IN THE SUPREME COURT OF MISSOURI
No. SC91737

EASTERN MISSOURI COALITION OF POLICE,
FRATERNAL ORDER OF POLICE, LODGE 15,
Plaintiff/Respondent,

v.

CITY OF UNIVERSITY CITY,
*Defendant/Appellant***.**

On Appeal From the Circuit Court of St. Louis County, Missouri
Case No. 09SL-CC01454

BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF KANSAS & WESTERN MISSOURI AND OF AMERICAN CIVIL LIBERTIES UNION OF EASTERN MISSOURI IN SUPPORT OF RESPONDENT AS *AMICI CURIAE*

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TABLE OF CONTENTS

Table of Authorities iii

Statement of Jurisdiction and Statement of Facts 1

Statement of Interest of Amicus Curiae 1

Summary of Argument 2

Argument 3

I. The trial court acted properly in entering a remedy that effectuated the right to collective bargaining contained in Article I, Section 29 of the Missouri Constitution. 3

II. The trial court's injunction does not offend the separation of powers enshrined in Article II, Section 1 of the Missouri Constitution 8

Conclusion 11

TABLE OF AUTHORITIES

Cases

Alderson v. Missouri, 273 S.W.3d 533, 539 (Mo. banc 2009) 9

Buechner v. Bond, 650 S.W.2d 611, 613 (Mo. 1983)..... 7

City of Springfield v. Clouse, 206 S.W.2d 539 (Mo. banc 1947) 5

Eastern Missouri Coalition of Police v. City of University City – S.W.3d –, 2011 WL 1661075 (Mo. App., E.D., May 3, 2011) 6

Marbury v. Madison, 5 U.S. 137, 163 (1803)..... 4

Missouri NEA v. Independence School Dist., 223 S.W.3d 131 (Mo.banc 2007) 3, 5

Quinn v. Buchanan, 298 S.W.2d 413 (Mo. banc 1957).....5-7

Savannah R-III School Dist. v. Pub. School Ret. Syst. of Mo., 950 S.W.2d 854 (Mo. banc 1997) 9

State ex rel. Weinstein v. St. Louis County, 451 S.W.2d 99 (Mo. banc 1970) 9

State ex rel. Missey v. City of Cabool, 441 S.W.2d 35, 45 (Mo. 1969).....4

Constitutions & Statutes

Mo. Const., Art. I, §14 4

Mo. Const., Art. I, § 29 .....3, 6-8, 9

Mo. Const. 1820, Art. 2 9

Mo. Const., Art. II, § 1 8-9

Mo. Rev. Stat. §§ 105.500-105.530 3

Secondary Sources

Chief Justice Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. Rev. 1309 (2003) 4

STATEMENT OF JURISDICTION AND STATEMENT OF FACTS

Amicus adopts the jurisdictional statement and statement of facts as set forth in Respondent's brief filed with the Court in this case.

STATEMENT OF INTEREST OF AMICUS CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of more than 500,000 members dedicated to defending the principles embodied in the Bill of Rights. The ACLU of Kansas and Western Missouri is an affiliate of the ACLU based in Kansas City, Missouri, with approximately 1500 members in Western Missouri. The ACLU of Eastern Missouri is an affiliate of the ACLU based in St. Louis with over 2500 members in Eastern Missouri. In furtherance of its mission, the ACLU engages in litigation, by direct representation and as *amicus curiae*, to encourage the protection of rights guaranteed by the federal and state constitutions. From its beginnings in the 1920s, the ACLU has supported the constitutional rights of workers. On behalf of their members, the ACLU of Kansas and Western Missouri and the ACLU of Eastern Missouri file this brief to highlight the significant constitutional issues implicated by the remedy provisions of the court order at issue in this case.

SUMMARY OF ARGUMENT

As interpreted by this Court, Article I, § 29 of the Missouri Constitution imposes a duty on public employers to create a framework for collective bargaining by employees who are excluded from the Missouri Public Sector Labor Law. The circuit court's affirmative injunction ordered the City to perform exactly those duties and nothing more. Thus, the injunction granted plaintiffs the remedy required to protect their right to bargain collectively through representatives of their own choosing. As such, the injunction was the proper and, in fact, constitutionally required remedy.

By enforcing a constitutional right with an appropriate remedy, a court simply performs its constitutional duty to protect the liberties and constitutional rights of the governed. Thus, the injunction at issue here does not violate the separation of powers.

