

**IN THE SUPREME COURT OF MISSOURI**

**No. SC87980**

**INDEPENDENCE-NATIONAL EDUCATION ASSOCIATION,  
INDEPENDENCE-TRANSPORTATION EMPLOYEES ASSOCIATION,  
INDEPENDENCE-EDUCATIONAL SUPPORT PERSONNEL,  
RANDI LOUISE MALLET, and RON COCHRAN,**

**Plaintiffs/Appellants,**

**v.**

**INDEPENDENCE SCHOOL DISTRICT,**

**Defendant/Respondent.**

**APPELLANTS' REPLY BRIEF**

**SCHUCHAT, COOK & WERNER**

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## INTRODUCTION

The District's Brief presents one side of an irrelevant political debate about the wisdom of public sector collective bargaining. The appropriate forum for this debate was the 1945 Constitutional Convention that adopted Article I, Section 29. The issue here is whether the framers intended this provision to apply to public employees. Both its express language and the debates uniformly support the conclusion that Article I, Section 29 guarantees to all employees, including public employees, "the right of collective bargaining." (*See* Appellant's Brief, at 10-14).

Compounding its irrelevancy, the District's polemic cites alleged facts and opinions not introduced at trial. The District presented no expert testimony about the alleged harms it discusses at length in Section I of its Brief. The record contains no evidence that the District repudiated the ITEA and IESP Memoranda of Understanding (MOUs) because they harmed education or permitted strikes. The record demonstrates, instead, that these MOUs defined basic terms and conditions of employment of custodians and bus drivers and expressly prohibited strikes.

The District's "parade of horrors" also ignores that the recognition of a Constitutional right to bargain for public employees would not compel any public

employer to agree to any collective bargaining agreement,<sup>1</sup> much less a harmful one. Nor would it require any group of public employees to select a collective bargaining representative.

Stripped of its ideology, the District's Brief offers scant legal argument pertinent to the questions of law before the Court: (1) Did *City of Springfield v. Clouse*, 206 S.W.2d 539 (Mo. banc 1947), correctly exclude public employees from the protection of Article I, Section 29 of the Missouri Constitution, which guarantees “employees. . . the right to organize and to bargain collectively. . .”?; and (2) Did *Sumpter v. City of Moberly*, 645 S.W.2d 359 (Mo. 1983), correctly extend dicta in *Clouse* to permit a public employer to rescind a collective bargaining agreement that has been approved by the governing legislative body pursuant to Missouri’s Public Sector Labor Law, MO. REV. STAT. §105.500? The District’s primary response to these questions is to declare the obvious - that *Sumpter* and *Clouse* are existing law. The “doctrine of *stare decisis* . . . is not, however, an inexorable command.” *Lawrence v. Texas*, 539 U.S. 558, 577 (2003). The District offers no persuasive reason why this Court should not re-examine and reverse these erroneous precedents.

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<sup>1</sup> See, e.g., *Pac. Legal Found. v. Brown*, 29 Cal. 3d 168 (Cal. 1981) (In upholding the constitutionality of a collective bargaining statute, the court observed that, “nothing in the act purports to compel the Governor to agree to conditions that he would feel obligated to ‘blue pencil’ or veto).

**POINT ONE: RECONSIDERATION OF CITY OF SPRINGFIELD v. CLOUSE**

- A. The District makes no response to the Associations’ argument about the plain language of Article I, Section 29 of the Missouri Constitution, and the District’s interpretation of the Constitutional debates is flawed.**

The language of Article I, Section 29 of the Missouri Constitution could not be clearer: “employees shall have the right to organize and to bargain collectively through representatives of their own choosing.” The provision is not limited to private sector employees, but is all-inclusive. The District and its Amici have no response to this plain language argument. ““The language of the section just quoted is too plain to need construction.”” *Rathjen v. Reorganized School District R-II of Shelby County*, 284 S.W.2d 516, 524 (Mo. 1955) (construing a 1950 amendment to Article X, Section 11 of the Missouri Constitution) (quoting *Harrington v. Hopkins*, 231 S.W. 263, 265 (Mo. 1921)).

To the extent any construction of a constitutional provision is needed, the Court is to apply a “broader and more liberal construction” than it does to statutes, because “a constitution is expected to be effective over a longer period of time and its method of revision or amendment is more cumbersome than the legislative process.” *Rathjen*, 284 S.W.2d at 524. The Court in *Rathjen*, decided only eight years after *Clouse*, rejected an attempt by plaintiffs to “imply an exception where none exist[ed] under the express terms or plain intendments of [a] constitutional provision.” *Id.* at 522. “The law is well settled that it is the duty of the court, in construing the constitution, to give effect to an express

provision rather than an implication.” *Id.* See also *City of Wellston v. SBC Communications, Inc.*, No. SC87207, 2006 Mo. LEXIS 98, at \*8, n.5 (Mo., August 8, 2006) (“This Court must enforce statutes as written, not as they might have been written.”) (quoting *State v. Rowe*, 63 S.W.3d 647, 650 (Mo. 2002) and *Kearney Special Rd. Dist. v. County of Clay*, 863 S.W.2d 841, 842 (Mo. 1993)). The Court in *Clouse* did exactly what *Rathjen* warned against: it implied an exception where none exists under the plain terms of Article I, Section 29.

