

IN THE MISSOURI SUPREME COURT

Supreme Court No. 84626

Cheryl Thruston, Fern Ward and Luana Gifford

Plaintiffs/Appellants,

v.

Jefferson City School District

Defendant/Respondent.

BRIEF OF AMICI CURIAE

**Missouri School Boards' Association, Missouri Municipal League,
and Cooperating School Districts of Greater St. Louis**

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
CIRCUIT NO. 19
DIVISION II

Circuit Court No. 00CV-323483

THE HONORABLE THOMAS J. BROWN, III

On Transfer From The Missouri Court of Appeals,
Western District, Case No. WD60172

Ivan Schraeder, MBE #35383
Cindy Reeds Ormsby, MBE #50986
Crotzer, Ford and Schraeder
222 S. Central Avenue, Suite 500
Clayton, Missouri 63105
314/726-3040 314/726-5120

Melissa Randol, MBE #42838
Missouri School Boards' Ass'n.
2100 I-70 Drive, Southwest
Columbia, Missouri 65203
573/445-9920 573/445-9981

ATTORNEYS FOR AMICI CURIAE

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JURISDICTIONAL STATEMENT

This appeal comes as a result of the Court granting transfer from the Western District Court of Appeals by Order dated August 27, 2002. The appeal involves questions of whether the trial court properly granted Defendant/Respondent's Motion to Dismiss. This Brief of Amici Curiae is filed pursuant to a Motion for Leave presented under Supreme Court Rule 84.05(f)(3).

Amici Curiae believe the trial court properly dismissed Plaintiffs/Appellants lawsuit and assert that the dismissal should also have been granted by the trial court without even reaching the constitutional issues. This Brief will address these other legal issues as well as relate and supplement the constitutional issues in support of the Brief filed by Defendant/Respondent in this matter.

Amici Curiae believe that this Court is without authority to consider the brief of Plaintiffs/Appellants' because it fails to comply with the requirements of Supreme Court Rule 84.06(c). The Plaintiffs/Appellants' brief contain no certificate by the lawyer certifying compliance with Supreme Court Rule 84.06. The brief and the appeal should be stricken for failure to comply with this Rule. Kline v. Casey's General Stores, Inc. 998 S.W.2d 140 (Mo. App. 1999); Greater Missouri Builders v. Blattner, 555 S.W.2d 648 (Mo. App. 1977).

STATEMENT OF FACTS

Amici Curiae adopt by reference the Statement of Facts as presented in Defendant/Respondent's Brief filed with the Western District Court of Appeals and transferred to the Supreme Court.

POINTS RELIED ON

I. THE TRIAL COURT PROPERLY DISMISSED THE PETITION FILED BY PLAINTIFFS/APPELLANTS WHO FAILED TO PROPERLY PLEAD THE ELEMENTS NECESSARY TO SUSTAIN A CAUSE OF ACTION WHEN THEY FAILED TO ATTACH COPIES OF THE ASSERTED WRITTEN CONTRACTS FOR THRUSTON AND WARD UPON WHICH THIS ACTION WAS BASED.

Section 509.230 RSMo. (2001)

Section 509.240 RSMo. (2001)

Warren v. State of Missouri, 939 S.W.2d 950 (Mo. App. 1997)

II. THE TRIAL COURT PROPERLY DISMISSED THE PETITION FILED BY PLAINTIFFS/APPELLANTS BECAUSE THE CASE CAN BE RESOLVED WITHOUT REACHING ANY CONSTITUTIONAL CLAIM.

Jackson County Board of Election Commissioners v. City of Independence, 13 S.W.3d 684 (Mo. App. 2000)

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IV. THE TRIAL COURT PROPERLY DISMISSED THE PETITION FILED BY PLAINTIFFS/APPELLANTS BECAUSE THE RELIEF SOUGHT WOULD REQUIRE THIS COURT TO VIOLATE THE SEPARATION OF POWERS DOCTRINE BY ENGAGING IN LEGISLATIVE ACTIVITY.

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5 U.S.C.A. 7101 et seq.

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V. THE TRIAL COURT PROPERLY DISMISSED THE PETITION FILED BY PLAINTIFFS/APPELLANTS BECAUSE THE RELIEF REQUESTED VIOLATES THE JUDICIAL PRINCIPLES OF *STARE DECISIS* AND THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION.

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ARGUMENT

Introduction

Amici Curiae requested the opportunity to present its Brief to the Court as a voice for all of the units of local government, the school districts of Missouri, the other subdivisions of government, the people each serves, the students educated in the public schools at all levels, and the general tax paying public who will be required to pay for the consequences of this Court's determination as to the issues presented.

