SC 98412

IN THE SUPREME COURT OF MISSOURI

MISSOURI NATIONAL EDUCATION ASSOCIATION, et al.,

Plaintiffs/Respondents,

v.

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

Defendants/Appellants.

Appeal from the Circuit Court of St. Louis County, Missouri
The Honorable Joseph Walsh III, Circuit Judge

AMICUS CURIAE BRIEF OF THE MISSOURI AFL-CIO IN SUPPORT OF PLAINTIFFS/RESPONDENTS

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INTEREST OF AMICUS AND INTRODUCTION

The Missouri AFL-CIO is a federation of labor organizations representing hundreds of thousands of Missouri's union members and their households in countless workplaces and disciplines throughout the state and files this brief amicus curiae with the consent of the parties in support of Plaintiffs/Respondents.

The Missouri AFL-CIO maintains among its objects and principles the desire to secure and protect legislation that safeguards and promotes the principles of collective bargaining, the rights of workers, farmers and consumers, and the security and welfare of all the people and to oppose legislation inimical to these objectives. The Missouri AFL-CIO is dedicated to protecting and strengthening Missouri's democratic institutions, securing full recognition and enjoyment of the rights and liberties to which Missourian's are justly entitled and to preserve and perpetuate the cherished tradition of our democracy by encouraging all workers without regard to race, creed, color, sex, age, national origin or ancestry to share equally in the full benefits of union organizations.

JURISDICTIONAL STATEMENT

The Missouri AFL-CIO agrees with the jurisdictional statement in the State of Missouri's (State's) opening brief.

FACTUAL BACKGROUND

The Missouri AFL-CIO agrees with the statement of facts in Plaintiffs/Respondents' brief.

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. COLLECTIVE BARGAINING WAS A FAMILIAR CONCEPT IN 1945 THAT HB 1413 MAKES UNRECOGNIZABLE

- Article I, Section 29 of the Missouri Constitution;
- *Independence-National Education Association v. Independence School District*, 223 S.W.3d 131 (Mo. 2007);
- Mayer, Gerald (2014). *Union membership trends in the United States* (CRS Report No. RL32553);
- Pub. L 80-101 (1947)

II. HB 1413 MISUNDERSTANDS COLLECTIVE BARGAINING

- *Am. Federation of Teachers v. Ledbetter*, 387 S.W.3d 360 at 362, 366 (Mo. banc 2012);
- National Labor Relations Act. *See*, 29 U.S.C. §157
- National Labor Relations Act. *See*, 29 U.S.C. §158
- *West Central Region Lodge #50 v. City of Grandview*, 460 S.W.3d 425, 444 (Mo.App.W.D. 2015)

III. HB 1413 MISUNDERSTANDS GOOD-FAITH NEGOTIATION

- *Am. Fed. of Teachers v. Ledbetter*, 387 S.W.3d 360, 364 (Mo. 2012);
- *Stand. Generator Serv. Co. of Missouri, Inc.*, 90 NLRB 790, 791 (N.L.R.B. 1950);
- *Independence-National Education Association v. Independence School District*, 223 S.W.3d 131 (Mo. 2007)

ARGUMENT

> In order to assert our rights, acknowledge our duties, and proclaim the principles on which our government is founded, we declare: That employees shall have the right to organize and to bargain collectively through representatives of their own choosing. Mo. Const. article I, §29.

Adopted in 1945, the Missouri Constitution proclaims, "employees shall have the right to organize and bargain collectively through representative of their own choosing." Mo. Const. art. I, §29. In *Independence-National Education Association v. Independence School District*, 223 S.W.3d 131 (Mo. 2007), the Supreme Court recognized Article I, Section 29's rights extend to all Missouri's employees; the private and public sectors alike. The Court continues to judicially frame this fundamental bargaining right Missouri's citizens granted themselves, but consistently protects its clear proclamation. As a matter of constitutional interpretation and fealty to the provision's meaning when adopted, the Court is urged to continue its practice.

