

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

Appeal No. ED95564

EASTERN MISSOURI COALITION OF POLICE
FRATERNAL ORDER OF POLICE, LODGE 15

Plaintiff/Respondent

CITY OF UNIVERSITY CITY

Defendant/Appellant

AMICUS CURIAE BRIEF OF MISSOURI NATIONAL EDUCATION
ASSOCIATION IN SUPPORT OF PLAINTIFF/RESPONDENT
EASTERN MISSOURI COALITION OF POLICE
FRATERNAL ORDER OF POLICE, LODGE 15

SCHUCHAT, COOK & WERNER

Sally E. Barker (MBE 26069)
Loretta K. Haggard (MBE 38737)
1221 Locust St., Second Floor
St. Louis, MO 63103
(314) 621-2626
Fax (314) 621-2378

**MISSOURI NATIONAL
EDUCATION ASSOCIATION**

Jacqueline D. Shipma (MBE36883)
1800 Elm St.
Jefferson City, MO 65101
(573) 634-3202
Fax (573) 634-5645

SCANNED

TABLE OF CONTENTS

TABLE OF CONTENTSii

TABLE OF AUTHORITIES iii

INTRODUCTION 1

JURISDICTIONAL STATEMENT3

STATEMENT OF FACTS.....3

POINTS RELIED ON4

CERTIFICATE OF COMPLIANCE26

CERTIFICATE OF SERVICE26

APPENDIX.....27

TABLE OF AUTHORITIES

Constitutional Provisions

Mo. Const. Art. I, Section 29	1, 2, 4, 5, 10, 11, 13, 14, 15, 16, 19, 21, 23, 24
Mo. Const. Art. I, Sections 8 and 9	10
Mo. Const. Art. II, Section 1	7
Mo. Const. Art. VI, Sections 19-22	4, 8, 9
N.J. Const. Art. I, Para. 19	17

Statutes

§§105.500, <i>et seq.</i> , R.S.Mo.	2, 10, 21
§527.020, R.S.Mo.	20, 21

Cases

<i>Alumax Foils, Inc. v. City of St. Louis</i> , 939 S.W.2d 907 (Mo. banc 1997)	17
<i>Angoff v. M & M Management Corp.</i> , 897 S.W.2d 649 (Mo. App. W.D. 1995)	17
<i>Bankers Assoc. v. Div. of Credit Unions</i> , 126 S.W.3d 360 (Mo. banc 2003)	6, 23

<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954)	14
<i>Citizens for Rural Preservation, Inc. v. Robinett</i> , 648 S.W.2d 117 (Mo. App. E.D. 1982)	6, 21, 23
<i>City of Arnold v. Tourkakis</i> , 249 S.W.3d 202 (Mo. banc 2008).....	8
<i>City of Springfield v. Clouse</i> , 206 S.W.2d 539 (Mo. 1947)	15, 18
<i>City of Springfield v. Goff</i> , 918 S.W.2d 786 (Mo. 1996).....	4, 8, 9
<i>City of St. Louis v. Grimes</i> , 630 S.W.2d 82 (Mo. 1982).....	9
<i>Cohen v. Poelker</i> , 520 S.W.2d 50 (Mo. 1975)	9
<i>Comite Organizador de Trabajadores Agricolas v. Levin</i> , 515 A.2d 252 (N.J. Super. 1985).....	18
<i>Comite Organizador de Trabajadores Agricolas v. Molinelli</i> , 552 A.2d 1003 (N.J. 1989)	5, 18
<i>Cooper v. Nunley Sun Printing Co.</i> , 175 A.2d 639 (N.J. 1961)	18
<i>David Ranken, Jr. Tech. Inst. v. Boykins</i> , 816 S.W.2d 189 (Mo. banc 1991)	5, 17
<i>Emporium Capwell Co. v. Western Addition Comm. Org.</i> , 420 U.S. 50 (U.S. 1975)	22
<i>Ferguson Police Officers Association v. City of Ferguson</i> , 670 S.W.2d 921 (Mo. App. E.D. 1984).....	6, 23
<i>Grant v. City of Kansas City</i> , 431 S.W.2d 89 (Mo. 1968)	4, 9
<i>Houde Engineering Corp.</i> , 1 NLRB (Old) 35 (1934).....	22