Amici Curiae also make their arguments to the Court in support of principles of law that control this case that require this Court to sustain the trial court's dismissal of the action without reaching the constitutional issues which Plaintiffs/Appellants argue.

Amici Curiae point out to the Court that the pleadings upon which this case was originally based were statutorily defective, denying the trial court jurisdiction of the subject matter, thereby requiring dismissal. Amici Curiae point out to this Court that the Relief requested by the Plaintiffs/Appellants puts the issue of separation of powers between the legislative and judicial branches at issue by asking this Court to make state policy when the Missouri General Assembly has already acted to establish clear policy related to employee rights. Amici Curiae point out to this Court that the decision this Court is being asked to make by the Plaintiffs/Appellants violates the judicial principle of *stare decisis* and seeks to overturn long-standing established employment principles regulating BOTH public employees and private sector employees in Missouri. The effects of Plaintiffs/Appellants' espoused position seeks to effectively overturn principles

established by this Court related to the interpretation and application of employment contract law, the unauthorized practice of law, the revocation of employment policy set by all Missouri employers, the application of the Hancock amendment to the Missouri Constitution, and well-settled federal court precedent related to employee rights of speech and association.

Each of these critical legal issues will be addressed separately in this Brief. However, Amici Curiae, as part of their introduction point out to this Court that any decision issued in this case is not limited to the litigants before the Court. The decision has a monumental effect on all governmental units operating in Missouri. There are approximately 524 school districts in this state serving approximately 894,000 students from Kindergarten through 12th grades, and employing more than 139,234 teachers and other employees. There are approximately 951 municipal governmental entities employing approximately 18,795 employees, which number does not include other units of government providing services such as water and sewer districts, which number does not include county governments, which number does not include special purpose governmental agencies, or any other identifiable non-federal governmental entity created by Missouri laws.

The consequence of the decision urged by Plaintiffs/Appellants in this lawsuit touches virtually every taxpayer and citizen of Missouri, every public employee and every governmental unit, as well as every business operating in the state. The immense effects are not all specifically identifiable because they reach to the very levels of

services in even the smallest unit of government paid for by the least number of taxpayers and citizens eligible for service.

The estimated costs to the governmental entities of this state paid for on the backs of Missouri's citizens have long been debated in the General Assembly and the subject of fiscal notes created in compliance with legislative debates on the issue ranging from a low of \$ 200,000 plus for the firefighters' Constitutional Amendment proposition on the November 2002 ballot to an evidentiary supported figure in excess of \$ 54,000,000 per year.

The issue of public sector collective bargaining does not need to be reached in this lawsuit to address the dispositive issues in the case. However, if this Court determines that it will address this issue, creation of new public employee rights to the collective bargaining, Amici Curiae point out that the Missouri Court for fifty-five (55) years has not wavered in its interpretation of the Missouri Constitution. Public employees in Missouri have no constitutional right to collective bargaining. Amici Curiae point out the U.S. Court of Appeals for the Eighth Circuit has decided the federal constitutional issues in a case almost identical to the one presented to this Court. Under the U.S. Constitution, public employees have no constitutional right to bargain collectively.

Standard of Review

A motion to dismiss for failure to state a claim shall be sustained where the petition fails to allege facts essential to recovery. ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp. 854 S.W.2d 371, 376 (Mo. banc 1993). In

determining whether sufficient facts exist, the petition is broadly construed in plaintiffs' favor, with all allegations and reasonable inferences accepted as true. Sheehan v. Sheehan, 901 S.W.2d 57, 58 (Mo. banc 1995). Even construing the facts most favorably to Plaintiffs/Appellants, the trial court properly dismissed Plaintiffs/Appellants' claims for failure to state a claim upon which relief can be granted.

I. THE TRIAL COURT PROPERLY DISMISSED THE PETITION FILED BY PLAINTIFFS/APPELLANTS WHO FAILED TO PROPERLY PLEAD THE ELEMENTS NECESSARY TO SUSTAIN A CAUSE OF ACTION WHEN THEY FAILED TO ATTACH COPIES OF THE ASSERTED WRITTEN CONTRACTS FOR THRUSTON AND WARD UPON WHICH THIS ACTION WAS BASED.

The civil procedure laws of Missouri require that certain prerequisites be plead to effectively bring an action based on a written contract. Section 509.230 RSMo. (2001) requires that the written instrument that serves as a basis for litigation be included in the requisite pleading in some detailed format. Section 509.240 RSMo. (2001) reinforces the first noted section when it states:

When any claim or counterclaim shall be founded upon any written instrument and the same shall be set up at length in the pleading or a copy attached thereto as an exhibit . . .

