

IN THE MISSOURI SUPREME COURT

NO. SC91766

AMERICAN FEDERATION OF TEACHERS
LOCAL 420, *et al.*,

Plaintiffs/Appellants,

v.

RICHARD LEDBETTER, *et al.*,

Defendants/Respondents

BRIEF OF AMICUS CURIAE
MISSOURI MUNICIPAL LEAGUE
IN SUPPORT OF
RESPONDENTS RICHARD LEDBETTER, ET AL

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JURISDICTIONAL STATEMENT

Amicus Curiae Missouri Municipal League adopts the jurisdictional statement contained in the brief of Appellant Respondents Richard Ledbetter, et al, as its jurisdictional statement.

INTEREST OF AMICI CURIAE

The Missouri Municipal League (“MML”) files this Amicus Brief, consented to by all parties, in support of Respondents and against Appellants. The MML seeks to preserve the decision of the Trial Court and to oppose the requested reversal espoused by Appellants in this matter.

The impact on this Court’s decision mandating any standard for conducting collective bargaining needs to be considered in light of the large number of employees working in the state’s 957 municipalities. The Official State Manual issued by the Missouri Secretary of State for 2009/2010 identifies that there are approximately 55,000 municipal employees, of which it is estimated that 13,750 are police officers and 6,050 are firefighters with the remainder of employees spread among all classifications of personnel. This number does not include employees of the 115 counties, or any of the school districts and other governmental entities operating in Missouri. As it can be readily noted, any decision that is made by the Court in this case will significantly set the policy considerations for employment decisions, budget considerations, programmatic debates, and public services to be delivered by the municipalities for the future.

The MML is a not for profit corporation organized in 1934 as an agency for the cooperation of Missouri cities, towns and villages to promote the interest, welfare, and closer relations among local governments. The MML consists of 668 Missouri cities and villages representing over 95% of the urban population of the State of Missouri. It serves as a means to coordinate and promote municipal policy at all levels of government for the benefit of the citizens of Missouri’s cities and villages. Most members of the MML have

law enforcement departments that employ police officers who are covered by the same constitutional principles as school districts and school boards, which employ teachers who are exempt from the Missouri meet and confer statute, but whose employees are included under the Missouri Constitution Article I Section 29 right to engage in collective bargaining. Section 105.500 RSMo *et seq* regulates certain public employees' rights to engage in meet and confer activities with their public employers while specifically exempting police officers, teachers and deputies from its provisions. The Missouri State Board of Mediation has determined through its decision-making authority as delegated by the Missouri General Assembly, that certain other types of public employees are also exempt from the coverage of Section 105.500 RSMo *et seq*. Other exemptions are for supervisors, managerial employees and confidential employees and are made by Board decisions and confirmed by the Missouri courts' opinions. *Parkway School District v. Parkway Assn. of Educational Support Personnel Local 902/MNEA*, 807 S.W.2d 63 (Mo banc 1991) – exclusion for confidential employees; *Baer v. Civilian Personnel Division, St. Louis Police Officers' Assn.*, 747 S.W.2d 159 (Mo. App. ED 1988) – exclusion for supervisors.

The MML submits its Amicus Brief to oppose Appellants' requested expansion of the constitutional rights for collective bargaining first recognized by this Court for public employees in *Independence NEA v. Independence School District*, 223 S.W.3d 131 (Mo. 2007). The MML and its local governmental constituencies support the preservation of the separation of powers doctrine as applied between the Missouri General Assembly and the Missouri Supreme Court. The MML seeks to preserve the constitutional principle of

the non-delegation of legislative authority from local municipal councils and governing boards. The MML seeks to preserve the General Assembly's and local governing bodies' exclusive discretionary constitutional power to establish laws implementing constitutional principles.

The MML is interested in protecting the constitutional principles governing local municipalities and their employment relationships with their employees. Such relationships interact with the public employees' constitutional right to engage in collective bargaining under Missouri Constitution Article I Section 29, as interpreted by the Missouri Supreme Court in the case of *Independence NEA v. Independence School District*, 223 S.W.3d 131 (Mo. 2007).

In this litigation, the Court is presented with a request from Appellants to expand the rights and obligations identified in the *Independence NEA* case by adopting standards for bargaining activities that are not provided for under the Missouri Constitution, and for which the Missouri General Assembly has not acted, and to apply such requested standards in violation of local governments' rights to regulate their own employment conditions. It is improper for the Supreme Court to delegate the legislative power of municipalities over their own employment policies under applicable Missouri law.