<i>Hunt v. Washington State Apple Advertising Commission,</i> 432 U.S. 333 (1977)	23
<i>Huttig v. City of Richmond Heights,</i> 372 S.W.2d 833 (Mo. 1963)	8
<i>Independence-NEA v. Independence School District,</i> 223 S.W.3d 131 (Mo. 2007)	1, 2, 4, 5, 9, 10, 11, 13, 14, 15, 16, 18, 19, 23, 24
<i>Independent Dairy Workers Union of Hightstown v. Milk Drivers</i> <i>& Dairy Employees Local 680,</i> 127 A.2d 869 (N.J. 1956)	5, 17, 18
<i>Johnson v. Christ Hospital,</i> 202 A.2d 874 (N.J. Super. 1964), <i>aff'd,</i> 211 A.2d 376 (N.J. 1965).....	18
<i>Lane v. Lensmeyer,</i> 158 S.W.3d 218 (Mo. banc 2005)	13
<i>Lenette Realty & Investment Co. v. City of Chesterfield,</i> 35 S.W.3d 399 (Mo. App. E.D. 2000).....	7, 8
<i>Missouri Alliance for Retired Americans v. Department of Labor,</i> 277 S.W.3d 670 (Mo. 2009)	5, 13, 14
<i>Morrow v. Kansas City,</i> 788 S.W.2d 278 (Mo. 1990).....	9
<i>Nat'l Treasury Employees Union v. Chertoff,</i> 452 F.3d 839 (D.C. Cir. 2006).....	22
<i>Quinn v. Buchanan,</i> 298 S.W.2d 413 (Mo. 1957)	14, 18, 19, 23

Smith v. Aurthur C. Baue Funeral Home, 370 S.W.3d 249
(Mo. 1963)..... 15

State ex rel. Cason v. Bond, 495 S.W.2d 385 (Mo. 1973)..... 4, 11

State ex rel. Donnell v. Osborn, 147 S.W.2d 1065 (Mo. banc 1941)..... 11

State ex rel. Missey v. City of Cabool, 441 S.W.2d 35
(Mo. 1969)..... 4, 10,
11, 21

State of Missouri v. Bern, 322 S.W.2d 175 (Mo. App. S.D. 1959) 17

*Ste. Genevieve School Dist. v. Board of Aldermen of City of
Ste. Genevieve*, 66 S.W.3d 6 (Mo. 2002) 6, 20,
21

Sumpter v. City of Moberly, 645 S.W.2d 359 (Mo. banc 1982) 15

Warth v. Seldin, 422 U.S. 490 (1975)..... 21

**AMICUS CURIAE BRIEF OF MISSOURI NATIONAL EDUCATION
ASSOCIATION IN SUPPORT OF PLAINTIFF/RESPONDENT
EASTERN MISSOURI COALITION OF POLICE,
FRATERNAL ORDER OF POLICE, LODGE 15**

INTRODUCTION

Amicus Curiae Missouri National Education Association (“MNEA”) represents approximately 35,000 teachers and other employees of public school districts in collective bargaining throughout the State of Missouri. Three of MNEA’s local affiliates were the plaintiffs in *Independence-NEA v. Independence School District*, 223 S.W.3d 131 (Mo. 2007), which recognized the right of all public employees to engage in collective bargaining with their employers. The issues presented in this case are complicated and of great public importance. This is one of the first appeals since *Independence* was decided to address the meaning of a public employer’s obligation to allow its employees to exercise this right.¹

Article I, Section 29 of the Missouri Constitution provides, “Employees shall have the right to organize and to bargain collectively through representatives of their own choosing.” The Supreme Court in *Independence* overruled 60 years of precedent and held that Article I, Section 29 applies to public as well as private

¹ Two other appeals pending before this District addresses similar issues. *American Federation of Teachers v. Ledbetter*, Appeal No. ED95131; *Eastern Missouri Coalition of Police, Fraternal Order of Police, Lodge 15 v. City of Chesterfield*, Appeal No. ED95366.

employees and therefore, public school teachers have a constitutional right to engage in collective bargaining. 223 S.W.3d 131 (Mo. 2007). In the absence of a statute implementing the constitutional right of collective bargaining for teachers, the Court charged school districts with the obligation to set the framework for teachers “to bargain collectively through representatives of their own choosing.” *Id.* at 136.

Missouri police officers, like public school teachers, are not covered by any statute defining how such officers may select their collective bargaining representative.² The Trial Court correctly held that Defendant/Appellant City of University City (the “City”) has an obligation to set the framework for its officers and sergeants to engage in collective bargaining by permitting them to select and bargain through an exclusive collective bargaining agent, and by failing to do so, “has violated the constitutional rights of the City’s police officers and sergeants guaranteed in Article I, section 29.” (L.F. at 120).

² The Public Sector Labor Law, §§105.500-.520, RSMo., implements the constitutional right of collective bargaining for public employees other than public school teachers, police, deputy sheriffs, Missouri state highway patrolmen, Missouri national guard, and college and university teachers. §105.510, RSMo.; *Independence*, 223 S.W.3d at 136 & n.2.