Plaintiffs/Appellants Thruston and Ward assert that their respective actions flow from their respective contracts of employment with Defendant/Respondent. Nowhere in the pleadings, which must be reviewed by the trial court in ruling on a motion to dismiss, are the employment contracts attached or recited. Both Plaintiffs/Appellants assert the denial of the use of a grievance procedure in their employment contract as the basis for their lawsuit, yet the trial court was not presented with the written employment agreements to determine if in fact there was a grievance procedure in their respective employment contracts.

Without the required pleading, Plaintiffs/Appellants failed to provide the trial court with any of the required written documents upon which the lawsuit was brought or to recite the contract terms that provided them with grievance rights. The purpose of the two cited statutory provisions is to provide the trial court with the necessary tools to review the viability of the claimed relief. Since the trial court must construe broadly the allegations and reasonable inferences in a plaintiff's favor when ruling on a motion to dismiss, it is critical that the trial court have the mandated written instruments to see what they contain.

Because the Plaintiffs/Appellants Thruston and Ward failed to properly plead their causes of action by failing to include the contracts by quoted parts or by attachment, the trial court properly dismissed the action even though the faulty pleadings were not specifically addressed by the trial court.

An appellate court reviewing a trial court's dismissal of an action is bound to

support the action of the trial court whether the reason for dismissal is stated or not, if the matter could be properly dismissed for that reason. Warren v. State of Missouri, 939 S.W.2d 950 (Mo. App. 1997).

In this case, the trial court could have granted the motion to dismiss on the faultiness of the pleadings related to Sections 509.230 and 509.240 RSMo. (2001), without addressing the constitutional issues. Therefore, this Court should sustain the trial court's determination that the Plaintiffs/Appellants failed to state a claim essential for relief pursuant to state law because of the faulty pleadings.

II. THE TRIAL COURT PROPERLY DISMISSED THE PETITION FILED BY PLAINTIFFS/APPELLANTS BECAUSE THE CASE CAN BE RESOLVED WITHOUT REACHING ANY CONSTITUTIONAL CLAIM.

The courts of Missouri have long taken the legal position that they will not decide constitutional issues in cases that can be resolved without reaching the constitutional issues. See Jackson Co. Bd. Of Election Commissioners v. City of Independence, 13 S.W.3d 684 (Mo. App. 2000) citing State of Missouri ex rel. Williams v. Marsh, 626 S.W.2d 223 (Mo. banc 1982).

Amici Curiae point out to this Court the glaring deficiencies of the original petition. Plaintiffs/Appellants failed to properly plead and produce the written documents on which their case rests as required under Missouri law. On this basis alone, the trial court should have dismissed the lawsuit. There was no need to reach the alleged

constitutional issues which have been asserted to this Court. Therefore, this Court should sustain the trial court's dismissal of the lawsuit regardless of the trial court's stated rationale.

III. THE TRIAL COURT PROPERLY DISMISSED THE PETITION FILED BY PLAINTIFFS/APPELLANTS BECAUSE THE RELIEF SOUGHT VIOLATES THE PROHIBITION OF THE UNAUTHORIZED PRACTICE OF LAW.

Plaintiffs/Appellants as a part of their lawsuit assert that they (Thruston and Ward) are either entitled to be represented by Plaintiff Gifford or that Plaintiff Gifford is entitled to provide representation to the two other Plaintiffs/Appellants.

This Court and the Missouri legislature have long held that the unauthorized practice of law is fatal to any legal proceeding unless the representative in the legal proceeding is an attorney licensed to practice law in Missouri.

Section 484.010 RSMo. (2001) defines the practice of law and the law business. Section 484.020 RSMo. (2001) prohibits anyone from engaging in the practice of law or law practice as defined in Section 484.010 RSMo. (2001), or both "unless he shall have been duly licensed therefore and while his license therefore is in full force and effect, nor shall any association . . . engage in the practice of law or do law business as defined in section 484.010, or both."

The relevant parts of Section 484.010 RSMo. (2001) state that:

the 'practice of law' is the appearance as an advocate

in a representative capacity . . . or the performance of any act in such capacity . . . before any . . . body, committee or commission constituted by law or having authority to settle controversies.

Subsection 2 of 484.010 RSMo. (2001) defines the “law business” as:

The advising or counseling for a valuable consideration of any person . . .or the doing of any act for a valuable consideration in a representative capacity . . . obtaining . . . or tending to secure for any person . . . any property rights whatsoever.

