
IN THE SUPREME COURT OF MISSOURI

THE MISSOURI DEPARTMENT OF
LABOR AND INDUSTRIAL
RELATIONS, et al.,

Appellants,

v.

REBECCA KARNEY, et al.,

Respondents

Appeal from the Circuit Court of Jackson County, Missouri at Independence
The Honorable James Francis Kanatzar, Circuit Judge

AMICUS CURIAE BRIEF OF
MISSOURI NATIONAL EDUCATION ASSOCIATION IN SUPPORT OF
RESPONDENTS REBECCA KARNEY, et al.

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INTEREST OF AMICUS AND INTRODUCTION

With the consent of the parties, Missouri National Education Association (“MNEA”) submits this brief as amicus curiae in support of Respondents Rebecca Karney et al. MNEA represents approximately 35,000 teachers and other public-school employees throughout the state for purposes of collective bargaining. MNEA has had a storied history before this Court in advancing and protecting the constitutional rights of public sector employees. Three of its local affiliates were 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 issue presented in this case—whether the Legislature can prohibit public sector employees from participating in picketing activity of any kind if they exercise their constitutional right to join the public sector union of their choosing and negotiate a collective bargaining agreement—is of great importance to *amicus* and to the public at large.

The picketing restriction at issue in this dispute was enacted by the Legislature as part of a broader law that restricts the rights of public sector employees to organize and collectively bargain. The constitutionality of that legislation, House Bill 1413 (“HB 1413”), is currently before the Circuit Court of St. Louis County in a lawsuit to which the MNEA is a plaintiff. *Missouri Nat’l Educ. Ass’n, et al. v. Missouri Dep’t of Labor, et al.*, Cause No. 18SL-CC01330. In March of 2019, the Circuit Court entered a preliminary injunction against the State, enjoining until further notice the implementation and enforcement of HB 1413 in its entirety. The court found that numerous provisions of HB 1413 infringed the rights of public employees under Article I, Sections 2, 8, 9, and 29 of

the Missouri Constitution. With respect to the picketing prohibition that is at issue in this appeal, the Circuit Court specifically found that it “places discriminatory burdens on the right to engage in peaceful non-disruptive informational picketing protected by Article I, Sections 8 and 9.” See Appendix to Brief of Amicus Curiae MNEA, at A-24.

The parties in the St. Louis County case are currently awaiting the court’s ruling on MNEA’s motion for summary judgment. When that decision issues, MNEA fully expects it to be appealed directly to this Court, where the constitutionality of HB 1413 in its entirety will need to be decided. When that appeal occurs, MNEA expects to demonstrate to this Court that HB 1413 penalizes certain public employees and their unions by singling them out for restrictions that violate those employees’ fundamental rights to choose a union representative, to be represented in collective bargaining, and to speak, associate, and petition for governmental redress as they see fit. To avoid piecemeal litigation of HB 1413’s constitutionality, this Court may wish to hold the present appeal for decision until the St. Louis County case is fully briefed and argued before this Court.

JURISDICTIONAL STATEMENT

Amicus MNEA agrees with the jurisdictional statement in the State’s opening brief.

FACTUAL BACKGROUND

The State’s recitation of the facts omits or distorts important features of both the specific statute challenged in this action (Section 105.585(2), RSMo) and the larger legislation that contains that statute (HB 1413). Amicus MNEA submits that two points

of clarification are necessary for this Court's full understanding of the issue raised by the State's appeal.

First, the State's brief gives the misleading impression that Section 105.585(2)'s picketing restrictions apply generally to all public employees. *See, e.g.*, State Br. at 7–8. This is not so: on the contrary, the restrictions are discriminatory and apply to only those public employees who have chosen to associate with unions the legislature disfavors. This discrimination is the product of a legislative carve-out, written into HB 1413 at the last minute, that completely exempts a newly devised category of “public safety labor organizations” and their members from all of HB 1413's many restrictions—including those on picketing.¹ *See* Section 105.503, RSMo. HB 1413 defines this new category of “public safety” unions as ones that wholly or primarily represent persons (a) trained or