CONSENT OF PARTIES

Pursuant to Missouri Supreme Court Rule 84.05(f)(2), counsels for Amicus contacted counsels for the Appellants and Respondents requesting their consent to file this amicus curiae brief in behalf of the MML. Counsels for Appellants and Respondents have each granted their consent to the filing of this amicus curiae brief.

STATEMENT OF FACTS

Amicus Curiae MML adopts the statement of facts contained in the brief of Respondents.

POINTS RELIED ON

I. THE TRIAL COURT PROPERLY HELD ARTICLE I SECTION 29 OF THE MISSOURI CONSTITUTION AS THAT PROVISION WAS INTERPRETED BY THE MISSOURI SUPREME COURT IN *INDEPENDENCE NEA V. INDEPENDENCE SCHOOL DISTRICT*, 223 S.W.3D 131 (MO. 2007), DOES NOT APPLY A “GOOD FAITH” STANDARD BECAUSE APPLYING THE “GOOD FAITH” STANDARD SOUGHT BY RESPONDENTS WOULD CONTRAVENE THE SEPARATION OF POWERS DOCTRINE OF THE MISSOURI CONSTITUTION IN THAT IT WOULD INFRINGE UPON BOTH THE GENERAL ASSEMBLY’S DEVELOPMENT OF LEGISLATION GOVERNING PUBLIC SECTOR BARGAINING AND RIGHT LOCAL GOVERNMENTS TO DEVELOP AND IMPLEMENT PROCEDURES FOR CONDUCTING COLLECTIVE BARGAINING WITH EMPLOYEES.

CASES

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506 S.W.2d 429 (Mo. 1974)

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Section 432.070 RSMo

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Tenn. Code Ann. § 49-5-601

Vt. Stat. Ann. tit. 16 § 2001

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Wis. Stat. § 111.70

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Missouri Constitution Article I Section 29

Missouri Constitution Article II Section 1

Missouri Constitution Article III Section 1

Missouri Constitution Article V Section 1

II. THE TRIAL COURT PROPERLY HELD ARTICLE I SECTION 29 OF THE MISSOURI CONSTITUTION AS THAT PROVISION WAS INTERPRETED BY THE MISSOURI SUPREME COURT IN *INDEPENDENCE NEA V. INDEPENDENCE SCHOOL DISTRICT*, 223 S.W.3D 131 (MO. 2007), DOES NOT APPLY A “GOOD FAITH” STANDARD BECAUSE THE APPLICATION OF SUCH A STANDARD CONSTITUTES AN IMPROPER DELEGATION OF THE LEGISLATIVE AUTHORITY OF THE GOVERNING BODIES OF LOCAL GOVERNMENT UNDER THE MISSOURI CONSTITUTION IN THAT SUCH A STANDARD WOULD DESTROY THE LONGSTANDING PRINCIPLE THAT A LOCAL GOVERNMENT BODY HAS THE ABILITY TO REJECT ALL PROPOSALS OFFERED IN BARGAINING.

CASES

Bader Realty & Inv. Co. v. St. Louis Housing Authority,
217 S.W.2d 489 (Mo. 1949)

Independence NEA v. Independence School District,
223 S.W.3d 131 (Mo. 2007)

OTHER AUTHORITIES

Missouri Constitution Article I Section 29

Missouri Constitution Article II Section 1

ARGUMENT

Summary of Argument

Amicus argues in this Brief that the Supreme Court should not overturn the ruling of the Trial Court because of the separation of powers doctrine under the Missouri Constitution which leaves the implementation of constitution based collective bargaining to the Missouri General Assembly and to local governments using their respective legislative authority.

Amicus argues that the Supreme Court should not impose a standard of “good faith” as a part of bargaining as urged by Appellants because to do so would add words to the Constitution that do not exist. Implementing such a standard would improperly substitute the Supreme Court’s concept of policy determination for that of the local governments and the Missouri General Assembly. Implementation of policy is solely the prerogative of legislative branch of government.