JURISDICTIONAL STATEMENT

Amicus Missouri National Education Association hereby adopts and incorporates by reference the Jurisdictional Statement of Plaintiff/Respondent Eastern Missouri Coalition of Police, Fraternal Order of Police, Lodge 15 (hereafter “FOP” or “Union”).

STATEMENT OF FACTS

Amicus Missouri National Education Association hereby adopts and incorporates by reference the Statement of Facts of Plaintiff/Respondent Union.

POINTS RELIED ON

Point I: The Trial Court Correctly Granted Judgment for Plaintiff/ Respondent Union, and Ordered Defendant/Appellant City of University City to Expeditiously Establish a Reasonable Framework of its Choosing for Collective Bargaining, in that the Court had the Power and the Duty to Remedy Defendant's Violation of the Constitutional Rights of its Police Officers and Sergeants to Bargain Collectively Through Representatives of Their Own Choosing.

Mo. Const. Art. I, Section 29

Mo. Const. Art. VI, Section 19(a)

Independence-National Education Association v. Independence School District,
223 S.W.3d 131 (Mo. 2007)

State ex rel. Missey v. Cabool, 441 S.W.2d 35 (Mo. 1969)

City of Springfield v. Goff, 918 S.W.2d 786 (Mo. 1996)

Grant v. City of Kansas City, 431 S.W.2d 89 (Mo. 1968)

State ex rel. Cason v. Bond, 495 S.W.2d 385 (Mo. 1973)

Point II: The Trial Court Correctly Granted Judgment for Plaintiff/ Respondent Union, Because Defendant/Appellant City Failed to Establish a Framework for Collective Bargaining, in That Article I, Section 29 of the Missouri Constitution Imposes on Municipalities and Other Public Employers an Affirmative Duty to Establish Such a Framework.

Mo. Const. Art. I, Section 29

Missouri Alliance for Retired Americans v. Department of Labor, 277 S.W.3d 670
(Mo. 2009)

Independence-National Education Association v. Independence School District,
223 S.W.3d 131 (Mo. 2007)

David Ranken, Jr. Tech. Inst. v. Boykins, 816 S.W.2d 189 (Mo. banc 1991)

*Independent Dairy Workers Union of Hightstown v. Milk Drivers & Dairy
Employees Local 680*, 127 A.2d 869 (N.J. 1956)

Comite Organizador de Trabajadores Agricolas v. Molinelli, 552 A.2d 1003 (N.J.
1989)

**Point III: The Trial Court Correctly Granted Judgment for Plaintiff/
Respondent Union, Because Plaintiff Has Associational Standing to Assert its
Members' Claims for Deprivation of their Constitutional Right to Bargain
Collectively, in that**

- (a) Plaintiff's Members Have Standing to Assert this Claim in Their
Own Right,**
- (b) The Interests Plaintiff Seeks to Protect Are Germane to its
Purpose, and**
- (c) Neither the Claim Asserted nor the Relief Requested Requires
Participation of Individual Members in the Lawsuit.**

Ste. Genevieve School Dist. v. Board of Aldermen of City of Ste. Genevieve, 66
S.W.3d 6 (Mo. 2002)

Bankers Assoc. v. Div. of Credit Unions, 126 S.W.3d 360 (Mo. banc 2003)

Ferguson Police Officers Association v. City of Ferguson, 670 S.W.2d 921 (Mo.
App. E.D. 1984)

Citizens for Rural Preservation, Inc. v. Robinett, 648 S.W.2d 117 (Mo. App. E.D.
1982)

ARGUMENT

Point I: The Trial Court Correctly Granted Judgment for Plaintiff/ Respondent Union, and Ordered Defendant/Appellant City of University City to Expeditiously Establish a Reasonable Framework of its Choosing for Collective Bargaining, in that the Court had the Power and the Duty to Remedy Defendant's Violation of the Constitutional Rights of its Police Officers and Sergeants to Bargain Collectively Through Representatives of Their Own Choosing.

The City's first Point challenges the remedy ordered by the Trial Court: an injunction affirmatively requiring the City to adopt a framework for bargaining. The City argues that the Court below violated the separation of powers provision of the Constitution (Article II, Section 1) by requiring it to enact legislation establishing a specific bargaining framework. The Trial Court did not dictate legislative terms to the City. It simply ordered the City to "expeditiously establish a reasonable framework of its choosing for collective bargaining," including a bargaining unit of police officers and sergeants; election procedures; and bargaining procedures. (L.F. at 120) (emphasis added). The Court identified the essential elements of a bargaining framework and left the details up to the City. The Trial Court was not only authorized to order the City to adopt a framework – it was *required* to by the very separation of powers principles invoked by the City.