¹ The discriminatory carve-out of these non-public safety unions and the employees they represent was added to HB 1413 at the very end of the legislative process, as part of the May 16, 2018, Senate Substitute. The State Senate approved the carve-out that very same day, and the House of Representatives followed suit the following day resulting in HB 1413's legislative passage. *See* <https://house.mo.gov/bill.aspx?bill=HB1413&year=2018&code=R>; *see also* David A. Lieb, *Union Seek to Block New Missouri Labor Group Restrictions*, AP News, Aug. 27, 2018, <https://apnews.com/86570e8442e843a49f20a1640752127d> (“[Representative] Taylor's original version of the legislation didn't include the exemption. He said it was added in the state Senate as the session neared its end to help secure the bill's passage”).

authorized by law or rule to render emergency medical assistance or treatment or (b) vested with the power of arrest for criminal code violations. Section 105.501, RSMo.

The result of the carve-out is to divide public sector employees into two castes and to accord them dramatically different rights. Critically, the rights public employees will enjoy are determined entirely by how they exercise their constitutionally protected prerogative to select and associate with a union to represent their interests. If a group of public employees—*even those with no public safety-related duties*—chooses to associate with and be represented by a favored union that primarily represents public safety personnel, they will be entirely free of HB 1413’s restrictions (including the picketing restrictions challenged here). Conversely, if a group of employees—*even a group consisting solely of public safety personnel*—chooses to associate with a disfavored union that does *not* primarily represent other public safety personnel, those employees and their union are subject to the full force and effect of HB 1413’s many burdens and restrictions.

This case provides a perfect illustration of how the discriminatory carve-out operates. The Plaintiffs are dispatchers employed by the Jackson County Sheriff’s Department and are represented for purposes of collective bargaining by the Communications Workers of America Local 360. Because that union’s members are not primarily employed in public safety positions as defined in Section 105.500(8), RSMo, it does not qualify as a “public safety” union for purposes of HB 1413, and all of its members are therefore subject to the picketing restrictions contained in Section 105.585(2), RSMo. Yet, if the Plaintiffs had chosen to be represented by a different union

that *did* qualify as a “public sector labor organization”—for example, by the Fraternal Order of Police—they would be entirely unaffected by the statute challenged here. Their rights to picket and protest are therefore determined entirely by their decision to select and associate with one union over another.

Second, the State contends that HB 1413 made only “procedural” changes to existing law and that these changes deal only with regulation of collective bargaining. State Br. 7, 19. Again, this is not so. Even with respect to collective bargaining, HB 1413 includes significant *substantive* changes to existing law, such as prohibiting public employers and disfavored, non-public safety unions from entering agreements that govern core workplace issues like employee discipline and work rules. Section 105.585(1), RSMo. Moreover, HB 1413’s restrictions on disfavored, non-public safety unions and the employees they represent extend well beyond collective bargaining and include the direct regulation of political activity. *See* Section 105.505(2), RSMo (prohibiting disfavored, non-public safety unions—and no other membership organization in the state—from using any portion of a member’s dues to make either a political “contribution” or “expenditure” without first obtaining that member’s “informed, written or electronic authorization,” which must be renewed annually); *see also* Section 105.533.2(6), RSMo (requiring disfavored, non-public safety unions—and no other membership organization in the state—to make annual reports disclosing extensive information related to political activities, efforts to influence legislation, voter education efforts, and issue advocacy).

POSITION OF ALL PARTIES TO FILING OF THIS BRIEF

All parties to this appeal consent to the filing of this brief.

POINTS RELIED ON

I. THE CHALLENGED STATUTE IS CLEAR ON ITS FACE, AND THIS COURT SHOULD RESIST THE STATE’S INVITATION TO REWRITE THE STATUTE IN ORDER TO SALVAGE ITS CONSTITUTIONALITY

Parktown Imports v. Audi of America, 278 S.W.3d 670 (Mo. banc 2009)

Jennings v. Rodriguez, 138 S. Ct. 830 (2018)

II. THE CHALLENGED STATUTE IS AN UNCONSTITUTIONAL RESTRICTION ON A BASIC RIGHT PROTECTED BY ARTICLE I, SECTIONS 8 AND 9 OF THE CONSTITUTION