In Reed v. Labor and Industrial Relations Commission, 789 S.W.2d 19 (Mo. 1990), this court addressed the issue of the unauthorized practice of law and the consequences of such activity by a non-attorney in behalf of another person. This Court found that the acts of the representative non-attorney were void actions and struck them down. This Court cited a long history of actions voided because a non-attorney appeared in violation of the prohibition against the unauthorized practice of law. This Court has also had occasion to address services provided by a layperson union representative in behalf of an individual in a labor-related proceedings. The Court found such activity to be the unauthorized practice of law for consideration in Hoffmeister v. Tod, 349 S.W.2d 5 (Mo. 1961).

When this Court reviews the allegations of Plaintiffs/Appellant in this matter as

presented to the trial court in light of these statutes and the consistent position of the Court, this Court is required to find that Plaintiffs/Appellants were seeking to have the trial court sanction the unauthorized practice of law by Gifford.

The relevant facts are that Gifford sought to represent Thruston and Ward in presenting their grievances on employment matters under contract and to “speak on behalf of and represent Appellants Thurston and Ward”. (Court of Appeals Brief of Appellate, Statement of Facts, p. 9). Thruston is “a dues paying member of MFT” who sought to argue alleged rights set out in her written employment contract with Defendant/Respondent. (Id. at 2). Ward sought to select a “representative” – Gifford – “to attempt to resolve all outstanding issues” related to her written employment contract with Defendant/Respondent. (Id. at 8)

Even a cursory reading of the pleadings and the briefs of Plaintiffs/Appellants shows that all of the Plaintiffs/Appellants asked the trial court to authorize them to secure and use the services of a non-attorney in a representational capacity to settle a controversy with the Defendant/Respondent concerning an alleged contractual employment matter. Wrapping a constitutional argument for rights of representation around the unauthorized practice of law package to get this Court’s attention serves as a subterfuge of the entire legal system and as a direct violation of Missouri law.

The trial court saw through the wrapping to the bundle it hid, and properly dismissed the action. This Court should do the same. To do otherwise is to open the floodgates of litigation and other types of legal controversies to be navigated by the

unskilled layman and other non-attorneys. Such a constitutional subterfuge asks this Court to abrogate judicial precedent and the Court's regulation of the practice of law in Missouri, neither of which actions can be condoned by this Court.

On this basis alone, the trial court should have dismissed the lawsuit. There was no need to reach the alleged constitutional issues which have been asserted to this Court. Therefore, this Court should sustain the trial court's dismissal of the lawsuit regardless of the trial court's stated rationale. To do otherwise is to permit the unauthorized practice of law in the public sector of employment to occur, at the very least.

IV. THE TRIAL COURT PROPERLY DISMISSED THE PETITION FILED BY PLAINTIFFS/APPELLANTS BECAUSE THE RELIEF SOUGHT WOULD REQUIRE THIS COURT TO VIOLATE THE SEPARATION OF POWERS DOCTRINE BY ENGAGING IN LEGISLATIVE ACTIVITY.

Article II, Section 1 of the Missouri Constitution provides for separation of powers doctrine for state government. It creates a balance between the legislative and the judicial branches of government, with each branch exercising its power separately and distinctly from the other. The legislative branch is charged with the power and responsibility to enact laws for the benefit of the Missouri's citizens within the constitutional framework authorized by the electorate.

Article V of the Missouri Constitution sets out the jurisdiction of the Supreme Court which provides for the Court to interpret the laws of the state and the Constitution.

In cases where the legislature has acted, the Court is encouraged to refrain from acting unless the legislature has violated some constitutional tenet in taking its action.

The Missouri General Assembly has acted affirmatively on the issue of employees' rights to engage in bargaining to the extent that the legislature believes that such actions are appropriate. The actions of the legislature are found in what is commonly known as the Missouri Meet & Confer law (Sections 105.500 through 105.530 RSMo. (2001)). These statutes specifically omit certain classes of employees from its coverage which this Court has consistently affirmed. Section 105.510 RSMo. (2001) specifically excludes "police, deputy sheriffs, Missouri state highway patrolmen, Missouri national guard, all teachers of all Missouri schools, colleges and universities". This Court has upheld the exclusion of these kinds of employees in several cases before it. See State of Missouri ex rel. Missey v. Cabool, 441 S.W.2d 35 (Mo. 1969). The federal courts have concurred in that determination as well when posed with federal constitutional challenges to the statute. See Vorbeck v. McNeal, 407 F.Supp. 733 (E.D.Mo. 1976).