Lenette Realty & Investment Co. v. City of Chesterfield, 35 S.W.3d 399 (Mo. App. E.D. 2000), relied on by Defendant, is actually very similar to the

present case. The court in *Lenette* held that the city's zoning classification was unconstitutional as applied to the plaintiff, but rather than adopt the plaintiff's proposed zoning classification wholesale, the court required the city to adopt a reasonable classification for the plaintiff's property within a reasonable time. *Id.* at 408-09. *Accord Huttig v. City of Richmond Heights*, 372 S.W.2d 833, 843-44 (Mo. 1963) (striking down zoning classification as unconstitutional as applied to plaintiff, and requiring city to grant plaintiff's application for a rezoning to commercial usage, but declining to dictate what commercial use would be allowed). The Court below similarly required Defendant to establish a "reasonable" collective bargaining framework "of its choosing," including the scope of the bargaining unit of police officers and sergeants, an election procedure, and negotiations procedures.

Defendant urges the Court to take judicial notice of its status as a constitutional charter city having "all powers which the general assembly of the state of Missouri has authority to confer upon any city." (Appellant's Brf., at 12, quoting *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 205 (Mo. banc 2008)). Defendant's suggestion that constitutional charter cities have such extensive legislative powers that they are beyond the reach of the judiciary is meritless. "The constitutional authority to cities to adopt and amend a charter, Mo. Const. art. VI, §§19-22, intends to grant cities broad authority to tailor a form of government that its citizens believe will best serve their interests." *City of Springfield v. Goff*, 918 S.W.2d 786, 789 (Mo. 1996). The broad legislative

powers conferred on charter cities are, however, tempered by the proviso that “such powers are consistent with the constitution of this state and are not limited or denied either by the charter so adopted or by statute.” Mo. Const. Article VI, Section 19(a) (emphasis added). Charter cities are just as bound as other municipalities to follow the Constitution and statutes of general applicability. See *Goff*, 918 S.W.3d at 789-90 (charter provision concerning zoning conflicted with Missouri Zoning Enabling Act and Article VI, Section 19(a) and was therefore void); *City of St. Louis v. Grimes*, 630 S.W.2d 82, 85 (Mo. 1982) (charter cities are subject to the Workers’ Compensation statutes), *superseded by statute on other grounds as stated in Morrow v. Kansas City*, 788 S.W.2d 278, 280 (Mo. 1990); *Cohen v. Poelker*, 520 S.W.2d 50, 53-54 (Mo. 1975) (Sunshine Act applies to charter cities); *Grant v. City of Kansas City*, 431 S.W.2d 89, 93 (Mo. 1968) (charter city properly enjoined from amending charter to establish earnings tax, because such a tax would violate state statute and constitution).

The Supreme Court in *Independence* held that in the absence of a collective bargaining statute covering teachers, it was the role of the Independence School District “to set the framework for these public employees to bargain collectively through representatives of their own choosing.” 223 S.W.3d at 136. Contrary to Defendant’s assertion at page 15-16 of its Brief, the source of the Independence School District’s duty to establish a bargaining framework was *not* a prior contractual obligation. The trial court in *Independence* rejected the claim of the

teachers' association that they had an enforceable contract with the District to follow a certain bargaining procedure. *See Independence-National Education Association v. Independence School District*, Cause No. 03CV207767-01 (Judgment of July 17, 2006) (set forth in the Appendix). This portion of the trial court decision was not appealed. The source of the Independence School District's duty to adopt a bargaining framework for teachers was Article I, Section 29 of the Constitution. Article I, Section 29 likewise imposes an obligation on charter cities like Defendant to establish a framework for bargaining with their police officers.

The Supreme Court in *State ex rel. Missey v. Cabool* recognized the propriety of mandamus and injunctive relief for a city's refusal to recognize and meet and confer with the union representing a majority of its employees, and for the city's retaliation against employees who joined the union. 441 S.W.2d 35, 45 (Mo. 1969). The sources of the duty to recognize and meet and confer with the union in *Missey* were the Public Sector Labor Law, §§105.500-105.520, R.S.Mo., and Missouri's Constitutional rights of free speech and free association (Article I, §§8 and 9), not Article I, Section 29.³ Nonetheless, the Court's discussion of the remedy is highly instructive:

³ *Missey* contains some language that relies on the *Clouse* decision, which was overruled in *Independence*, and therefore is no longer good law. However,

Courts have power to grant injunctions where a municipal employer engaged in wholesale violation of its employees' rights. . . . The irreparable harm done by acting unlawfully to impede organization of public employees has been recognized as a subject for injunctive relief elsewhere”

441 S.W.2d 35, 45 (Mo. 1969) (citing cases from other states). The Court ordered the city to recognize the union, reinstate the fired employees, and make them whole. *Id.* For other cases in which the courts issued mandatory injunctions against representatives of the executive and legislative branch, see *State ex rel. Cason v. Bond*, 495 S.W.2d 385, 389, 394 (Mo. 1973) (ordering State Treasurer and Office of Administration to make appropriations without regard for Governor's unconstitutional partial veto); *State ex rel. Donnell v. Osborn*, 147 S.W.2d 1065, 1070 (Mo. banc 1941) (compelling Speaker of the House to open and publish election returns for the office of Governor and declare the winner, as required by Constitution).