Nonetheless, since the District cannot rely on the plain language to defend *Clouse*, it offers one response to the Plaintiffs’ arguments regarding the Constitutional debates. The District quotes Reuben Wood, the President of the State Federation of Labor and the sponsor of Article I, Section 29, as saying, “I don’t believe there is anyone in the organization that would insist upon having a collective bargaining agreement with a municipality setting forth wages, hours and working conditions.” *Clouse*, 206 S.W.2d at 543. Based on this statement, the District argues, it is hard to believe that the framers intended to include public employees within the scope of Article I, Section 29. (Respondent’s Brief at 20).

Yet, Reuben Wood also urged the adoption of Article I, Section 29, to assist public school teachers in organizing their profession. II Debates of the Mo. Const. Conv. of 1943-44, at 1953 (hereinafter “Debates”) (Appendix at A-28). Mr. Wood also acknowledged a long-established practice of many cities to engage in collective bargaining with organized employees. Debates, at 1962-63 (Appendix at A-34 to A-35).

Finally, he fought hard and successfully against two proposed amendments that would have excluded public employees from Article I, Section 29. Debates, at 1962, 1969 (Appendix at A-34, A-36).

Mr. Wood's seemingly contradictory comments can be reconciled by recognizing that collective bargaining in the public sector does not mean exactly the same thing as collective bargaining in the private sector. Public employee strikes were and continue to be forbidden in Missouri. *St. Louis Teachers' Association v. Board of Education*, 544 S.W.2d 573, 575 (Mo. 1976); *State ex inf., John C. Ashcroft v. Kansas City Firefighters Local No. 42*, 672 S.W.2d 99, 105 (Mo. Ct. App. 1984). Moreover, statutes that govern the operation of state and local governments (like the statutes that dictated wages and hiring practices in the City of Springfield) often limit the scope of bargaining in the public sector. *Clouse*, 206 S.W.2d at 542. However, Wood would not have made the comments he did about public employees or urged the rejection of the two proposed amendments excluding public employees if he believed that Article I, Section 29 covered only private sector employees.

Evidently the judges of the Missouri Supreme Court at the time of the *Clouse* decision did not approve of the concept of public sector collective bargaining. However, “[u]nless the meaning of the terms employed is not clear, questions as to the wisdom, expediency or justice of the constitutional provision should play no part in the construction thereof.” *Rathjen*, 284 S.W.2d at 527. This Court should apply the logic of the *Rathjen* case and overrule the *Clouse* Court's twisted and result-oriented reasoning.

**B. The District’s argument that Missouri courts still follow the non-delegation doctrine is simply wrong.**

The District is blatantly wrong when it states that, “Missouri’s government follows the nondelegation doctrine to ensure that important decisions are made by the governing legislative body, which is the political body most accountable to the people.”

(Respondent’s Brief at 13). In support of this proposition, the District cites a single source: the dissenting opinion in *Menorah Medical Center v. Health and Educational Facilities Authority*, 584 S.W.2d 73 (Mo. 1979) (Donnelly, J., dissenting). The majority opinion in *Menorah*, cited by the Plaintiffs, holds just the opposite: “The liberalizing trend in interpreting statutes which are faced with nondelegation challenges has been recognized and adopted by Missouri courts.” 584 S.W.2d at 84. The District simply ignores the majority opinion in *Menorah* and the four other decisions cited by Plaintiffs in which the Missouri Supreme Court has rejected non-delegation challenges to statutes. *Murray v. Mo. Highway and Transp. Comm’n*, 37 S.W.3d 228 (Mo. 2001); *ABC Sec. Serv., Inc. v. Miller*, 514 S.W.2d 521 (Mo. 1974); *Milgram Food Stores, Inc. v. Ketchum*, 384 S.W.2d 510 (Mo. 1964), *cert. dismissed*, 382 U.S. 801 (1965); *Bd. of Pub. Bldg. v. Crowe*, 363 S.W.2d 598 (Mo. 1962).