POINT RELIED ONE

I. THE TRIAL COURT PROPERLY HELD ARTICLE I SECTION 29 OF THE MISSOURI CONSTITUTION AS THAT PROVISION WAS INTERPRETED BY THE MISSOURI SUPREME COURT IN *INDEPENDENCE NEA V. INDEPENDENCE SCHOOL DISTRICT*, 223 S.W.3D 131 (MO. 2007), DOES NOT APPLY A “GOOD FAITH” STANDARD BECAUSE APPLYING THE “GOOD FAITH” STANDARD SOUGHT BY RESPONDENTS WOULD CONTRAVENE THE SEPARATION OF POWERS DOCTRINE OF THE MISSOURI CONSTITUTION IN THAT IT WOULD INFRINGE UPON BOTH THE GENERAL ASSEMBLY’S DEVELOPMENT OF LEGISLATION GOVERNING PUBLIC SECTOR BARGAINING AND RIGHT LOCAL GOVERNMENTS TO DEVELOP AND IMPLEMENT PROCEDURES FOR CONDUCTING COLLECTIVE BARGAINING WITH EMPLOYEES.

The separation of powers doctrine has been a fundamentally important and long accepted principle of Missouri constitutional law. Article II Section 1 of the Missouri Constitution provides:

“The powers of government shall be divided into three distinct departments—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.”

The constitutional demand that the powers of the departments of government remain separate derives from a historical assurance that persons are not trusted with unlimited power. *State Auditor v. Joint Committee on Legislative Research*, 956 S.W.2d 228, 231 (Mo. 1997). As in the federal realm of government, the separation of powers into distinct departments is “vital to our form of government” in Missouri. *Id.* (quoting *State on Information of Danforth v. Banks*, 454 S.W.2d 498, 500 (Mo. banc 1971)).

It is this specific principle that Amicus urges this Court to consider carefully as it examines Appellants’ request to expand the Missouri Constitution beyond the mandate expressed in Article I Section 29. It is this specific principle that prohibits the imposition of a standard of conduct and/or policy on local governments relating to the processes of collective bargaining that has not been addressed by the General Assembly or the various municipalities in Missouri.

There are two types of acts that violate the separation of powers doctrine. The first type occurs when one branch of government impermissibly interferes with the other branch’s constitutionally designated power; while the second type occurs when one branch assumes power that is more properly entrusted to another branch. *State Auditor*, 956 S.W.2d at 231. The Missouri Constitution, in Article III Section 1, assigns the legislature, through the General Assembly, the sole responsibility to “make, amend and repeal laws for Missouri and to have the necessary power to accomplish its law-making responsibility.” *Id.* at 230. This power is plenary. *Id.* at 231.

The Missouri Constitution mandates that “[t]he judicial power of the state shall be vested in a supreme court, a court of appeals consisting of districts as prescribed by law, and circuit courts.” Missouri Constitution Article V Section 1. This power includes exclusive jurisdiction to determine the validity of a statute and interpretation of a provision of the Constitution. *Asbury v. Lombardi*, 846 S.W.2d 196, 199 (Mo. 1993). Missouri courts have interpreted this function to say that “to substitute for the concept of the general assembly our view of what might be the more salutary public policy would be for us [the Supreme Court] to legislate rather than to adjudicate... We must leave the law as it has been so long construed to stand as it reads until the general assembly sees fit to alter it.” *Lemasters v. Willman*, 281 S.W.2d 580, 590 (Mo. Ct. App. 1955).

In *State ex rel Davisson v. Bolte*, 52 S.W. 262 (Mo. 1899) the Court recognized that it could not order a legislative official to do anything within the legislature’s constitutional prerogatives. To do otherwise would be to violate the separation of powers doctrine. *Id.* at 264. The Court stated that “where the legislature is within its legislative power it can not be controlled by the judiciary . . . or in any other way, for to do so would be the usurpation of a power which does not belong to the latter.” *Id.* at 264.

The separation of powers doctrine has long been upheld in Missouri. *State ex rel. Johnson v. Regan*, 76 S.W.2d 736, 741 (Mo. Ct. App. 1934). “It has long been the settled law of this state that our courts will not interfere with either of the co-ordinate departments of government in the exercise of powers, except to enforce ministerial acts required by law that leave to the officer no discretion.” *Id.* As further described,

Missouri case law clearly indicates the state's desire to uphold the separation of powers between the judicial and legislative branches.

The Court was presented with an opportunity to apply its definition of “ministerial” duties to local governmental prerogatives in legislating as it relates to the local entity's contracting powers in *Sunswept Properties, LLC v. Northeast Public Sewer District*, 298 S.W.3d 153 (Mo. App E.D. 2009). The Court stated:

“Where an ordinance involves a determination of facts, or a combination of law and facts, a discretionary act rather than a ministerial act is involved...when the entity seeks to contract for delivery of services.” *Id.* at 159.

The important element shown by *Sunswept Properties* is that the local entity's power to contract is a discretionary function, one which the Courts may not enter under the separation of powers doctrine.