This Court has acted to strike down the part of the law that originally prohibited membership in a labor organization or participation in a labor organization. See Vorbeck v. McNeal, 407 F.Supp. 733 (E.D.Mo. 1976). The interference with the right to join and participate IN AN ORGANIZATION was distinguished from rights of collective bargaining under the Labor Organizations law. See International Association of Firefighters, Local 3808 v. City of Kansas City, 220 F.3d 969 (8th Cir. 2000), Germann v.

City of Kansas City, 776 F.2d 761 (8th Cir. 1985), Crain v. Board of Police Commissioners, 920 F.2d 1402 (8th Cir. 1990). In these cases, the Court has identified a constitutional right to join and participate internally in the organization without governmental employer interference. Plaintiffs/Appellants in this case seek to have the Court expand the Labor Organizations statute through judicial fiat rather than through the legislative process as provided in the Missouri Constitution.

A review of the public records for the Missouri General Assembly over the last twenty-two (22) years shows that the legislature has debated various forms and types of collective bargaining for many, and in some cases for all, public employees. The public records reflect the following results of the General Assembly's action:

- 1981 SB 53 Died* on Senate Perfection Calendar
 HCS HB 800, 184 and 35 Defeated in House Budget Committee on 5/5
- 1983 SB 38 Died in Senate Budget Control Committee
- 1984 HB 887 (St. Louis Police) Defeated on 4/3
 HB 1581 Died on House Perfection Calendar
 SB 442 Died on Senate Perfection Calendar
- 1985 SB 34 Died on Senate Perfection Calendar
 HB 432 (St. Louis Police)
 HB 783 Defeated on House floor on 4/18
- 1986 HB 1138 Died on House Perfection Calendar
- 1987 SB 307 Died on Senate Perfection Calendar

1988	HB 1706	Died on House Calendar
1989	HB 575	Died on House Perfection Calendar
	SB 183	Died on Senate Perfection Calendar
1990	SB 533	Local Option for Firefighters – Passed, but vetoed by Governor
1991	HB 371	Died on House Perfection Calendar
1992	SB 629	Died on Senate Perfection Calendar
	HB 1054	Died on House Perfection Calendar
1993	SB 333	Died on Senate Informal Perfection Calendar
1994	SB 711	Tabled in a parliamentary procedure on 4/19. Bill failed to be removed from table on a recorded vote of 16-15.
1995	SB 1	Had a test vote on 4/20. Recorded tie vote forced the sponsor to place the bill on the Senate Informal Calendar where it died.

Other Bills:

	HB 176	Referred to Labor Committee; died
	HB 639	Referred to Labor Committee; died
	HB 503	no action
1996	HB 1512	Referred to Labor Committee; died
	SB 550	Referred to Labor & Industrial Rel. Committee; died
	HB 1366	Passed out of committee; died

1997	SB 393	Died in Senate Committee
1998	SB 471	Defeated by recorded vote of Senate on 4/22 (15 to 18)
	SB 507	School employees only, introduced but never processed
1999	HB 166	Defeated in recorded vote of House on 3/9 (73 to 88)
	SB 156	Never acted on after House vote on HB 166.
	SB 185	Combined with SB 156.
2000	SB 547	no action
	SB 600	no action
	SB 726	withdrawn
	HB 1500	no action
2001	SB 120	Never came out of assigned Senate Committee

(*Where reference is made that a proposal “died” it means the bill was in that status at the end of the legislative session when the General Assembly adjourned.)

The General Assembly has acted regularly on the policy issue of collective bargaining for teachers and for other public employees and has chosen to maintain the status quo under the Meet & Confer law. (Id.) It is the General Assembly’s primary responsibility to set the public policy. It is clear from the legislative actions taken over the last twenty (20) plus years that the legislature’s intent is not to thrust full public sector collective bargaining on the citizens of the state and to maintain the limited labor relations activity to that permitted under the Meet & Confer law. (Id.)

Other states which have public sector collective bargaining in some form have

enacted the measures through legislative action. Even the federal government used the legislative processes under the aegis of Congress to relate to the issue. 5 U.S.C.A. 7101 et seq. This is truly an arena best left to the legislature under the Missouri constitutional framework. This Court should not allow itself to be persuaded to interfere with the established principle that keeps the various levels of state government segregated as to their identities and functions just because Plaintiffs/Appellants do not like the constitutionally approved form of the exercise of rights that the General Assembly has adopted and refused to change.

Under the guise of federal constitutional rights, these Plaintiffs/Appellants seek to change the entire employment structure of the state of Missouri without legislative approval. In fact, these Plaintiffs/Appellants have failed to point this Court to a case, which was decided in the 8th Circuit Court of Appeals applying the 1st Amendment rights of freedom of speech and freedom of association. This 8th Circuit case is both factually and legally identical to this case.