Carey v. Brown, 447 U.S. 455 (1980)

Citizens United v. Fed. Election Comm’n, 558 U.S. 310 (2010)

Iowa Right To Life Committee, Inc. v. Tooker, 717 F.3d 576 (8th Cir. 2013)

Brown v. Alexander, 718 F.2d 1417 (6th Cir. 1983)

Janus v. AFSCME Council 31, 138 S. Ct. 2448 (2018)

United States v. Nat’l Treasury Employees Union, 513 U.S. 454 (1995)

ARGUMENT

I. THE CHALLENGED STATUTE IS CLEAR ON ITS FACE, AND THIS COURT SHOULD RESIST THE STATE’S INVITATION TO REWRITE THE STATUTE IN ORDER TO SALVAGE ITS CONSTITUTIONALITY

Section 105.585(2) provides:

Every labor agreement shall expressly prohibit all strikes and picketing of any kind. A strike is any refusal to perform services, walkout, sick-out, or any other form of interference with the operations of any public body.

Every labor agreement shall include a provision acknowledging that any public employee who engages in any strike or concerted refusal to work, or who pickets over any personnel matter, shall be subject to immediate termination of employment.

The State's primary argument before this Court is that the circuit court below erred by reading Section 105.585(2), RSMo too broadly. Contrary to the plain language set forth above, the State claims that this provision does *not* prohibit employees represented by disfavored, non-public safety unions from engaging in "picketing of *any kind*." State Br. at 14–18. Likewise, the State claims that this section does not require the "immediate termination" of such employees if they engage in even a peaceful, non-disruptive picket over "*any personnel matter*." *Id.* at 18. Instead, the State urges this Court to disregard the plain language of the statute and instead read it to only restrict picketing "in conjunction with a strike." *Id.* at 14–18.

The State's reading of the statute is unsustainable. As this Court has explained, the "primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue." *Parktown Imports v. Audi of America*, 278 S.W.3d 670, 672 (Mo. banc 2009). And here, the language of Section 105.585(2) is unmistakably clear: it prohibits "picketing of *any kind*" and mandates "immediate termination" for "picket[ing] over *any personnel matter*." As a result, Section 105.585(2) prevents employees represented by disfavored, non-public safety unions from engaging in peaceful, non-disruptive picketing that is merely informational, and it requires that

employees involved in such picketing be immediately terminated if their activity relates to their employment. In arguing so strenuously for a far narrower interpretation, the State frankly acknowledges that the restriction described by the plain language of Section 105.585(2) would be “blatantly unconstitutional.” State Br. at 21.

The State seeks to avoid this result first by suggesting that the terms “picketing” and “picket” should be defined solely by reference to protests in support of a strike or other work stoppage. State Br. at 16–17. But under “traditional rules of construction,” terms that are not otherwise defined in a statute must be “given their plain and ordinary meaning as found in the dictionary.” *Asbury v. Lombardi*, 846 S.W.2d 196, 201 (Mo. banc 1993). And in both legal settings and common usage, the term “picket” is understood to include nondisruptive protests, such as those that merely “publicize a labor dispute.” *Black’s Law Dictionary* 1147 (6th ed. 1990); *see also Merriam-Webster Online* (defining picket as a “protest or strike involving pickets” and giving as an example “the union often pickets the plant as well, but it is strictly an informational picket publicizing the nature of the controversy”), <https://www.merriam-webster.com/dictionary/picket>; *Cambridge Dictionary* (defining picket as “a group of people who stand outside an organization’s building holding signs to protest against something. The people who protest are often employees who disagree with the management.”), <https://dictionary.cambridge.org/us/dictionary/english/picket>.² The State’s attempt to

² There is also ample caselaw demonstrating that pickets occur outside the context of strikes or other work stoppages. *See, e.g., Employers Ass’n, Inc. v. United*

cabin the reach of Section 105.585(2) is inconsistent not only with these authoritative definitional sources, but also with the language of the statute that broadly and without qualification prohibits “picketing of *any* kind.”