ARGUMENT

I. The trial court acted properly in entering a remedy that effectuated the right to collective bargaining contained in Article I, Section 29 of the Missouri Constitution.

The circuit court entered and the court of appeals affirmed an affirmative injunction that ordered the City of University City (hereafter "City") to "expeditiously establish a reasonable framework of its choosing for collective bargaining." (L.F. 120). The trial court required that the framework include a mechanism for defining appropriate bargaining units, procedures for holding a certification election, and procedures for the meet and confer process. *Id*.

In *Missouri NEA v. Independence School Dist.*, this Court held that Article I, § 29 of the Missouri Constitution grants all employees – public and private sector employees alike – "the right to organize and to bargain collectively through representatives of their own choosing." 223 S.W.3d 131, 136 (Mo.banc 2007). *See also* Mo. Const., Art. I., § 29. In so holding, the Court further recognized that, for employees excluded from the Missouri Public Sector Labor Law, Mo. Rev. Stat. §§ 105.500-105.530, the public employer has an duty "to set the framework for these public employees to bargain collectively through representatives of their own choosing." *Id.*

There can be no doubt that Missouri's "Courts have power to grant injunctions where a municipal employer engaged in wholesale violation of its employees' rights." *State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35, 45 (Mo. 1969). In *Marbury v. Madison*, 5 U.S. 137, 163 (1803), furthermore, the United States Supreme Court made it clear that "[t]he very essence of civil liberty consists in the right of every individual to claim the protection of the law, whenever he receives an injury." Citing Blackstone's Commentaries, the Court acknowledged "that every right, when withheld, must have a remedy, and every injury its proper redress." *Id*. Justice Marshall concluded on this issue by stating that "[t]he Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right." *Id.* (emphasis added).

Moreover, Article I, § 14 of the Missouri Constitution guarantees "[t]hat the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay." Mo. Const. Art. I, §14. This provision – shared in one form or another with thirty-nine other states – has its roots in Magna Carta and the explications of Coke and Blackstone. Chief Justice Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. Rev. 1309 (2003).

Although this provision creates no rights or duties, it does guarantee that – when a person's rights have been violated – there will be a remedy.

Because the affirmative injunction entered by the circuit court did nothing more than order the City to stop violating its employees' rights and to perform its constitutional duty to allow its police officers to exercise their right to engage in collective bargaining, the circuit court's injunction was valid under *Missey*, and it was required pursuant to Article I, § 14 of the Missouri Constitution.

It is too late in the day to claim – as does the City – that Article I, § 29 imposes no duties on public employers to effectuate the rights of their police officers to exercise the right to collective bargaining. This Court settled that issue four years ago in *Missouri NEA*. Although the Court did not specifically overrule *Quinn v. Buchanan*, 298 S.W.2d 413 (Mo. banc 1957), it did so *sub silentio* when it overruled *City of Springfield v. Clouse*, 206 S.W.2d 539 (Mo. banc 1947) and when it clearly enunciated the duty of employers of public employees who are excluded from the scope of the Missouri Public Sector Labor Law – namely teachers and law enforcement officers – to create a framework for collective bargaining. *Missouri NEA*, 223 S.W.3d at 136.

Even if *Missouri NEA* did not overrule *Quinn sub silentio*, the Court should overrule that case now because it is internally inconsistent, is confusing, and was wrongly decided. In *Quinn*, the Court initially noted that "violation of one's

fundamental rights by another would usually be such a wrong" as would justify a remedy. 298 S.W.2d at 417. The Court further found that Article I, § 29 "is a declaration of a fundamental right of individuals. . . . [and that] Any governmental violation of the declared right is void. As between individuals, because it declares a right the violation of which is a legal wrong, there is available every appropriate remedy to redress or prevent violation of this right." 298 S.W.2d at 418-419. But, at that point, the Court gutted one of the fundamental guarantees of Article I, § 29, by holding that "the constitutional provision provides for no required affirmative duties concerning this right and these remedies can only apply to their violation." 298 S.W.2d at 419. Specifically, the Court determined, in *Quinn*, that Article I, § 29 obliges private employers to do no more than permit their employees to join unions but imposes no duty on those employers to recognize the unions or to bargain with them. 298 S.W.2d at 420.