I. COLLECTIVE BARGAINING WAS A FAMILIAR CONCEPT IN 1945 THAT HB 1413 MAKES UNRECOGNIZABLE

The Missouri Supreme Court interprets our Constitution according the plain and ordinary meaning of its provisions at the time the citizens adopted them. *Independence-NEA* at 137. This interpretive cannon is instructive as the general population's understanding of and familiarity with collective bargaining at art. I, §29's adoption is both greater and broader than the Missouri Legislature's understanding passing HB 1413. Thankfully Missouri's citizens took their promising and bold understanding of labor relations and bargaining and, perhaps anticipating future attacks on the same, applied it to

all Missouri workers as a matter of state constitutional law. When reviewing HB 1413 though art. I §29's lens the Court must keep in mind the provision is intended to equally protect private as well as public employees (not merely classes of public employees) to the fullest extent Missouri's citizens expected when adopting their constitution.

In 1945 the United States labor movement was amid rapid expansion. The United States Congress passed the Wagner Act in 1935 guaranteeing private sector workers in interstate commerce the right "to bargain collectively through representatives of their own choosing." 29 U.S.C. §§151, 157. (repeating, and not finding it necessary to describe, the already common understanding, and "encouraging the practice and procedure of collective bargaining").

The Wagner Act built upon prior federal statutes recognizing and protecting dignity in workplace collective actions. Notable among these federal acts acknowledging collective bargaining's importance in American society were the Clayton Act and Norris-LaGuardia Act's prior proclamations on union and employee rights. 15 U.S.C. §17 (1914); 29 U.S.C. §102 (1932) (protecting employees "in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining").

From 1935 to 1945 American workers working under collective bargaining agreements rose from approximately 8.5% of all employed workers to 27.1%; representing over 35.4% of non-agricultural workers in interstate commerce. Mayer, Gerald (2014). *Union membership trends in the United States* (CRS Report No. RL32553). Retrieved October 25, 2020 from Cornell University ILR School:

https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1176&context=key_workplace. By 1945 the men and women adopting Article I §29 as a guarantee in Missouri's Bill of Rights could not rationally read the *words* "That employees shall have the right to organize and to bargain collectively through representatives of their own choosing" in isolation from each other or the broader economy in which they lived.

In 1945 the common *phrases* "bargain collectively" and "collective bargaining" were concepts synonymous with what Missouri's citizens were living with for the ten (10) years under the federal NLRA as it existed in 1945. It is perhaps telling Missourian's did not change Art. I §29 after the NLRA's Taft-Hartley amendments in 1947 (over Missourian Harry S Truman's veto) limiting certain employee and union activities. Pub. L 80-101 (1947). What is left in our constitution is a concept of collective bargaining that is coextensive with the most expansive acknowledgement of workplace democracy available in the country.

II. HB 1413 MISUNDERSTANDS COLLECTIVE BARGAINING

Collective bargaining[1] is a meeting of two parties, the employer though its representative, and the employees through their representative, meeting as equals to develop an enforceable workplace framework. For this concept to be successful the parties

[1] *See also*, WEBSTER'S THIRD NEW INT'L DICT. 445 (3d ed. 2002): Collective Bargaining: Negotiation for the settlement of the terms of a collective agreement between an employer or group of employers on one side and a union or number of unions on the other; *broadly*: any union-management negotiation.

must be able to meet as equals and put the entire panoply of items touching and affecting the workplace and those involved therein on the table to negotiate.