Equally unconvincing is the State’s attempt to restrict the plain language of Section 105.585(2) by reference to the overall context of the legislation in which this provision appears. State Br. at 19–20. Contrary to the State’s suggestion, HB 1413 does not deal only with strikes and collective bargaining. Instead, the law seeks to regulate core political activity and issue advocacy, regardless of whether it is connected to labor relations with a public employer. *See* Section 105.505(2), RSMo (mandating that disfavored, non-public safety union cannot use a member’s dues to make either a political “contribution” or “expenditure” without first obtaining that member’s “informed, written or electronic authorization,” which must be renewed annually); *see also* Section 105.533(2)(6), RSMo (requiring disfavored, non-public safety unions to make annual reports disclosing extensive information related to political activities, efforts to influence legislation, voter education efforts, and issue advocacy). Given this context, Section

Steelworkers, 32 F.3d 1297, 1298 (8th Cir. 1994) (“Although the union was engaged in informational picketing during the negotiations, it never publicly manifested any intention to strike.”); *Wayneview Care Ctr. v. Nat’l Labor Relations Bd.*, 664 F.3d 341, 346 (D.C. Cir. 2011) (“[T]he employees ultimately voted not to strike,” and “would only engage in after-hours informational picketing.”).

105.585(2)’s reference to “picketing of any kind” should be read in its natural and literal sense—and not limited only to picketing in conjunction with a strike.

Finally, appeals to the canons of statutory construction do nothing to help the State’s position. That is because, where the language of a statute is unambiguous, there is no need to resort to such canons as a way to clarify meaning. *See Ben Hur Steel Worx, LLC v. Dir. of Revenue*, 452 S.W.3d 624, 626 (Mo. banc 2015); *Butler v. Mitchell-Hugeback*, 895 S.W.2d 15, 19 (Mo. banc 1995). This is particularly true of the canon of statutory interpretation the State relies on most heavily here: the canon of constitutional avoidance. *See* State Br. at 21; *see also M & P Enterprises, Inc. v. Transamerica Fin. Servs.*, 944 S.W.2d 154, 159 (Mo. banc 1997) (“[A]mbiguous statutes that are susceptible to more than one construction should be construed in a manner consistent with the constitution.”). This canon applies only when a statute is genuinely ambiguous, *id.*, and it permits a court to choose “between competing plausible interpretations of a statutory text.” *Jennings v. Rodriguez*, 138 S. Ct. 830, 843 (2018). Where the text of a statute admits of only one plausible construction, however, “the canon simply has no application.” *Id.* at 842 (citation and quotation marks omitted). In other words, “[s]potting a constitutional issue does not give a court the authority to rewrite a statute as it pleases.” *Id.* The text of Section 105.585(2) is plain, and this Court should not abandon its proper judicial role in attempting to salvage it.³ *See St. Louis Bd. of Educ. v. State*, 47 S.W.3d

³ The State’s effort to invoke constitutional avoidance is flawed for the additional reason that it offers no construction of the statute—plausible or otherwise—that actually

366, 371 (Mo. banc 2001) (explaining that this Court will not “transcend the limits of [its] constitutional powers and engage in judicial legislation supplying omissions and remedying defects in matters delegated to a coordinate branch of our tripartite government”).

Indeed, to the extent canons of statutory construction have any role in this case, it is to further reinforce the conclusion that the State’s proposed interpretation of Section 105.585(2) is unworkable. By its plain terms, the statute prohibits both “strikes” and “picketing” of “any kind,” and defines “strike” broadly to include “*any . . . form of interference with the operations of any public body.*” *Id.* (emphasis added). Picketing in support of a work stoppage surely qualifies as “interference with the operations of any public body” and is therefore already proscribed as a form of “strike.” As a result, the State’s proposed construction of the statute would make the restriction on “picketing of any kind” redundant, thereby contravening the canon of interpretation that “each word, clause, sentence and section of a statute should be given meaning.” *Hadlock v. Dir. of Rev.*, 860 S.W.2d 335, 337 (1993).⁴

“eliminat[es] any constitutional question.” *Parker v. Bond*, 330 S.W.2d 121, 126 (Mo. 1959). Even the implausible constructions of the statute that are most favorable to the State create insurmountable constitutional issues involving the rights of public employees to speak on matters of public concern.