Just as local entity contracting is recognized as a discretionary activity, the Supreme Court in *Independence NEA* recognized that all local governments in Missouri have complete discretion to act on contracts with their employees, even under the Missouri Constitution Article I Section 29. Thus, the Court cannot enter into the arena of the local governments' discretion in contracting with its employees by imposing a standard of “good faith” without violating the separation of powers doctrine.

The Missouri General Assembly has adopted numerous laws setting out the relationships of local governments with their employees that have a direct impact on the whole concept of collective bargaining. Examples of such laws are as follows: Section

67.010 RSMo relates to annual budgeting; Section 67.080 RSMo relates to expenditures of local funds; Section 67.150 RSMo and Section 67.210 RSMo relates to public employees' insurance programs; Section 78.370 RSMo relates to control and oversight of employees; Section 79.050 RSMo relates to appointment and retention of police officers; and Section 79.110 RSMo relates to the Mayor and board's authority to enact ordinances that are deemed to be for the good of the government. There are numerous other laws that relate directly to local governments' power to control public employees and their relationships with their employing local governments. A cursory review of this limited list reveals that local governments' powers to govern and to integrate collective bargaining matters into the municipal systems are matters of discretion. These employment relationships are beyond the control of the Missouri Courts to set standards under the separation of powers doctrine. Section 432.070 RSMo even sets how a local government must contract for such documents to be binding on the local government. Thus, there is no need for this Court to interfere with the separation of powers doctrine to reach the standard espoused by the Appellants in relation to collective bargaining rights.

Since the ratification of the Missouri Constitution, the court has remedied many instances of one branch of government infringing on another. Commonly, such remedies are most frequently necessary on occasions where the executive or judicial branch infringes on the power of the legislature. Indeed, the judiciary cannot create public policy when it feels its view would be better than what was provided by the legislative branch. *Lemasters*, 281 S.W.2d at 590.

Appellants urge this Court to create public policy by creating a standard that it characterizes as “good faith” in collective bargaining. Under Missouri law, however, the legislature determines what standards and policies are appropriate to advance constitutional principles and to “make, amend and repeal laws for Missouri and to have the necessary power to accomplish its law-making responsibility.” Examples of the legislature’s exercise of its prerogatives in this regard have already been provided earlier in this Brief.

A branch of government cannot unilaterally exercise a power belonging to another branch. The following provides two examples of unconstitutional interference of power between the legislative and judicial branches in Missouri specifically related to municipal legislative actions.

It is unconstitutional for the Court to order a municipality to take an action commonly implemented through legislative action. In *Lenette Realty & Investment Company v. City of Chesterfield*, 35 S.W.3d 399, 409 (Mo. App. E.D. 2000) the plaintiff wanted the court to invade the legislature’s authority. There, Lenette argued that the trial court failed to order the city to adopt Lenette’s proposed rezoning plan. *Id.* However, the Court found that a trial court cannot order a municipality to zone its land in a certain way, and said, “Any such judicial command to a legislative body raises serious questions regarding the constitutionally mandated distinction between the legislative and judicial branches.” *Id.* In this case, Appellants seek a standard to be put in place that is neither articulated in the Missouri Constitution nor acted upon by the General Assembly or local government. Adopting the bargaining standard espoused by Appellants would violate the

separation of powers doctrine since the application of such a standard would impose a legal duty on a municipal body that can only be established through the initiative of the legislative branch.

In *Quinn v. Buchanan*, 298 S.W.2d 413, 417 (Mo. 1957), the Court recognized the power of the legislature to create laws to enforce Article I Section 29 of the Missouri Constitution: “[I]t is proper and within the legislative power to enact laws to protect and enforce the provisions of the Bill of Rights.” (citation omitted). There, the Court determined that the provision itself, although guaranteeing employees the right to organize and bargain collectively through a representative of their own choosing, does not oblige the employer with similar obligations. *Id.* at 419. Instead, the provision was intended to protect employees against legislation or acts that would prevent or interfere with their right to organize and bargain collectively. *Id.* Subsequently, the Court held that any affirmative duties imposed on the employer were a matter for the legislature to decide. *Id.* *Quinn* is a good example of the Court recognizing the separation of powers between the branches of government, and declaring questions of the law only within its province as it relates to the exercise of collective bargaining rights under Article I Section 29.

