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**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.<sup>1</sup>

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

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<sup>1</sup> 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 University City*, Appeal No. ED95564.

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.<sup>2</sup> The Trial Court correctly held that Defendant/Appellant City of Chesterfield (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 “deprived its employees of their rights under Article I, Section 29 [of the Constitution of Missouri] to bargain collectively through representatives of their own choosing.”

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<sup>2</sup> 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, Because Defendant/Appellant City of Chesterfield 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

§§77.260, 77.480, R.S.Mo.

§§88.541, 88.551, R.S.Mo.

*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)

*StopAquila.org v. City of Peculiar,* 208 S.W.3d 895 (Mo. 2006)

*Ried v. City of Maplewood,* 673 S.W.2d 487 (Mo. App. E.D. 1984)

*Independent Dairy Workers Union of Hightstown v. Milk Drivers & Dairy*

*Employees Local 680,* 127 A.2d 869 (N.J. 1956)

**Point II: 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,**
- (c) Neither the Claim Asserted nor the Relief Requested Requires Participation of Individual Members in the Lawsuit, and**
- (d) The Evidence Properly Admitted at Trial Establishes that Plaintiff Represents the Overwhelming Majority of the Police Officers and Sergeants Employed by Defendant.**

*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)

**Point III: The Trial Court Correctly Granted Judgment for Plaintiff/  
Respondent Union, and Ordered Defendant/Appellant to Adopt a Framework  
for Collective Bargaining which will Include a Bargaining Unit of Police  
Officers and Sergeants, and Procedures for a Certification Election and for  
the Bargaining Process, 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

*Independence-National Education Association v. Independence School District,*

223 S.W.3d 131 (Mo. 2007)

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

*State ex inf. Dalton v. Dearing,* 263 S.W.2d 381 (Mo. banc 1954)

## ARGUMENT

**Point I: The Trial Court Correctly Granted Judgment for Plaintiff/Respondent Union, Because Defendant/Appellant City of Chesterfield Refused 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/Appellant City'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. (Appellant's Brf., at 20). 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. (*Id.*, at 21). 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.

The illogic of the City’s argument is compounded when it then proclaims that it is powerless to establish a framework for police officers to bargain collectively *even if it wanted to*. (*Id.*, at 24). This position completely ignores the Supreme Court’s express directive in *Independence* that in the absence of an implementing statute, public employers are required “to set the framework for these public employees to bargain collectively through representatives of their own choosing.” 223 S.W.3d at 136. The City’s claim that this directive applied only to the defendant in *Independence* and not to other public employers, like it, in precisely an analogous situation has no basis in law or logic.

The Trial Court properly rejected the suggestion that Article I, Section 29 creates a hollow right which municipal employers are powerless to implement and the courts are powerless to remedy.

**A. *Independence* Recognizes that Article I, Section 29 Imposes a Duty on Employers to Bargain Collectively, and it Impliedly Overrules *Quinn v. Buchanan*, Which Held to the Contrary.**

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 bargain collectively with Plaintiff. *Quinn* is distinguishable and is impliedly overruled to

the extent it can be read as inconsistent with *Independence*.<sup>3</sup> 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

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<sup>3</sup> *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*.

collectively. Rather, the public sector labor law is read to provide 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 City characterizes this passage as a “small and insignificant part of one sentence of a lengthy opinion” and as mere dicta unnecessary to the Court's holding. (Appellant's Brf., at 21). 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 agreement<sup>4</sup> with unions

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<sup>4</sup> As a factual matter, the City is just wrong in its claim that the Independence School District had reached an agreement with the teachers' union. The trial court rejected the claim of the teachers' union that they had an agreement with the district to follow a certain bargaining procedure. See *Independence-National*

representing its employees. (*Id.*). 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.