In its decision below, the court of appeals held that *Quinn* is inapplicable to the current case because it dealt with a private sector labor dispute and because "*Quinn* acknowledged . . . that the Constitutional right of collective bargaining could not be denied by the *government*." *Eastern Missouri Coalition of Police v. City of University City* – S.W.3d –, 2011 WL 1661075 (Mo. App., E.D., May 3, 2011) (emphasis in original). This reading would mean that Article I, § 29 grants more rights to public sector employees than to private sector employees based on

Quinn's language acknowledging that the Missouri Bill of Rights imposes limits on governments but not private parties. That logic is strained. But, more importantly, *Quinn*'s holding that the words of Article I, § 29 protect only the right to organize and to choose a representative union fundamentally misreads the clear language of this constitutional provision. In fact, *Quinn* reads out of Article I, § 29 "the right . . . to bargain collectively." Thus, *Quinn* violates an elementary principle of constitutional interpretation because "[e]very word in a constitutional provision is presumed to have effect and meaning." *Buechner v. Bond*, 650 S.W.2d 611, 613 (Mo. 1983).

Collective bargaining is a right that requires activity by the employer. Unless the employer recognizes the employees' chosen representative and sits down with that representative to discuss terms and conditions of employment, the employees have no meaningful right to collective bargaining. As interpreted in *Quinn*, the collective bargaining provision would go no farther than the constitutional guarantees of free speech, assembly, and petition that are enshrined in the First Amendment to the United States Constitution and in Article I, §§ 8 and 9 of the Missouri Constitution, thus making Article I, § 29 duplicative and superfluous. In order to avoid that absurd result, the Court should continue to read the language of Article I, § 29 literally so that it imposes duties on the employers of employees who choose a representative for purposes of collective bargaining.

Doing otherwise would essentially write Article I, § 29 out of the Missouri Constitution.

As interpreted by the Court in *Missouri NEA*, Article I, § 29 of the Missouri Constitution imposes the duties that the circuit court's affirmative injunction ordered the City to perform. Thus, the injunction did nothing more than grant the remedy required to protect the right of the plaintiffs to bargain collectively through representatives of their own choosing. As such, the injunction was the proper and, in fact, constitutionally required remedy.

II. The trial court's injunction does not offend the separation of powers enshrined in Article II, Section 1 of the Missouri Constitution.

Article II, § 1 of the Missouri Constitution provides as follows:

> The powers of government shall be divided into three distinct departments – the legislative, executive and judicial – each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

Mo. Const., Art. II, § 1. This provision – in substantially similar form – has been in the Missouri Constitution since Statehood. *See* Mo. Const. 1820, Art. 2.

"Article II, section 1 of the Missouri Constitution concerns the division of power, including the judicial power, which in turn guarantees certain rights to the public and places obligations on the courts to protect and enforce those rights and to administer justice." *Alderson v. Missouri*, 273 S.W.3d 533, 539 (Mo. banc 2009). *See also State ex rel. Weinstein v. St. Louis County*, 451 S.W.2d 99, 101 (Mo. banc 1970). "The reason for the separation of powers is to protect the liberty and security of the governed." *Savannah R-III School Dist. v. Pub. School Ret. Syst. of Mo.*, 950 S.W.2d 854, 859 (Mo. banc 1997).

Here, the circuit court was simply complying with its constitutional obligation to protect and enforce the right to collective bargaining guaranteed by Article I, § 29 of the Missouri Constitution. In fact, in this case, the circuit court's injunction left it to the City's governing body to fashion the precise contours of the framework for selecting and bargaining with a representative of its police officers. The circuit court did not usurp the City's legislative functions by imposing a detailed remedy.

If the Court were to accept Appellant's argument that this injunction violated the separation of powers, it would deprive constitutional rights and liberties of all force and meaning and leave them as sterile abstractions. It would allow

governments to run amok violating the rights and liberties of the people without any threat of remedy or enforcement. That would be a setback of profound import and would undo our social contract's long understanding of the judicial function going back to *Marbury v. Madison* and Magna Carta.

By enforcing a constitutional right with an appropriate remedy, a court simply performs its constitutional duty "to protect the liberty and security of the governed" and does not violate the separation of powers. Thus, the injunction at issue here does not implicate the separation of powers.

CONCLUSION

Based on the foregoing and the reasons provided in Appellant's brief, *amici* ACLU of Eastern Missouri and ACLU of Kansas & Western Missouri urge this Court to rule in Respondent's favor.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06; (3) contains 2710 words, as determined using the word-count feature of Microsoft Office Word 2003. The undersigned further certifies that the accompanying disk has been scanned and was found to be virus-free.

/s/ Stephen Douglas Bonney

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of this brief and a copy of the brief on disk were served upon the counsel identified below by United States Mail, postage prepaid, on June 9, 2011:

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