When Article I, Section 29 became part of the Bill of Rights in 1945, the term "bargain collectively" was well understood to require negotiations over working conditions broadly defined—including such issues as promotion, assignment, discharge, schedule, work rules, and other similar topics. *See*, e.g., *NLRB v. Westinghouse Air Brake Co.*, 120 F.2d 1004, 1006 (3d Cir. 1941); *NLRB v. Reed & Prince Mfg. Co.*, 118 F.2d 874, 881 (1st Cir. 1941). An Employer refusing to "bargain collectively with the representatives of [its] employees" was itself a violation of employee's rights to "bargain collectively" under the National Labor Relations Act. *See*, 29 U.S.C. §§157 and 158(a)(5). Likewise, as this Court acknowledges, Missouri's citizens understood that such collective bargaining was to be conducted with an ongoing duty of "good faith" requiring a "present intention to reach an agreement" over the subjects of bargaining and an obligation to "match . . . proposals, if unacceptable, with counter-proposals." *Am. Federation of Teachers v. Ledbetter*, 387 S.W.3d 360 at 362, 366 (Mo.banc 2012). The process required, and requires, a give and take with every term and condition of employment, and compensation of whatever kind. Collective bargaining therefore is more than just about wages, it concerns the entirety and affects of working life.

In 1945 Missouri's citizens recognized that when acting as employees bargaining collectively with an employer, all aspects of wages, hours, terms, and conditions of employment were on the bargaining table for discussion. Legitimate workplace concerns, such as what skills job classifications required, how promotions were determined, what

actions gave rise to discipline and the severity of such discipline all affected (and still affect) employees during working hours, together with their ability to plan for and maintain their jobs, and therefore their financial security. So too was the ability to address grievances related to the same. *See*, *Locasio v. Ford Motor Co.*, 203 S.W.2d 518 (Mo. App.1947) (discussing without novelty both seniority and grievance procedures recognized in a collective bargaining agreement in Missouri in 1941).

On the bargaining table in 1945, as today, is how, when, and under what conditions deductions of any-kind are made from a bargaining unit member's paycheck as it is a question directly affecting employee's wages and manner of payment. Since before 1940 collectively bargaining for how and in what manner dues deductions from employees' paychecks can be made and processed. *See*, *Sanford et al v. Boston Edison Co.*, 64 N.E.2d 631, 635 (Mass. 1946):

> That a check-off is an appropriate subject matter to be covered by a collective bargaining agreement is plainly indicated by *National Labor Relations Board v. Reed & Prince Mfg. Co.*, 1 Cir., 118 F.2d 874, 883 (cert denied, 61 S.Ct. 1119 (1941)); *Utah Copper Co. v. National Labor Relations Board*, 10 Cir., 139 F.2d 788, 791, and *National Labor Relations Board v. Baltimore Transit Co.*, 4 Cir., 140 F.2d 51, 58 (cert denied, 64 S.Ct. 847 (1944)). *See*, *Borderland Coal Corp. v. International Organization of United Mine Workers of America*, D.C., 275 F. 871; *Local 60 of Industrial Union of Marine & Shipbuilding Workers of America v. Welin Davit & Boat Corp.*, 133 N.J.Eq. 551, 33 A.2d 708; *Greenwald v. Chiarella*, 185 Misc. 762, 57 N.Y.S.2d 765; *Pacific Mills v. Textile Workers' Union of America, Local No. 254*, 197 S.C. 330, 15 S.E.2d 134, 135 A.L.R. 497.

As much as the right to bargain check-off affects bargaining, its use similarly affects the bargaining unit's "right to organize" itself.

Similarly, many collective bargaining agreements prior to 1945 and continuing through 2018 as evidence by those agreement in evidence, contain "management rights" clauses. These clauses regularly grant the employer certain discretions over hiring, discipline, and promotion like many of the rights HB 1413 mandates public employers cannot negotiate away. The difference is that current management rights clauses are negotiated, not imposed.

From an employer's prospective certain unilateral decision making is understandably attractive to maintain, and unions are presumably willing to grant management certain unencumbered rights. Such a grant to management is not unilateral; it is part of a bargain for items the covered bargaining unit find equally important. This distinction is important and supported in Missourian's understanding of collective bargaining when they adopted article I, §29.