An employee's constitutional right to bargain collectively without a corresponding duty by the employer to bargain is no constitutional right at all. What good does it do for employees to choose a representative to make bargaining proposals to their employer if the employer can simply ignore them and walk away? The City's interpretation of Article I, Section 29 leads to the absurd result that Article I, Section 29 does nothing more than duplicate the right of free speech. This view violates the rule disfavoring absurd interpretations. *David Ranken, Jr. Tech. Inst. v. Boykins*, 816 S.W.2d 189, 192 (Mo. banc 1991), *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. Ct. App. 1995); *State of Missouri v. Bern*, 322 S.W.2d 175, 177-79 (Mo. Ct. App. 1959).

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*Education Association v. Independence School District*, Cause No. 03CV207767-01 (Judgment of July 16, 2006) (set forth in the Appendix). This portion of the trial court decision was not appealed.

Over fifty years ago, the New Jersey courts similarly concluded, even in the absence of implementing legislation, that their state constitution<sup>5</sup> imposes an affirmative duty on employers to bargain collectively. *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, 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.

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<sup>5</sup> 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.

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.<sup>6</sup> 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

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<sup>6</sup> 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. The City completely misses this distinction when it states, “Under *Quinn v. Buchanan*, a *municipal employer* can have no such ‘duty’” [to bargain]. (Appellant’s Brf., at 24) (emphasis added).

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 an affirmative duty to bargain.

**B. The City has the Power, Even Absent Implementing Legislation, to Establish a Framework for Bargaining Collectively with the Union.**

Even if the Constitution imposes a duty on employers to bargain, the City claims that it is powerless to fulfill this duty absent implementing legislation to establish a bargaining framework. (Appellant’s Brf., at 24). It is true that cities have only those legislative powers conferred on them by the State. *StopAquila.org v. City of Peculiar*, 208 S.W.3d 895, 899 (Mo. 2006); *City of Kansas City v. Jordan*, 174 S.W.3d 25, 41 (Mo. App. W.D. 2005). However, the State “expresses the grant of those powers via our state constitution” as well as through statutes. *Woodson v. Kansas City*, 80 S.W.3d 6, 10 (Mo. App. W.D. 2002). Constitutional provisions are “given a broader construction” than statutory provisions, “due to their more permanent character.” *StopAquila.org*, 208 S.W.3d at 899. “[C]onstitutional provisions are to be construed as mandatory unless, by express provision or by necessary implication, a different intention is manifest.” *Id.*, quoting *State ex inf. Dalton v. Dearing*, 263 S.W.2d 381, 385 (Mo. banc 1954). Article I, Section 29 of the Missouri Constitution itself imposes on cities as well as

school districts the power and duty to bargain collectively with the representatives of their employees.

If the Constitution itself is somehow inadequate by itself to empower third class cities to bargain collectively with their police officers, the statutes governing third class cities and their police departments provide ample authority. Section 77.260, R.S.Mo., provides that the mayor and city council of third class cities shall have the power

to enact and ordain any and all ordinances not repugnant to the constitution and laws of this state, and such as they shall deem expedient for the good government of the city, the preservation of peace and good order, the benefit of trade and commerce, and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be deemed necessary to carry such powers into effect, and to alter, modify or repeal the same.

Section 85.541, R.S.Mo. permits, but does not require, cities of the third class to establish a merit system police department, directed by a police chief. *Ried v. City of Maplewood*, 673 S.W.2d 487, 488 (Mo. App. E.D. 1984). Third class cities that do not adopt a merit system shall employ a marshal as chief of police; the appointment of police officers “shall be prescribed by ordinance;” and the city council “shall, by ordinance, provide for the removal of any . . . policeman guilty of misbehavior in office.” §85.551, R.S.Mo. Apart from these requirements, third class cities “utilizing the provisions of §85.551 are given substantial leeway in

structuring their police departments.” *Ried*, 673 S.W.2d at 489. Finally, Section 77.480, R.S.Mo. provides, “The duties, powers and privileges of officers of every character in any way connected with the city government, not herein defined, shall be prescribed by ordinance . . . .”