⁴ The State tries to invoke the same canon of interpretation by arguing that, “[i]f the statute already prohibited ‘picketing of any kind,’ then there is no need for the statute

This Court should read Section 105.585(2) in accordance with its plain meaning. So construed, the statute restricts peaceful, non-disruptive informational picketing and requires that termination be imposed on employees if their picketing involves any personnel matter. As we explain below—and as the State essentially concedes, *see* State Br. at 21—such restrictions are plainly unconstitutional and were properly enjoined by the Circuit Court below.

II. THE CHALLENGED STATUTE IS AN UNCONSTITUTIONAL RESTRICTION ON A BASIC RIGHT PROTECTED BY ARTICLE I, SECTIONS 8 AND 9 OF THE CONSTITUTION

Picketing is an exercise of “basic constitutional rights in their most pristine and classic form” that has “always rested on the highest rung of the hierarchy of” constitutional values. *Carey v. Brown*, 447 U.S. 455, 466–67 (1980); *see also State v. Wooden*, 388 S.W.3d 522, 525–26 (Mo. 2013) (“The ability to criticize the government and public officials are undeniably privileges that are afforded to all citizens . . .”). Section 105.585(2)’s broad restrictions on such activity are especially offensive to the Constitution because “they almost completely foreclose[] a venerable means of

to prohibit picketing over personnel matters.” State Br. at 18. But there is nothing inconsistent or superfluous about the two provisions. The first sentence of the statute broadly prohibits “picketing of any kind,” without specifying what action the employer must take in response it. Meanwhile, the third sentence of the statute identifies one topic of employee picketing—“personnel matters of any kind”—and specifies that “immediate termination” is the form of discipline to be applied to that particular infraction.

communication that is both unique and important.” *City of Ladue v. Gilleo*, 512 U.S. 43, 54 (1994). Thus, even if these restrictions were even-handed as between different groups of public employees, they would certainly be unconstitutionally onerous.

But, as we have explained above, HB 1413’s restrictions—including the restrictions on picketing—are not even-handed and are therefore even more constitutionally flawed. The restrictions apply only to certain public-employee speakers, namely, those who associate with and are represented by disfavored non-public safety unions. As the United States Supreme Court has explained, there is no constitutional support for the proposition that “the Government may impose restrictions on certain disfavored speakers.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010). On the contrary, the government commits a “constitutional wrong when by law it identifies certain preferred speakers.” *Id.* Such discriminatory restrictions deprive a disfavored speaker of “the right to use speech to strive to establish worth, standing, and respect for the speaker's voice.” *Id.* at 340–41.

This prohibition on speaker-based discrimination is further illustrated by *Iowa Right To Life Committee, Inc. v. Tooker*, 717 F.3d 576 (8th Cir. 2013). There, the court upheld an even-handed provision of an Iowa law that required any entity to obtain the approval of its board before expending funds for certain kinds of political advertisements. *Id.* at 605. However, the court struck down a provision that imposed an additional, speaker-based requirement that corporations, but no other entities, submit a certification that its board authorized the political expenditure. *Id.* at 605–06. The court recognized that the discriminatory feature of the Iowa law—which is far less burdensome than the

speaker-based requirements that Section 105.585(2) imposes on disfavored unions—“impinge[d] upon the exercise of a fundamental right” and was “presumptively invidious.” *Id.* at 606. Because picketing involves core constitutionally protected expression, Section 105.585(2)’s speaker-based restrictions are subject to strict scrutiny and cannot survive. *See Carey*, 447 U.S. at 460–62; *Police Dep’t of City of Chicago v. Mosley*, 408 U.S. 92, 99 (1972).

The same result follows even if this Court were to apply the more deferential standards that allow the government to impose certain evenhanded restrictions on public-employee speech.

Under those standards, a public employee’s speech may be restricted if it does not involve “a matter of public concern,” *Connick v. Myers*, 461 U.S. 138, 147 (1983), or if the interests of an employee in speaking on a matter of public concern are outweighed by “the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees,” *Pickering v. Board of Ed. of Township High School Dist. 205*, 391 U.S. 563, 568 (1968). Neither circumstance is necessarily present here.