Article I, Section 29 of the Constitution, as construed by the Supreme Court in *Independence*, requires local governments, in the absence of a state statute, to establish a framework for their employees to bargain collectively. Defendant has refused to establish such a framework. The Trial Court properly issued an

Missey's discussion of mandatory injunctive relief for Constitutional and statutory violations is good law.

injunction affirmatively requiring the City of University City to “expeditiously establish a reasonable framework of its choosing for collective bargaining” for its police officers and sergeants.

Point II: The Trial Court Correctly Granted Judgment for Plaintiff/ Respondent Union, Because Defendant/Appellant City Failed to Establish a Framework for Collective Bargaining, in That Article I, Section 29 of the Missouri Constitution Imposes on Municipalities and Other Public Employers an Affirmative Duty to Establish Such a Framework.

Defendant City argues in its second Point that Plaintiff Union failed to establish the “justiciable controversy” element of its declaratory judgment claim, because it had no “legally enforceable duty” to establish a collective bargaining framework. Defendant confuses the threshold issue of justiciability with failure to state a claim on the merits. A case presents a justiciable controversy if “(1) the plaintiff has a legally protectable interest at stake; (2) a substantial controversy exists with genuinely adverse interests; and (3) the controversy is ripe for judicial determination.” *Missouri Alliance for Retired Americans v. Department of Labor*, 277 S.W.3d 670, 676 (Mo. 2009). “Proof that the plaintiff has a ‘legally protectable interest at stake’ requires a showing ‘of a pecuniary or personal interest directly at issue and subject to immediate [**10] or prospective consequential relief.’” *Id.*, quoting *Lane v. Lensmeyer*, 158 S.W.3d 218, 222 (Mo. banc 2005). This case unquestionably presents a justiciable controversy, because: (1) the Union’s members have a legally protectable interest in exercising their right to bargain collectively, and as explained in Point III below, the Union has associational standing to assert their interest; (2) there is a substantial and genuine controversy as to whether the City has a duty to establish a bargaining framework;

and (3) the dispute could not be more ripe. *Missouri Alliance for Retired Americans*, 277 S.W.3d at 677. The City's second Point goes to the merits of Plaintiff's claim, not to the existence of a justiciable controversy.

Defendant's interpretation of *Independence* reduces this landmark ruling to a nullity. According to the City, *Independence* changes nothing. Employees have a right to bargain collectively with their employers, the City argues, but employers have no corresponding duty to bargain collectively with their employees. This contention is like arguing that African-American children have a Constitutional right under *Brown v. Board of Education* to the same education as white children in integrated schools, but school districts have no duty to desegregate. The *Independence* decision, argues the City, does nothing more than require employers who have already *voluntarily* recognized and bargained with an employee union to *continue* bargaining with that union, and to make binding any agreements they voluntarily enter into. In other words, according to the City, the constitutional right of collective bargaining is only applicable to cities that voluntarily recognize this right and not to ones, like it, that oppose collective bargaining.

Relying on *Quinn v. Buchanan*, 298 S.W.2d 413, 419 (Mo. 1957), a decision rendered fifty years before *Independence*, the City argues that it has no affirmative duty under Article I, Section 29 of the Missouri Constitution to establish a framework for collective bargaining. *Quinn* is distinguishable and is impliedly overruled to the extent it can be read as inconsistent with

Independence.⁴ The City's attempt to analogize the present case to *Quinn* and distinguish it from *Independence* is without merit.