The record before the Trial Court demonstrates that the City itself does not regard itself as powerless to adopt a framework for collective bargaining *if it wants to*. The City Attorney sent a letter to the Union’s attorney in 2007, stating that the City “declines, at this time, to establish a framework for recognition of FOP Lodge 15 . . . . *Should the general assembly fail to act on this matter or should different facts and circumstances present themselves to the City of Chesterfield, the City Council might certainly choose to act, at a future point in time, on this matter.*” (L.F. at 40) (emphasis added). The City’s protestations to this Court that it lacks the power to comply with a duty imposed by the Constitution are baseless.

**Point II: 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,**
- (c) Neither the Claim Asserted nor the Relief Requested Requires Participation of Individual Members in the Lawsuit, and**
- (d) The Evidence Properly Admitted at Trial Establishes that Plaintiff Represents the Overwhelming Majority of the Police Officers and Sergeants Employed by Defendant.**

The Trial Court held that 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). The City concedes that its police officers have standing to bring suit in their own right

and that the Union’s “purpose is to represent interests of the City’s police officers.” (Appellants’ Brf., at 2, 28). The City argues that the third prong of the associational standing test is not satisfied, because only individuals may assert rights under Article I, Section 29. The City also disputes the Trial Court’s factual finding that the Union represents the overwhelming majority of the City’s police officers and sergeants. Both of these arguments are meritless.

**A. Unions May Bring Suit on Behalf of Their Members, Seeking Declaratory Relief Against an Employer for Violation of Article I, Section 29 of the Missouri Constitution.**

The City relies on *Quinn* for the proposition that “although employees who are members of a labor union may bring an action to vindicate their rights under Article I, Section 29, the union itself may not do so.” (Appellant’s Brf., at 28). *Quinn* does not say this. The union was not even a party to the lawsuit in *Quinn*, because at that time, voluntary associations were not considered entities that could sue and be sued. *Quinn*, 298 S.W.2d at 418. The plaintiffs in *Quinn* were union officers and members, who sought to represent a class of union members. The Court held that the class representatives *did* have the right to seek injunctive relief (but not damages) on behalf of union members for violation of Article I, Section 29. *Id.* The Court *granted* “preventive relief” to the class representatives, but denied “mandatory relief”:

[W]e hold plaintiffs in this class action are entitled to preventive relief enjoining defendant from coercing his employees into withdrawing from the union and rescinding their authorization to it to act as their collective bargaining representative and also from otherwise interfering by coercion with these employees' rights to freely choose the union as their collective bargaining representative. . . . However, plaintiffs are not entitled to the mandatory relief sought or to require defendant to recognize and bargain with the union. The relief to which they are entitled is to have the rights of those employees, who voluntarily choose to organize with them for the purpose of collective bargaining, protected from coercion.

*Id.* at 419. *Quinn* is impliedly overruled by *Independence* to the extent it stated that employers have no affirmative duty to bargain under Article I, Section 29 – but it correctly allowed the class action by union officers to proceed. *See also State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35, 38 (Mo. 1969) (union officers were proper class representatives to seek injunctive relief against city for violating Missouri Public Sector Labor Law).

Long after *Quinn* and *Missey* were 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), adopting three-part test for associational standing enunciated in *Hunt v. Washington Apple Advertising Comm’n*, 432 U.S. 333, 343 (1977). The City does not even attempt to distinguish the associational standing cases relied on by the Trial Court. 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 Trial Court properly found that the FOP has associational standing to seek redress for the City’s denial of its members’ right to bargain collectively.<sup>7</sup>

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<sup>7</sup> 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 29). 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.

**B. Although Not Necessary to the Trial Court’s Decision Concerning Standing, Substantial Evidence Supports the Trial Court’s Finding that the Union Represents the Overwhelming Majority in a Bargaining Unit of the City’s Police Officers and Sergeants.**

The City argues in a circular fashion that in order to establish standing, the FOP must first prove two issues on the merits: 1) “the existence of a cognizable bargaining unit of the City’s police officers and sergeants,” and 2) that the FOP “actually represents the police employees in that supposed bargaining unit for whom it claims the right to sue.” (Appellant’s Brf., at 29). Standing is a threshold jurisdictional issue. *Hebert v. Schieber*, 289 S.W.3d 256, 258 (Mo. App. W.D. 2009). Without standing, the Court would have no authority to decide any issues on the merits.