The separation of powers doctrine is most commonly impacted in the context of judicial affairs when a court interprets a statute. As a general matter, when the legislature constitutionally declares a public policy or statute, the judiciary must disregard all matters relating to wisdom, adequacy, propriety, expediency or policy of the act in question. *State of Missouri ex rel. Reser v. Rush*, 562 S.W.2d 365, 369 (Mo. 1978).

What is for the public good is for legislative determination. *Bader Realty & Inv. Co. v. St. Louis Housing Authority*, 217 S.W.2d 489, 493 (Mo. 1949). “Courts determine questions of power, not policy.” *Id.* If a court were to construe a clear statute or policy in a manner the court favored, but was inimical to its stated mandate or legislative intent, it would be akin to the Court legislating rather than adjudicating and therefore be unconstitutional. *Lemasters v. Willman*, 281 S.W.2d 580, 590 (Mo. Ct. App. 1955).

The Missouri Supreme Court decision in *Independence NEA v. Independence School District* followed the established rules of constitutional interpretation and held that, for purposes of Article 1 Section 29 of the Missouri Constitution, the word “employees” meant its plain meaning, and included public and private employees. *Independence NEA*, 223 S.W.3d 131, 137 (Mo. 2007). Specifically, the Court said, “Deviations from clear constitutional commands...do not promote respect for the rule of law. If people want to change the constitution, the means are available to do so.” *Id.* The decision in *Independence NEA* overruled *City of Springfield v. Clouse*, 206 S.W.2d 539 (Mo. banc 1947) because it did not follow the plain meaning of the word “employees” indicating the importance of respect and promotion of the separation of powers between the legislative and judicial branches.

Independence NEA did not overrule *Quinn* as that case related to the separation of powers. In *Quinn*, this Court observed as follows:

“Whether or not employers and organized employees can bargain or reach agreement depends on the willingness of both just as in the case of bargaining for any kind of contract between other persons who have the

right to make contracts. Perhaps modern industrial conditions make desirable more than that for the best labor relations but that is a matter for the Legislature.” *Quinn*, 298 S.W.2d at 420.

The *Quinn* court recognized the right to engage in bargaining and at the same time recognized that its judgment as to what may be better or best is a legislative function. *Quinn* also made an astute pronouncement that is still applicable today – contracting between parties is left to the parties to sort out and that any changes to the platform of public sector industrial relations must be determined by the Legislature. *Quinn*, like *Independence NEA*, recognized the constitutional right articulated in Article I Section 29 does not purport to *require* collective bargaining by either employees or employers. It only confers the right to *organize* for the purpose of collective bargaining through the employees’ chosen representative(s). *See, Quinn* at 419-20; *Independence NEA* at 137-138)(“To allow employees to bargain collectively does not require agree to any terms with the represented groups.”). *Quinn* is still relevant and, contrary to any argument that Appellants may make, the *Independence NEA* case confirms that local governments are free to negotiate and contract as they determine appropriate. *Independence NEA*, 223 S.W.3d at 136. It is not for this Court to set standards or policies regulating the authority of the local governments to contract – particularly such a subjective, amorphous standard as “good faith” in the context of public sector collective bargaining.

In the case of local governments, the *Independence NEA* decision reflected that principle when it stated without hesitation that local governments are free to reject and all proposals as within the local governments’ legislative prerogatives. Indeed, there is

nothing in Missouri's Public Sector Labor Law, 105.510, *et seq.* RSMo., that requires a public entity to agree to a proposal by its employee unions or organizations. *Independence NEA*, at 136. In fact, this Court has repeatedly recognized that the public sector labor law allows employers to reject all employee proposals, as long as the employer has met and conferred with employee representatives. *Id.* See *Peters v. Board of Education of the Reorganized School District No. 5*, 506 S.W.2d 429 (Mo. 1974); *Finley v. Lindbergh School District*, 522 S.W.2d 299 (Mo. App. 1975). The Court stated that the ability to reject "all proposals" eliminates any delegation of the public employer's legislative power. *Id.*

From an historical perspective, there was a recent attempt to modify the Missouri Constitution to expand its requirements specifically as to collective bargaining for certain public employees to include a "good faith" standard. The attempt to amend the Constitution failed at the polls by a vote of the electorate in 2002, rejecting the "good faith" standard. The ballot question appeared as Constitutional Amendment #2 with the results of 881,395 voters voting NO and 840,493 voters voting YES. See Secretary of State Elections Data for 2002. The Court can certainly recognize the voting record of the citizens of Missouri as these relate to their attitudes on collective bargaining for public employees. They do not want the rights expanded through amendments to the Missouri Constitution.