In Roberts v. Van Buren Public Schools, 773 F.2d 949 (8th Cir. 1985), the federal court was requested to extend 1st Amendment protections to teachers who were using an internal grievance procedure to address what the teachers identified as matters of public interest. The 8th Circuit, after reviewing the established issues related to public employee speech and the protections accorded to it under the 1st Amendment, found that a teacher's right to join an association and actively participate "must be balanced against, and may be overridden by, the government's interest as an employer in efficiency."

Amici Curiae believe that if this Court must reach to the constitutional issues promoted by the Plaintiffs/Appellants to render a decision in this case rather than utilizing the dispositive issues raised earlier in this Brief, the Court is well guided by the federal court's pronouncement on the federal constitutional issues raised and decided in Roberts v. Van Buren Public Schools, 773 F.2d 949 (8th Cir. 1985).

Federal courts are the controlling determiner of federal constitutional questions under the supremacy clause of the United States Constitution. Article VI, Section 2, U.S. Constitution, State of Missouri, ex rel. Nixon v. McClure, 969 S.W.2d 801 (Mo. App. 1998). Inasmuch as Plaintiffs/Appellants have raised the federal constitutional questions, they must live and die by the federal court's determinations of the alleged 1st Amendment rights. What that means for the case at bar is that this Court must accept the trial court's dismissal of the action as being in full compliance with the federal constitutional tenets as expressed by the federal court.

Therefore, this Court should uphold the dismissal of the action by the trial court.

V. THE TRIAL COURT PROPERLY DISMISSED THE PETITION FILED BY PLAINTIFFS/APPELLANTS BECAUSE THE RELIEF REQUESTED VIOLATES THE JUDICIAL PRINCIPLES OF *STARE DECISIS* AND THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION

Amici Curiae believe that this Court should refrain from taking up a review of City of Springfield v. Clouse, 206 S.W.2d 539 (Mo. banc 1947), as urged by

Plaintiffs/Appellants on the basis of *stare decisis*. In a recent renewal of this long standing legal principle, the Missouri Supreme Court had occasion to revisit requests to overturn judicial precedent. In Crabtree v. Bugby, 967 S.W.2d 66 (Mo. 1998), the Court stated, after reminding the lower courts of their responsibility to follow judicial precedent:

Similarly, this Court should not lightly disturb its own precedent. Mere disagreement by the current Court with the statutory analysis of a predecessor Court is not a satisfactory basis for violating the doctrine of *stare decisis*, at least in the absence of a recurring injustice or absurd results.

Plaintiffs/Appellants urge this Court to revisit and overturn fifty-five (55) years of legal precedent. The basis of their request is that times have changed requiring this Court to change the Constitution to suit its desires. Plaintiffs/Appellants have made no case for “recurring injustice”. They only seek change because time has passed. They only seek change because they believe that their request will better facilitate the protections of certain employee constitutional right, which the federal courts and this Court have already determined do not exist.

Take a look at the case Plaintiffs/Appellants have brought to this Court. They asked for relief from a written contract but they never presented the contract for the Court’s review. If the document had been presented in conformity with state law, this

Court would have seen that the Plaintiffs/Appellants were seeking a rewrite of the contract couched in terms of constitutional deprivation. It is hardly a “recurring injustice” to have litigants live by the contracts that they enter into. Of course, since the pleadings are defective with the absence of the contract in the pleadings, this Court cannot see what the Plaintiffs/Appellants agreed to during their term of employment. This Court should not allow itself to be taken into constitutional territory without the map required to review the route. *Stare decisis* is the principle that provides the Court with the legal barrier to avoid such journeys into already charted territory.

Plaintiffs/Appellants attempt to lead this Court into the area of federal constitutional rights. The problem with their attempts is that federal courts have already issued decisions in almost identical fact situations to the case at bar. In Roberts v. Van Buren Public Schools, 773 F.2d 949 (8th Cir. 1985), the federal court determined that teacher grievances do not rise to an interest protectable under the umbrella of the 1st Amendment’s freedom of speech and association. Plaintiffs/Appellants are attempting to get this Court to overlook the supremacy clause of federal courts when dealing with federal constitutional questions by arguing that a long-standing state constitutional interpretation must be adjusted to protect asserted federal rights. This Court cannot act to change decisions under the *stare decisis* principle to effect an indirect change to federal precedent in violation of the supremacy principle. State of Missouri ex rel. Nixon v. McClure, 969 S.W.2d 801 (Mo. App. 1998).