The Supreme Court in *Independence* holds that Article I, Section 29 applies to public employees as well as private employees, and overrules *City of Springfield v. Clouse*, 206 S.W.2d 539 (Mo. 1947), which had held the opposite. The Court in *Independence* also holds that agreements between public employers and the unions representing their employees are just as enforceable as any other type of contract, and overrules *Sumpter v. City of Moberly*, 645 S.W.2d 359 (Mo. banc 1982), which had held to the contrary. The Supreme Court reversed the trial court's judgment in favor of the Independence School District, finding that the District had violated Article I, Section 29 by unilaterally imposing a new bargaining procedure without first bargaining with the unions representing its employees. *Independence*, 223 S.W.3d at 133. *Independence* leaves open for future cases the precise contours of the employer's affirmative duty to bargain; but it unquestionably establishes the *existence* of such a duty, even in the absence of an implementing statute. The Court explains,

To be consistent with article I, section 29, the statute's exclusion of teachers cannot be read to preclude teachers from bargaining collectively. Rather, the public sector labor law is read to provide

⁴ *Smith v. Arthur C. Baue Funeral Home*, 370 S.W.3d 249, 254 (Mo. 1963), which relies on *Quinn*, is also impliedly overruled by *Independence*.

procedures for the exercise of this right for those occupations included, but not to preclude omitted occupational groups from the exercise of the right to bargain collectively, because all employees have that right under article I, section 29. Instead of invalidating the public sector labor law to the extent that it excludes teachers, this Court's reading of the statute *recognizes the role of the general assembly, or in this case, the school district – in the absence of a statute covering teachers – to set the framework for these public employees to bargain collectively through representatives of their own choosing.*

Id. at 136 (emphasis added).

The key to the *Independence* case, the City argues, is that the Independence School District (unlike the City) had already voluntarily recognized, bargained with, and reached agreement⁵ with unions representing its employees. The City would have this Court declare that public employees may compel their employer to bargain only if the employer has previously *agreed voluntarily* to bargain. This circular interpretation has no basis in the language of Article I, Section 29, the *Independence* decision, or logic.

The constitutional right of employees to “organize and bargain collectively

⁵ As stated above, the City is just wrong in its claim that the Independence School District had reached an agreement with the teachers' union.

through representatives of their own choosing” is meaningless if the employer has no duty to allow employees to select a collective bargaining representative and no duty to recognize and bargain with the representative that is selected. The City’s interpretation of Article I, Section 29 is absurd and must be rejected. *See David Ranken, Jr. Tech. Inst. v. Boykins*, 816 S.W.2d 189, 192 (Mo. banc 1991) (“It is presumed that. . . the legislature does not intend to enact absurd laws. . . . Statutory construction is favored that avoids unjust or unreasonable results.”), *overruled on other grounds by Alumax Foils, Inc. v. City of St. Louis*, 939 S.W.2d 907 (Mo. banc 1997); *Angoff v. M & M Management Corp.*, 897 S.W.2d 649, 654 (Mo. App. W.D. 1995) (“The legislature is presumed to have intended a logical result, rather than an absurd or unreasonable one.”); *State of Missouri v. Bern*, 322 S.W.2d 175, 178 (Mo. App. S.D. 1959) (rejecting statutory construction that would result in confusion and absurdity).

Over fifty years ago, the New Jersey courts similarly concluded, even in the absence of implementing legislation, that their state constitution⁶ imposes an affirmative duty on employers to bargain collectively. *Independent Dairy Workers Union of Hightstown v. Milk Drivers & Dairy Employees Local 680*, 127

⁶ Article I, paragraph 19 of the New Jersey Constitution provides, “Persons in private employment shall have the right to organize and bargain collectively. . . .” Although this provision and the cases construing it pertain only to the private sector, their logic is identical to that which the Court should apply in this case.

A.2d 869 (N.J. 1956); *Comite Organizador de Trabajadores Agricolas v. Molinelli*, 552 A.2d 1003, 1008 (N.J. 1989). “[T]o impose no affirmative duty upon an employer to bargain collectively with the representatives of his employees renders impotent the rights guaranteed to employees under the constitutional provision.” *Johnson v. Christ Hospital*, 202 A.2d 874 (N.J. Super. 1964), *aff’d*, 211 A.2d 376, 377 n.1 (N.J. 1965) (“Courts would be derelict in the discharge of their historic function if they allowed a right so created to fail for lack of a means of enforcement.”) *Accord Cooper v. Nunley Sun Printing Co.*, 175 A.2d 639, 643 (N.J. 1961) (court “needs no legislative implementation to afford an appropriate remedy to redress violation of those rights. To find otherwise would be to say that our Constitution embodies rights in a vacuum, existing only on paper.”); *Comite Organizador de Trabajadores Agricolas v. Levin*, 515 A.2d 252, 255 (N.J. Super. 1985) (“The Constitution guarantees the right to organize and bargain collectively. To say that it does not confer upon the employer a corresponding duty to likewise bargain is preposterous.”).