In *Independence NEA*, the Court specifically recognized that the bargaining process and its framework are left to a particular local governing body to establish "in the

absence of a statute covering teachers – to set the framework for these public employees to bargain collectively.” *Id.* This Court specifically and without hesitation identified that local legislative bodies have the power to create and engage the collective bargaining process as they desire to do so, in the absence of action by the Missouri General Assembly. *Id.* at 136.

In this case, Appellants are asking this Court to change its recently issued decision in *Independence NEA* to establish a standard of “good faith” that is not set out in the Missouri Constitution Article I Section 29. If the public employer has the unlimited ability to reject “all proposals” in order to avoid having its legislative powers delegated away, then this Court’s pronouncements in *Independence NEA* are not what they were represented to be. This Court, just a few short years ago, in overturning 60 years of precedent, stated unequivocally that a local government has the absolute discretion to reject “all proposals.” The Court stated “the plain meaning of article I, section 29...does not violate the non-delegation doctrine...” because “[t]he employer is **free to reject any and all proposals** made by employees . . .[and, therefore] employer is therefore not delegating or bargaining away any of its legislative power.” *Id.* at 137.

If “all” proposals can be rejected and if the “employer is free to reject any and all proposals,” there can be no standard set by this Court that requires the creation of a standard maintaining anything less than full rejection of proposals. There can be no standard of “good faith” imposed by this Court in the absence of wording in the Constitution or in state statute. If this Court ventures down the road of creating standards that are exclusively within the legislative sphere of authority, it violates the separation of

powers doctrine that it took pains to avoid when reaching its decision in *Independence NEA* and deviates from its recent pronouncements in *Independence NEA*, which were cited to allow for bargaining; but without violating the delegation of legislative authority. This Court must adhere to the Constitutional principle of “what is for the public good is for legislative determination.” *Bader Realty & Inv. Co.*, 217 S.W.2d at 493 (Mo. 1949). “Courts determine question of power, not policy.” *Id.*

Appellants seek to have this Court adopt a standard for bargaining that has not been addressed by the Missouri General Assembly or by the local governing bodies who are parties to this litigation. Appellants choose to overlook the legal basis upon which the standard of “good faith” is founded that they assert should be adopted by this Court. In every jurisdiction in this country addressing collective bargaining, public and private sectors, the “good faith” standard is one that was adopted by the appropriate legislative body as a statutory provision. See 29 U.S.C. 158 (d); *Alaska Stat.* § 23.40.110; *Cal. Gov. Code* § 3543.5; *Conn. Gen. Stat.* § 10-153a; *Del. Code Ann.* 14 § 4007; *Fla. Stat.* § 447.309; *Haw. Rev. Stat.* § 89-9; *Idaho Code Ann.* § 33-1271; 115 *Ill. Comp. Stat.* 5/10; 5 *Ill. Comp. Stat.* 315/7; *Ind. Code* § 20-29-2-2; *Iowa Code* § 20.9; *Kan. Stat. Ann.* §72-5413; *Me. Rev. Stat.* 26 § 965; *Md. Code Ann., Education*, § 6-408; *Mass. Gen. Laws 150E* § 6; *Mich. Comp. Laws* § 423.30; *Minn. Stat.* § 179A.07; *Mont. Code Ann.* § 39-31-305; *Neb. Rev. Stat.* § 48-824; *Nev. Rev. Stat.* §288.033; *N.H. Rev. Stat. Ann.* § 273-A:3; *N.J. Stat. Ann.* § 34:13A-5.4; *N.M. Stat. Ann.* § 10-7E-17; *N.Y.* § 209-a; *N.D. Cent. Code* § 15.1-16-13; *Ohio Rev. Code Ann.* § 4117.01; *Okla. Stat .tit.* 70 § 509.6;

O.R.S. § 243.672; Or. Rev. Stat. § 243.672; 43 Pa. Con. Stat. Ann. § 1101.701; R.I. Gen. Laws § 28-9.3-4; S.D. Codified Laws § 3-18-2; Tenn. Code Ann. § 49-5-601; Vt. Stat. Ann. tit. 16 § 2001; Wash. Rev. Code § 41.59.020; Wis. Stat. § 111.70 (as cited in Respondents' Brief in the Eastern District Court of Appeals). “Good faith” collective bargaining is *not* a principle created by the Courts in the absence of legislative adoption.