Contrary to the City’s assertion, the Union need not represent “an overwhelming majority” of the City’s police officers and sergeants in order to have associational standing. The Union has standing if 1) its individual members have standing, 2) the interests sought to be protected are germane to the Union’s purpose, and 3) neither the claim nor the relief sought require the participation of individual members. *Ferguson Police Officers’ Ass’n*, 679 S.W.2d at 924. A union representing less than a majority of the City’s police officers could satisfy this threshold test, and sue to force the City to conduct a representation election. The election itself (like the election ordered by the Court below) would determine whether a majority of the unit wanted the union to serve as their exclusive

bargaining representative. As a practical matter, a union is unlikely to bring a lawsuit to compel an election unless it already enjoys majority support. However, majority support is not necessary for the union to have standing to seek an election.

In any event, substantial evidence supports the Court's finding that the FOP represents the overwhelming majority of the City's police officers and sergeants. The City itself admits that at the time of trial, all 64 of its police officers were also members of FOP. (Appellant's Brf., at 2; Tr. 43-44). Regardless of whether the signed Representation Interest Cards are hearsay or not, the mere fact that all of the police officers *belonged* to the Union is substantial evidence that the FOP represents the "overwhelming majority of the City's police officers and sergeants." The Trial Court correctly admitted the two sets of signed Representation Interest Cards (Exhibits 2 and 3) into evidence over the City's hearsay objection, based on the testimony of Office James Carroll that "a large amount," possibly a majority, of the cards were signed in his presence. (Tr. 46-51).

While the City complains that the FOP never submitted proof prior to the lawsuit that a majority of its police officers and sergeants wished to be represented

by the FOP, it does not appear that the City ever asked it to.<sup>8</sup> (Appellant's Brf., at 3, 5, 6, 7, 8, 11). Given the City's adamant refusal to hold a representation election or establish a framework for collective bargaining, its complaint that it did not know its officers and sergeants wanted to bargain collectively is disingenuous. The City's position is that it had no obligation to hold an election under any circumstances.

**Point III: The Trial Court Correctly Granted Judgment for Plaintiff/Respondent Union, and Ordered Defendant/Appellant to Adopt a Framework for Collective Bargaining which will Include a Bargaining Unit of Police Officers and Sergeants, and Procedures for a Certification Election and for the Bargaining Process, 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.**

In its Point III, the City makes the startling assertion that courts have no power to grant mandatory relief to cure a city's violation of a state constitutional provision because of the separation of powers doctrine. No Missouri case

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<sup>8</sup> To protect employees from retaliation for signing union authorization cards, it is customary for unions not to submit the cards to the employer. A neutral party is generally retained to perform this function.

supports such a narrow view of the judicial power, including the cases the City cites for this Point.

The City argues that *Independence* supports its separation of powers claim based upon a highly selective reading of the decision. The City plucks five words from the decision (i.e. “the role of the general assembly”)<sup>9</sup> and claims that they support its contention that only a legislative body may order it to adopt a collective bargaining framework. The City ignores that the *Independence* Court in the same sentence as these five words expressly holds that a public employer has an obligation to set the framework for collective bargaining “*in the absence of a statute . . .*” 223 S.W.3d at 136. (emphasis supplied).<sup>10</sup>

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<sup>9</sup> “Even the *Independence* decision . . . recognized this important limitation when it referred to the ‘*role of the general assembly*’ and the local legislative body (there, the school district) to set the framework for public sector collective bargaining, rather than the courts.” (Appellant’s Brf. at 36) (emphasis supplied).