The *Quinn* decision on which the City rests its defense addressed none of these issues because it relied on the *Clouse* decision that *Independence* expressly overturned – a fact the City conveniently ignores. To the extent that *Quinn* contains statements that employers have no duty to bargain, it is totally

inconsistent with *Independence* and no longer good law.⁷ If Article I, Section 29 did not impose an affirmative duty on employers to bargain, there would have been no reason for the Court in *Independence* to reverse the trial court's ruling holding precisely the opposite. *See, Independence* at 135 (In describing the trial court's decision that it reversed, the Supreme Court noted that the "trial court agreed that the district had refused to bargain collectively with the unions and had unilaterally rescinded its agreement, but concluded that Missouri law allowed such actions.").

Both the holding of *Independence* and the logic of the foregoing New Jersey cases compel the conclusion that Article I, Section 29 imposes on employers a duty to allow their employees to select a collective bargaining representative and a duty to recognize and bargain with the chosen representative. The Trial Court properly rejected the suggestion that Article I, Section 29 creates a hollow right which the courts are powerless to remedy.

⁷ Even if *Quinn* is still good law, it is distinguishable from the present case, because it involved a private sector employer. The Court in *Quinn* noted that Article I, Section 29 is part of the Constitution's Bill of Rights, which may not be taken away by *government*. 298 S.W.2d at 417. In the absence of legislation or a common law remedy, *Quinn* held, an individual employee could not enforce his rights under Article I, Section 29 against a *private* employer. *Id.* This case, of course, involves a public employer.

Point III: The Trial Court Correctly Granted Judgment for Plaintiff/ Respondent Union, Because Plaintiff Has Associational Standing to Assert its Members' Claims for Deprivation of their Constitutional Right to Bargain Collectively, in that

- (a) Plaintiff's Members Have Standing to Assert this Claim in Their Own Right,**
- (b) The Interests Plaintiff Seeks to Protect Are Germane to its Purpose, and**
- (c) Neither the Claim Asserted nor the Relief Requested Requires Participation of Individual Members in the Lawsuit.**

Defendant argues in its third Point that Plaintiff Union has no “legally protectable interest” in the dispute between it and its police officers and sergeants. The phrase “legally protectable interest” means the same thing as “standing,” but in the context of a declaratory judgment action. *Ste. Genevieve School Dist. v. Board of Aldermen of City of Ste. Genevieve*, 66 S.W.3d 6, 10 (Mo. 2002). A plaintiff has a legally protectable interest if it “is directly and adversely affected by the action in question or if the plaintiff’s interest is conferred by statute.” *Id.* The question of standing or legally protectable interest is a threshold issue; the plaintiff does not have to prove its claim on the merits in order to have standing to assert it. §527.020, R.S.Mo. (“Any person . . . whose rights, status or other legal relations are affected by a statute, . . . may have determined any question of construction or

validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder.”) (emphasis added); *Ste. Genevieve School District*, 66 S.W.3d at 10 (school district threatened with loss of funds “has standing to seek a declaratory judgment challenging the statutory interpretation that would lead to the deprivation”).

“A voluntary membership association may have standing in one of two ways -- either (1) by seeking judicial relief from injuries to its own rights (derivative capacity) or (2) by seeking to vindicate whatever rights its members may enjoy (representative capacity).” *Citizens for Rural Preservation, Inc. v. Robinett*, 648 S.W.2d 117, 113-34 (Mo. App. 1982), quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

Like the union in the *Missey* case, Plaintiff Union *does* have a very real interest of its own in being recognized as the exclusive representative of the majority of the City’s police officers and sergeants. *Missey*, 441 S.W.2d at 44 (“IBEW Local 2 also has a stake in these actions and its interest cannot be protected by an action at law by the discharged employees for their back pay alone.”). The City would likely try to distinguish *Missey* on the basis that the union there had an express statutory right to be recognized as exclusive representative. §§105.510-.525, R.S.Mo. The standing issue, however, is the same whether the Plaintiff seeks to enforce a statutory or a constitutional right. The City argues that because Article I, Section 29 does not mention an “exclusive bargaining representative,” Plaintiff Union has no “legally protectable interest” in

being the *exclusive* representative of the City's police officers and sergeants. (Appellant's Brf., at 23-24). This argument is both beside the point and incorrect.⁸ The nature of the representation has nothing to do with the issue of standing. Plaintiff is the *only* union that has asserted an interest in representing the City's officers, and the City has refused to provide for an opportunity for the officers to democratically select Plaintiff as their bargaining representative. Plaintiff plainly has standing to seek relief for this injury.