Appellants seek to have this Court reject its own positions as to collective bargaining processes as set out in *Independence NEA* and to overlook the separation of powers doctrine under the Missouri Constitution. If the Court falls into the bottomless pit that Appellants want this Court to drop, the division between the legislative body and the judicial body is forever eliminated. Regardless of what the Court’s attitude is toward collective bargaining policy, it is for the state legislature and the local governing bodies to determine how rights are to be implemented and what standards are proper under Missouri law.

In the area of public sector labor law, Missouri’s lower courts have tried to uphold the concept of separation of power between branches. Though not persuasive authority, the following examples show the acknowledgement of power separation. In *Local #77 v. City of St. Joseph*, Case No. 09BU-CV01900 (Cir. Ct. Buchanan County, Mo. 2010), the Court granted summary judgment for the defendant-City when the plaintiff-union argued that an employer must respond to a proposal from employees with a counterproposal. *Id.* at 2. Following the *Independence NEA* Court’s plain meaning standard, the Court determined that private sector labor laws (specifically those outlined in the National

Labor Relations Act, 29 U.S.C. Section 151, *et seq.*) could not apply to the municipality without the legislature taking such action. *Id.* at 3.

Furthermore, the Missouri Court of Appeals recently transferred *Eastern Missouri Coalition of Police v. City of Chesterfield*, 2011 WL 1712262 (Mo. App. E.D. 2011) to the Missouri Supreme Court for decision. In doing so, the Court issued an opinion on whether or not the trial court's order directing the City of Chesterfield to adopt collective bargaining procedures violates the separation of powers doctrine. *Id.* at *4. The Court suggested that such an order might violate the separation of powers, considering that "courts should not interfere with the exercise of power by other branches of government except to enforce ministerial acts requiring no discretion." *Id.* The Court of Appeals stated that, under the *Independence NEA* decision, a framework for collective bargaining is more than ministerial and therefore requires an ordinance passed by a legislature to adopt a standard. *Id.*

Although the above cases are not binding authority, they are instructive of how the lower appellate courts view *Independence NEA*'s application. The Courts concluded that an order by a trial court creating standards or processes for implementation of bargaining rights goes too far when it directs the public employer to designate a specific collective bargaining unit or engage in specific bargaining activities. *Id.* at *5.

CONCLUSION

In conclusion, the Court would be violating Missouri's separation of powers doctrine by adding the words "good faith" to the Missouri Constitution where they do not

exist. To do so would be for this Court to legislate in violation of the Missouri Constitution Article II Section 1, the separation of powers doctrine. Legislative action to implement policy is specifically reserved for the Missouri General Assembly and governing bodies of local governments under the Missouri Constitution.

POINT RELIED TWO

II. THE TRIAL COURT PROPERLY HELD ARTICLE I SECTION 29 OF THE MISSOURI CONSTITUTION AS THAT PROVISION WAS INTERPRETED BY THE MISSOURI SUPREME COURT IN *INDEPENDENCE NEA V. INDEPENDENCE SCHOOL DISTRICT*, 223 S.W.3D 131 (MO. 2007), DOES NOT APPLY A “GOOD FAITH” STANDARD BECAUSE THE APPLICATION OF SUCH A STANDARD CONSTITUTES AN IMPROPER DELEGATION OF THE LEGISLATIVE AUTHORITY OF THE GOVERNING BODIES OF LOCAL GOVERNMENT UNDER THE MISSOURI CONSTITUTION IN THAT SUCH A STANDARD WOULD DESTROY THE LONGSTANDING PRINCIPLE THAT A LOCAL GOVERNMENT BODY HAS THE ABILITY TO REJECT ALL PROPOSALS OFFERED IN BARGAINING.

In *Independence NEA*, this Court specifically recognized that the bargaining process and its framework are left to a particular local governing body to establish “in the absence of a statute covering teachers – to set the framework for these public employees to bargain collectively.” *Independence NEA*, 131 S.W.3d at 136. This Court specifically and without hesitation identified that local legislative bodies have the power to create and engage the collective bargaining process as they desire to do so in the absence of action by the Missouri General Assembly. It is a part of all local governments’ power over their own legislative and policy prerogatives within the constitutional pronouncement of this Court that Article I Section 29 applies to public employees and affords them a right to engage in collective bargaining within the confines of applicable Missouri law.