Amici Curiae assert that there is no argument advanced in this case that meets the

high test of “recurring injustice”, especially when the proposed injustice is one sanctioned by the federal courts applying constitutional principles.

The second basis for disturbing the principle of *stare decisis* is that the adherence to judicial precedent would create absurd results. None of the arguments made by Plaintiffs/Appellants suggests that adherence to the principles would in any way render their case with an “absurd result”. In fact, when the Court looks at the written decision of the trial court, it sees that the trial court applied the same reasoned legal principles that have been enunciated by both state and federal courts for decades and in cases having factual similarities to this case. Amici Curiae posit that the results Plaintiffs/Appellants seek is the absurd result, not the maintenance of the Clouse decision and its consistent and recent progeny.

Amici Curiae remind this Court that it is being asked to overturn legal principles that have been properly enacted by the Missouri General Assembly. It is being asked to rewrite the obligations of the 951 units of local government that employ in excess of 18,795 fulltime employees and countless part-time workers. 2000 U.S. Census. To rewrite employment relationships of the 524 school districts which employ more than 139,234 teachers and other types of employees. 2000 U.S. Census. The Court is being asked to proscribe a new type of employee/employer relationship that the Missouri General Assembly has determined is not necessary after decades of passionate debate among the parties at interest. The Court is asked to saddle the taxpayers with the millions of dollars of costs associated with public employee bargaining at a time when the state

cannot even meet its own financial obligations to the state agencies, educational institutions and school districts of the state. This Court is asked to rewrite the teacher tenure laws through its actions and change the legal working relationships between school districts and their licensed staff. This Court is asked to rewrite the employment relationships for the 2000 or so local governments on asserted legal principles that have already been determined by the federal courts not to be applicable to public employees and circumstances raised by Plaintiffs/Appellants.

Amici Curiae assert that the exact reason for having *stare decisis* applied is so cases like this one can be decided and controlled on long standing established legal principles. It is hard for Amici Curiae to fathom how employment principles established for 55 years, which govern literally all 951 governmental entities and 524 public school districts in Missouri, regulating 139,234 teachers and 20,609 other full time public employees, employed in 3,410 political subdivisions, can be justified in such a way to ignore or abandon the application of *stare decisis* on facts like those presented in this case. 2000 U.S. Census. It is beyond imagination that this Court would consider creating new law that demonstratively will annually cost the taxpayers of Missouri countless millions of dollars on the request of Plaintiffs/Appellants who did not make their case pleadings let alone overcome established federal court precedent in complete opposition to the Plaintiffs/Appellants' asserted positions in this case. This Court should sustain the trial court on the basis of *stare decisis*.

VI. THE TRIAL COURT PROPERLY DISMISSED THE PETITION FILED BY PLAINTIFFS/APPELLANTS BECAUSE THE EFFECT OF A REFUSAL TO DO SO WOULD BE TO OVERRULE JOHNSON V. MCDONNELL DOUGLAS.

In the absence of the contract documents upon which Plaintiffs/Appellants place their arguments, the Court's attention is drawn to the Supreme Court's precedential opinion regarding the employer's policies and their effect on employment relationships. In Johnson v. McDonnell Douglas, 745 S.W.2d 661 (Mo. 1988), the Court was presented with the attempts of an employee to establish an employment contract based on the employer's policies. The employee sought to establish an implied contractual relationship. In summary, the Court stated that in the absence of contract provisions, an employer is free to unilaterally adopt, revise, revoke or otherwise change policies without creating any contractual liability in the employment relationship.

In this case, the Plaintiffs/Appellants continually refer to a grievance procedure that is not in the record and which is not a part of the contract that should have been attached to the trial court pleadings by reference or by verbatim recitation. That grievance policy can only be enacted in one other way, by policy edict. Under Johnson, the policy of an employer, not a part of an employment contract, can be changed unilaterally as the employer decides. The employer is not required to follow the policy even though it may exist because it is not contractually binding.

Using Johnson holdings to address the grievance policy in this case, it is clear that

Defendant/Respondent was free to follow its grievance policy, to change it, or to revoke it and Plaintiffs/Appellants had no grounds to object or to insist that it be followed.

If the Court permits Plaintiffs/Appellants to argue that under the constitution, public employers policies cannot be changed unilaterally in the absence of coverage in a contract, the Court will be plowing new ground in contravention of principles established in Johnson. It will also be ignoring the federal court's pronouncements that employee rights to associate do not create rights to bargain collectively. Roberts v. Van Buren Public Schools, 773 F.2d 949 (8th Cir. 1985).