The City does not even address the issue of the Union asserting the claims

⁸ The phrase "bargain collectively" as used in Article I, Section 29 is a term of art that that has historically been understood to mean bargaining through a single union chosen by the majority of employees in a bargaining unit. *Emporium Capwell Co. v. Western Addition Comm. Org.*, 420 U.S. 50, 62 (U.S. 1975) (without the principle of majority rule, "the phrase 'collective bargaining' is devoid of meaning. . . ."); *Nat'l Treasury Employees Union v. Chertoff*, 452 F.3d 839, 860 (D.C. Cir. 2006) (Even though undefined in the statute at issue, "'collective bargaining' is a term of art, defined in other statutory schemes, and [federal agency] was not free to treat it as an empty linguistic vessel."); *Houde Engineering Corp.*, 1 NLRB (Old) 35 (1934) (concepts of majority rule and exclusive representation were inherent in the concept of "collective bargaining," even though they did not appear in the text of the National Industrial Recovery Act).

of its individual members. Plaintiff Union has associational standing, because 1) its members have standing to bring suit in their own right; 2) the interests the Union seeks to protect are germane to its purpose; and 3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Ferguson Police Officers Association v. City of Ferguson*, 670 S.W.2d 921, 924 (Mo. App. E.D. 1984), quoting *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). None of these elements is disputed by the City.

The City instead relies on *Quinn* for the proposition that unions cannot sue or be sued in the absence of statutory authorization. *Quinn*, 298 S.W.2d at 418. Long after *Quinn* was decided, and in reliance on federal standing cases, Missouri courts began to allow voluntary, unincorporated membership associations to bring suit on behalf of their members. *Ferguson Police Officers Association*, 670 S.W.2d at 924 (union had associational standing to assert its members' First Amendment rights). See also *Bankers Assoc. v. Div. of Credit Unions*, 126 S.W.3d 360, 363 (Mo. banc 2003); *Citizens for Rural Preservation, Inc. v. Robinett*, 648 S.W.2d 117, 133 (Mo. App. E.D. 1982), citing *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). It would be ironic indeed if a union did not have associational standing to sue to vindicate its members' constitutional right to "bargain collectively through representatives of their own choosing." Mo. Const. Art. I, Section 29.

The City acknowledges that the plaintiffs in *Independence* were employee

associations, but tries to distinguish their standing on the basis that they were suing to enforce already existing contracts with the school district. (Appellant's Brf., at 25). As stated above, the trial court in *Independence* rejected the claim that the teachers' association had a contract with the district, and that holding was not appealed. The teachers' association still had standing to appeal the denial of its members' claim for violation of their constitutional rights to bargain collectively.

The Trial Court implicitly and correctly found that the FOP has associational standing to seek redress for the City's denial of its members' right to bargain collectively.

CONCLUSION

The City of University City does not want to engage in collective bargaining with the majority representative of its police officers and sergeants. To avoid doing so, it has constructed an argument that ignores or distorts key aspects of the *Independence* decision, and if accepted, would reduce this landmark decision to a nullity. Plainly, however, neither the City nor any lower court is free to ignore this Supreme Court decision or its view of Article I, Section 29. The Trial Court's opinion and order is fully in accord with both. Amicus Curiae, therefore, respectfully requests that the Trial Court's decision be affirmed in its entirety.

Respectfully submitted,

SCHUCHAT, COOK & WERNER

Loretta K Haggard

Sally E. Barker (M.B.E. #26069)
Loretta K. Haggard (M.B.E. #38737)
1221 Locust Street, Second Floor
St. Louis, MO 63103
(314) 621-2626
FAX: (314) 621-2378
Attorneys for Amicus Curiae
Missouri National Education Association

MISSOURI NATIONAL
EDUCATION ASSOCIATION

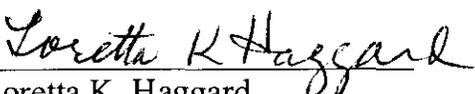
Jacqueline D. Shipma

Jacqueline D. Shipma (M.B.E. #36883)
1800 Elm St.
Jefferson City, MO 65101
(573) 634-3202
Fax (573) 634-5645
Director of Legal Services

CERTIFICATE OF COMPLIANCE

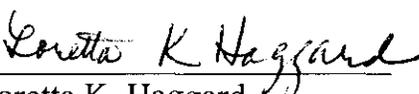
The undersigned certifies that:

- 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 5,492 words in this brief
- 4) an electronic version of this brief will be provided to the Court, and it complies with Rule 84.06(g).


Loretta K. Haggard

CERTIFICATE OF SERVICE

The foregoing Amicus Curiae Brief of Missouri National Education Association has been served on this 23rd day of February 2011, by electronic mail and first-class mail, postage prepaid, on Gregory C. Kloeppe and Danielle Thompson, Attorneys for Plaintiff/Respondent, The Kloeppe Law Firm, 9620 Lackland Rd., St. Louis, MO 63114; and Timothy A. Garnett and Nathan J. Plumb, Attorneys for Defendant/Appellant, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., 7700 Bonhomme, Suite 650, St. Louis, MO 63105.


Loretta K. Haggard