.03 and complies with the limitations contained in Supreme Court Rule 84.06(b)(1).

The foregoing brief contains 7,202 words.

The undersigned further certifies that the disk simultaneously filed with the briefs filed with this Court under Supreme Court Rule 84.06(g) has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

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