Amici Curiae point out that this is one more significant reason for this Court to refuse to revisit Clouse as requested by the Plaintiffs/Appellants. The failed pleadings and the required application of the numerous identified principles of the law bring the Court to only one justified conclusion -- the trial court's granting of dismissal was proper and correct. This Court should sustain the trial court and bring this litigation to a close as quickly and cleanly as did the trial court, even though this Court has numerous other legal reasons for doing so without reaching the Clouse decision.

VII. THE TRIAL COURT PROPERLY DISMISSED THE PETITION FILED BY PLAINTIFFS/APPELLANTS BECAUSE THE RELIEF REQUESTED VIOLATES THE HANCOCK AMENDMENT TO THE MISSOURI CONSTITUTION.

The Missouri Constitution prohibits the state from requiring an increase in activity or service by counties or other political subdivisions unless there is an appropriation

provided to the county or political subdivision. Missouri Constitution Article X Section 21. Plaintiff/Appellants in this action are asking the Court to increase an activity of virtually all political subdivisions by imposing collective bargaining activities.

There is already a constitutionally tested method of employment labor relations in Missouri, enacted by the General Assembly and is embodied in the current Labor Organizations law. (Sections 105.500 - 105.530 RSMo. (2001)). These laws exclude teachers from its coverage. The Court is being asked to add teachers to the employees covered by the law or to mandate collective bargaining for all public employees in Missouri, both of which increases the employment activity of political subdivisions of the state.

In fact, the legislature has determined that the cost of bargaining increases costs to local governments when it considered the fiscal notes related to all of the legislative proposals considered over the last twenty-two (22) years. Those fiscal notes have been estimated to have a financial impact as high as \$54,000,000 on local governmental units. In the proposed constitutional amendment currently pending before the voters of Missouri, the cost of firefighter collective bargaining alone is estimated to range from approximately \$250,000 to \$3.1 million. See Certification of Constitutional Amendment, attached.

The court is required to interpret the law to avoid creating conflicts through its interpretation. If the Court accepts Plaintiffs/Appellants' position, it creates a direct conflict between Article I, Section 29 and the Hancock Amendment (Article X, Section

21, Missouri Constitution). Therefore, the court should resist any temptation to overturn or revisit Clouse and sustain the trial court by applying the principles of *stare decises* and supremacy of federal constitution interpretation.

CONCLUSION

For the reasons set forth above, the trial court properly granted the Defendant/Respondent's Motion to Dismiss, and the dismissal below should be affirmed.

Respectfully submitted,

CROTZER, FORD & SCHRAEDER

MO. SCHOOL BOARDS' ASS'N.

By: _____
Ivan Schraeder, #35383

By: _____
Melissa Randol, #42838

By: _____
Cindy Reeds Ormsby, #50986

COUNSEL FOR AMICI CURIAE

CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned certifies that:

- (1) this brief contains the information required by Rule 55.03;
- (2) this brief complies with the limitations contained in Rule 84.06(b);
- (3) there are 6,677 number of words in this brief,
- (4) there are 789 number of lines of monospaced type in the brief,
- (5) the floppy disk containing a copy of this brief filed contemporaneously herewith has been scanned for viruses and is virus free

Ivan L. Schraeder, #35383

Cindy Reeds Ormsby, #50986

CERTIFICATE OF SERVICE

The undersigned certifies that Amici Curiae Brief in case no 84626, styled Thruston et al. v. Jefferson City School District, was duplicated in accordance with Rule 84.06, and that it was filed in person on the 8th day of October, 2002 by hand-delivering an original and ten (10) copies to and a floppy disk electronic copy of the same to:

Mr. Thomas F. Simon, Clerk
Missouri Supreme Court
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and by mailing two true and correct copies (each) of the foregoing, and a floppy disk electronic copy of the same, by placing them in postage paid envelopes in the US Postal Service on this 7th day of October 2002, addressed as follows:

Ronald Gladney, Esq.
Bartley, Goffstein, Bollato and Lange, L.L.C.
4399 Laclede Avenue
St. Louis, Missouri 63108
Attorneys for Plaintiff/Appellant

Thomas A. Mickes, Esq.
Doster, James, L.L.C.
17107 Chesterfield Airport Road
Suite 320
Chesterfield, MO 63005

Johnny Richardson, Esq.
Brydon, Swearengen, et al.
312 East Capitol Avenue
Jefferson City, MO 65101

Co-Counselors for Defendant/Respondent

Cindy Reeds Ormsby
Counsel for Amici Curiae