<sup>10</sup> The complete sentence from the decision is as follows: “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.*” 223 S.W.3d at 136. (Emphasis supplied)

The other cases cited in this section of the City's brief do not salvage its argument. Most have nothing to do with the separation of powers doctrine. The Supreme Court in *Parkway School Dist. v. Parkway Ass'n of Educ.*, 807 S.W.2d 63 (Mo. 1991), gave deference to the an administrative agency's (the State Board of Mediation's) interpretation of a governing statute (Chapter 105) ; it did not, as the City seems to suggest, hold that in absence of a regulating statute, a city may refuse to implement a constitutional right or that a court may not remedy a deprivation of that right. *Wrinkle v. International Union of Operation Engineers, Local 2*, 867 S.W.2d 633 (Mo. App. S.D.1993), also cited by the City, held only that a minority of the members of a bargaining unit had no standing to appeal the bargaining unit determination.

The decisions, *State ex rel. Spink v. Kemp*, 283 S.W. 2d 502 (Mo. banc 1955), and *Bradley v. Mullenix*, 763 S.W.2d 272 (Mo. App. E.D. 1988), cited by the City on pages 35 and 36 of its brief, are also inapposite. Both address the distinguishable issue of judicial enactment of exceptions to existing statutes. They lend no support to the City's claim that a court may not require it to fulfill its constitutional obligation to set a framework for collective bargaining in the absence of a statute. Here, the Trial Court did not change Article I, Section 29; it enforced it. The remaining cases the City cites discuss the broad principle of separation of powers, but do not remotely apply it in the manner the City urges here.

Finally, if it is the City’s contention that a court may only order the City to do something expressly enumerated in a statute, that argument is also baseless. Statutes governing school districts (e.g. Chapter 168, R.S. Mo.) do not expressly enumerate collective bargaining as one of their obligations, but plainly, the Supreme Court ordered them in *Independence* to set a framework for collective bargaining to implement Article I, Section 29. Like school districts, cities have been granted the power to employ personnel, and they have the concomitant obligation to do so consistently with Article I, Section 29. If a collective bargaining representative is selected by a majority of employees, these employers must bargain with that representative about the terms and conditions of their employment. The City’s refusal to comply with this constitutional obligation not only permitted the trial court, but required it, to grant relief that remedied the constitutional violation. *See generally, Missey*, 441 S.W.2d at 45 (Courts have power to grant mandatory injunctions where a municipal employer engaged in wholesale violation of its employees’ Article I, Section 8 and 9 rights.);<sup>11</sup> *State ex inf. Dalton v. Dearing*, 263 S.W.2d 381, 385 (Mo. banc 1954) (“[C]onstitutional

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<sup>11</sup> This action was brought pursuant to Chapter 105, but also Article I, Sections 8 and 9 of the Missouri Constitution, and the Court found mandatory injunctive relief appropriate for all violations. Apart from this holding, there is language in this decision that relies on the *Clouse* decision, which was overruled in *Independence*, and therefore, is no longer good law.

provisions are to be construed as mandatory unless, by express provision or by necessary implication, a different intention is manifest.”).

The Trial Court, therefore, appropriately entered a mandatory order necessary to remedy the City’s absolute refusal to determine a framework for collective bargaining as required by Article I, Section 29 and *Independence*. The Trial Court’s conclusion that police officers and sergeants were an appropriate unit for bargaining and order to hold a certification election for such a unit are based upon undisputed facts and criteria for an appropriate unit, and therefore, must be affirmed.

### **CONCLUSION**

The City of Chesterfield 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

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## **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 5,913 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).

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Sally E. Barker

## **CERTIFICATE OF SERVICE**

The foregoing Amicus Curiae Brief of Missouri National Education Association has been served on this 9<sup>th</sup> 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 Robert M. Heggie, City Attorney of Chesterfield, 222 South Central Ave., Suite 501, St. Louis, MO 63105.

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Sally E. Barker

**APPENDIX**

*Independence-National Education Association v. Independence School District,*

Cause No. 03CV207767-01 (Judgment of July 16, 2006)