**C. The District’s reliance on the number of times *Clouse* has been followed is misplaced, when this Court did not critically reexamine *Clouse* in those cases.**

The only other legal argument the District makes for reaffirming *Clouse* is that this Court has “revisited *Clouse* in virtually every decade since it was decided and on

each occasion has refused to change its ruling.” (Respondent’s Brief at 22). However, this Court was not asked to reexamine *Clouse* in these cases. They merely required the application of *Clouse* to different facts. *Glidewell v. Hughey*, 314 S.W.2d 749, 756 (Mo. 1958) (public utilities board too enmeshed with city operations to be considered a proprietary entity exempt from *Clouse*’s prohibition against public sector bargaining); *State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35, 41 (Mo. 1969) (Public Sector Labor Law “does no violence to *Clouse*,” because legislative body may “adopt, modify or reject outright the results of the discussions”); *Curators of Univ. of Missouri v. Public Service Employees Local No. 45*, 520 S.W.2d 54, 57-58 (Mo. 1975) (Public Sector Labor Law does not unconstitutionally infringe on the sovereign right of the board of curators to govern its affairs); *Sumpter*, 645 S.W.2d at 361-364 (under *Clouse*, governing body may not bind itself to follow an agreement adopted pursuant to the Public Sector Labor Law); *Akin v. Director of Revenue*, 934 S.W.2d 295, 299 (Mo. 1996) (under *Clouse*, legislature could not delegate to voters the power to enact or repeal a general tax for education).<sup>2</sup>

The plaintiffs in *Thruston v. Jefferson City Sch. Dist.*, No. SC84624,

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<sup>2</sup> *Morrow v. City of Kansas City*, 788 S.W.2d 278, 280-281 (Mo. 1990), cited by the District, does not even cite *Clouse*, much less critically reexamine it.

<sup>3</sup> Amici Missouri State Teachers Association (MSTA) and Missouri Council of School Administrators (MCSA) argue that this case is not justiciable, because the ITEA and IESP Memoranda of Understanding (MOUs) have expired. This

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argument is meritless. First, issues not raised by a party may not be raised by amici. *Hemeyer v. KRCCG-TV*, 6 S.W.3d 880, 882 (Mo. 1999). Second, Plaintiffs claim that the District's actions were void ab initio, and such claims are not mooted by intervening events. *R.E.J., Inc. v. City of Sikeston*, 142 S.W.3d 744 (Mo. 2004). Third, Plaintiffs seek an injunction requiring the District to comply with portions of the MOUs for one year following the judgment – a remedy which precludes a finding of mootness. See *Furniture Mfg. Corp. v. Joseph*, 900 S.W.2d 642, 649 (Mo. Ct. App. 1995) (rejecting mootness challenge to enforcement of one-year restrictive covenant after year passed, since relief could run prospectively). Fourth, Counts I and II present issues of public importance that fall within an exception to the mootness doctrine because they are “capable of repetition, yet evading review,” in that the District could rescind other MOUs with Plaintiffs in the future. *In re 1983 Budget for Circuit Court*, 665 S.W.2d 943 (Mo. 1984). Finally, the expiration of the ITEA and IESP MOUs has no effect on Count IV, which asserts that Plaintiffs have a Constitutional right to bargain apart from any MOU.

<sup>4</sup> For over one hundred years before enactment of the Teacher Tenure Act in 1969 and since, this Court has recognized the binding nature of teachers' contracts with public school districts. See, e.g., *Dial v. Lathrop R-II Sch. Dist.*, 871 S.W.2d 444, 450 (Mo. 1994) (school board may not unilaterally change

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terms of teacher's contract except in the limited circumstances defined in Section 168.110 of the Tenure Act); *Dye v. School Dist.*, 195 S.W.2d 874 (Mo. 1946) (school district liable for breach of teacher's contract due to its failure to re-employ him); *Wilson v. Board of Education*, 63 Mo. 137 (Mo. 1876) (teachers' contracts valid and binding).

<sup>5</sup> The Court of Appeals chastised the District for failing to acknowledge the significance of *Peters* and *Finley*: "Despite Appellants' reliance upon these cases before the trial court and on appeal, the District has failed to even mention *Finley* or *Peters* in its brief on appeal, let alone attempt to differentiate those cases from the case at bar." 162 S.W.3d at 18.

<sup>6</sup> The National Assessment of Educational Progress (NAEP), also known as "the Nation's Report Card," evaluates students' performance in different subject areas. See <http://nces.ed.gov/nationsreportcard/about/> (Supplemental Appendix hereto, at A-2 to A-4). The U.S. Department of Education is responsible for carrying out the NAEP project. *Id.*

<sup>7</sup> The summary of state collective bargaining laws was prepared by the Education Commission of the States (ECS), which is the operating arm of the interstate Compact for Education established in 1967. The ECS website "features the nation's only comprehensive database of state education policy enactments, searchable by state, by year and by policy issue...." See

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<http://www.ecs.org/html/aboutECS/ECShistory.htm> (Supp. App. at A-9 to A-14).

<sup>8</sup> Of course, unlawful work stoppages can occur even in the absence of a right to bargain collectively. See *St. Louis Teachers Ass'n*, 544 S.W.2d 573; *Kansas City Firefighters Local No. 42*, 672 S.W.2d 99.