The applicable Missouri law provides no formal structure for teachers, police officers and deputies because they are specifically exempted from the only law relating to collective bargaining rights in Missouri. The state agency that administers the only bargaining law in Missouri has identified other public employees who are exempt from the Board of Mediation's governance. Public workers who are supervisors, managerial employees or confidential workers find themselves in the same legal position as those employees specifically exempted by law. The laws and policies and decisions governing the excluded employees are left to the legislative prerogatives of the local legislative bodies whether they be city councils or school boards or county commissions or special governmental districts. The *Independence NEA* decision was crafted so as not to conflict with the legislative rights of those bodies or with the legislative prerogatives of the General Assembly which retains the authority to pass laws directly addressing such matters.

This Court went on to relate how a local governmental entity could address bargaining proposals from public employees under Article I Section 29 without interfering with the legislative functions of local governments. The Court specifically stated that it “has repeatedly recognized that the public sector labor law allows employers to reject all employee proposals [citations omitted]”. *Id.* at 137. The Court directly stated that the ability to reject “all proposals” eliminates any delegation of any public employer's legislative powers. *Id.*

In this case, Appellants are asking this Court to change its recently issued decision in *Independence NEA* to establish a standard of “good faith” that is not set out in the

Missouri Constitution Article I Section 29. It is specifically and clearly outside of the parameters of this Court's decision in *Independence NEA*. If the public employer has the unlimited ability to reject "all proposals" in order to avoid having its legislative powers delegated away, then this Court's pronouncements in *Independence NEA* are not what they were stated to be by this Court. This Court, just few short years ago, in overturning 60 years of precedent, stated unequivocally that a local government has the absolute discretion to reject "all proposals". It stated that "the plain meaning of article I, section 29...does not violate the non-delegation doctrine..." because "The employer is **free to reject any and all proposals** made by employees. The employer is therefore not delegating or bargaining away any of its legislative power." If "all" proposals can be rejected and if "employer is free to reject any and all proposals", there can be no standard set by this Court that requires the creation of a standard maintaining anything less than full rejection of proposals. Even a cursory reading of the arguments made and the authorities cited by Appellants concedes that all other jurisdictions, public and private sector alike, set the bargaining standard by legislation.

There can be no standard of "good faith" imposed by this Court in the absence of wording in the Constitution or in state statute. There can be no standard of "good faith" adopted in this case if *Independence NEA* has any meaning, as this Court addressed the prohibition of the delegation of legislative authority in that case. If this Court ventures down the road of creating standards that are exclusively within the legislative authority, it violates the separation of powers doctrine that it took great care to avoid in reaching its decision in *Independence NEA* and deviates from its recent pronouncements in

Independence NEA cited to allow for bargaining but without violating the improper delegation of legislative authority. This Court must adhere to the principles of the Constitution that “What is for the public good is for legislative determination.” *Bader Realty & Inv. Co.*, 217 S.W.2d at 493 (Mo. 1949). “Courts determine question of power, not policy.” *Id.*

CONCLUSION

In conclusion, the Court would be violating its own pronouncements in the *Independence NEA* case by adding the words “good faith” to the Missouri Constitution where they do not exist. To do so would be for this Court to substitute its concepts of local governmental policy and practices concerning public employees and collective bargaining for those of the General Assembly and all local governments’ implementation of Article I Section 29 by legislating in violation of the Missouri Constitution Article II Section 1 separation of powers doctrine. Legislative action to implement policy is specifically reserved for the Missouri General Assembly and governing bodies of local governments under the Missouri Constitution.

CONCLUSION

In conclusion, the Court should sustain the judgment of the Trial Court in behalf of Respondents and deny any of the relief requested by Appellants.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Missouri Supreme Court Rule 84.06(c) counsel for the Amicus Curiae certify that:

1. As required by Missouri Supreme Court Rule 55.03, counsel for Amicus Curiae is Ivan L. Schraeder of the Lowenbaum Partnership, LLC, 222 S. Central, Suite 901, St. Louis, Missouri 63105, Voice 314-746-4823 Facsimile 314-746-4848 is authorized to execute this certificate.

2. The Brief to which this certificate is attached complies with the limitations contained in Missouri Supreme Court Rule 84.06(b).

3. The Brief contains 7,589 words in Microsoft Word 2007 format.

4. Also served and filed with this Brief of Amicus Curiae is a CD containing the brief and identifying the caption of the case, the filing party, the disk number, and the word processing format of Microsoft Word 2007. The disk has been scanned for viruses and it is certified virus free.

Respectfully submitted for Amicus by

/s/ Ivan L. Schraeder

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CERTIFICATE OF SERVICE

I hereby certify that two true and accurate copies of the foregoing Brief of Amicus Curiae and one disk containing the Brief, were mailed, postage prepaid, this 24th day of June 2011, to the following:

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