The State claims that employee picketing that involves complaints about their working conditions is categorically unprotected because it does not involve matters of public concern. *See* State Br. at 24–27. But Section 105.585(2)’s restrictions extend to “picketing of any kind”—not just picketing over workplace conditions. In any event, the United States Supreme Court’s recent decision in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), explains that when “employees speak through their union, the category

of speech that is of public concern is greatly enlarged, and the category of speech that is of only private concern is substantially shrunk.” *Id.* at 2473. Thus, it is a virtual certainty that Section 105.585(2) would prohibit speech on matters of public concern.

Furthermore, the balance between the right of employees to speak and the employer’s interest in efficient operation does not favor the broad restriction contained in Section 105.585(2). As the United States Supreme Court has explained, the deferential balancing envisioned by cases like *Pickering* applies only to ad hoc disciplinary decisions, while a “speech-restrictive law with widespread impact . . . gives rise to far more serious concerns.” *Janus*, 138 S. Ct. at 2472 (citations and quotation marks omitted). Thus, “when such a law is at issue, the government must shoulder a correspondingly heav[ier] burden and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on [constitutional] rights.” *Id.* (citations and quotation marks omitted). That heavier burden cannot be met here in light of the fact that Section 105.585(2) would apply to completely peaceful and nondisruptive picketing on matters of the highest public concern. The State simply cannot “show that the interests of both potential audiences and a vast group of . . . employees in a broad range of present and future expression are outweighed by that expression’s necessary impact on the actual operation of the [g]overnment.” *United States v. Nat’l Treasury Employees Union*, 513 U.S. 454, 468 (1995).

In any event, the deferential standards that apply to government regulation of public employee speech cannot salvage restrictions like those in HB 1413 that discriminate against, and interfere with, employees’ exercise of their protected rights in

associating with a union. For example, in *Brown v. Alexander*, 718 F.2d 1417 (6th Cir. 1983), the court struck down such a restriction even though it did not directly burden employee speech at all. That case involved a constitutional challenge to a statute granting public employees the option of payroll deductions for dues to “independent” unions but prohibiting deductions for any union that was affiliated with other unions. *Id.* at 1419. The court recognized that such a discriminatory restriction “directly limits freedom of association between labor organizations, and their members or members of other such organizations, and thus it could restrain or restrict freedom of association, a fundamental . . . right.” *Id.* at 1425. As a result, the court concluded that the classification was subject to strict scrutiny that it could not survive. *Id.* at 1425–26. HB 1413’s discrimination against non-public safety unions affects a far broader set of workplace rights that “strike[] at the heart of freedom of association” protected by Article I, Sections 8 and 9, and cannot be sustained. 718 F.2d at 1426; *see also Int’l Ass’n of Firefighters, Local No. 3808 v. City of Kansas City*, 220 F.3d 969, 974–75 (8th Cir. 2000) (striking down a Kansas City ordinance that prohibited a public-employee supervisor from joining or engaging in activities on behalf of a union that either represented or was “affiliated directly or indirectly” with a union that represented employees under the direction of that supervisor because the restriction burdened the plaintiff’s “constitutionally protected right” to organize and associate with a union and therefore triggered elevated constitutional scrutiny, which it could not survive).

Section 105.585(2)—like the rest of HB 1413—is fatally constitutionally flawed. Public employees have a right to be free of discriminatory, speaker-based restrictions that

interfere with their rights to freely associate with a union to represent their interests. Likewise, they have a right to engage in peaceful, nondisruptive picketing to address workplace issues and other matters of public concern. Because Section 105.585(2) substantially interferes with those rights, it must be struck down as unconstitutional.

CONCLUSION

For the reasons set forth above, the judgment of the Circuit Court should be affirmed.

Respectfully submitted,

/s/ Loretta K. Haggard

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above was filed electronically under Rule 103 through Missouri Case Net, on this 16th day of December, 2019.

/s/ Loretta K. Haggard

CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies that the above brief complies with the limitations in Rule 84.06(b) in that excluding the cover, certificates of service and compliance, and signature blocks, the brief contains 5073 words.

/s/ Loretta K. Haggard