In 1941 federal courts, with the United States Supreme Court denying certiorari, considered reserving such management rights as non-negotiable as a refusal to bargain collectively.

> The Board's position is that an employer who insists upon reserving the right to act unilaterally and of its own will alone upon matters involving legitimate collective bargaining and denies the employees any contractual provision for opportunity to bargain collectively with regard thereto thereby refuses to bargain collectively within the meaning of the Act. With this reasoning we agree. Petitioner's default in this respect did not lie in its refusal to cover the subject matter by contract but in its refusal to preserve the right of collective bargaining with reference thereto. *Singer Mfg. Co. v. N.L.R.B.*, 119 F.2d 131, 136 (7th Cir. 1941), cert. denied 313 U.S. 595 June 2, 1941, reh'g denied, Oct. 13, 1941.

However, HB 1413's commandments to all Missouri public employers to take certain common management rights off the bargaining table is anathema to the concept of collective bargaining as it existed in 1945 in the private sector (which the Missouri Constitution also covers if either the NLRA and/or pre-emption falls), and as it exists today under the Missouri Constitution today for Missouri's public and private sector workers. Rather than bargain these provisions to quickly reach a binding agreement HB 1413 explicitly subjects bargaining to six categories of "following limitations." HB 1413 page 14. §105.585, ln. 3-4.

In a similar attempt to take management prerogatives outside the scope of collective bargaining, Missouri courts warned public employers such unilateral demands are not enforceable. *West Central Region Lodge #50 v. City of Grandview*, 460 S.W.3d 425, 444 (Mo.App.W.D. 2015) (Reh'g and/or transfer denied). *West Central Region* thereby serves as an important recognition that public employers must fairly and freely bargain with their employees in the same manner as private sector employers.

Just as the National Labor Relations Board and this Court would find a private sector employer does not bargain in good faith if and when it dictates what can be negotiated and how, the same applies to the public sector. Both public and private sector employers are free to "show their hand" by setting guidelines (or ordinances) but the same will not be enforceable as bulwarks against employees' rights to bargain collectively. *Id*.

Further, while the court in *West Central Region* acknowledged the legislature, not cities, may establish a "collective bargaining framework" it cautioned employees bargaining collectively through their union are free to challenge a framework that violates

a public employer's duty to negotiate in good faith as recognized in *Ledbetter.* 387 S.W.3d at 367. *Id*. at 445.

Taking legitimate matters off the bargaining table as "non-negotiable" both dictates a result at bargaining and limits bargaining in every literal and meaningful way. Neither employer's nor employee's can "bargain collectively" as Missourians contemplated that phrase in 1945 if the public employer is legally prohibited from negotiating certain topics, and where the public employer has already achieved a desired result through legislative mandate.

III. HB 1413 MISUNDERSTANDS GOOD-FAITH

HB 1413 frustrates collective bargaining by explicitly not requiring a party to a resulting contract be at the table in the first instance. With the exception of public safety labor unions, HB 1413 does not require an employer appoint a negotiator with *any* authority to negotiate *any* provision on a public employer's behalf.

HB 1413 directs non-public safety labor unions to bargain as follows:

(a) Collect authorizations from bargaining unit members authorizing each specific demand made at the bargaining table; (HB 1413 pg. 5.; §105.533(5)(j), ln. 29);

(b) Collect authorizations from bargaining unit members authorizing and pre-accepting each contract term to be presented to the public employer; (HB 1413 pg. 5.; §105.533(5)(k), ln. 30); and,

(c) Present a fully pre-ratified complete proposed collective bargaining agreement to the public employer, ratified by "a majority of its members"[2]; (HB 1413 pg. 13; §105.580.5, ln. 20).

From there, the only purpose the public employer's "negotiator" legally satisfies is to courier the union's full offer to the public body for it to:

(a) Fully accept;

(b) Fully reject, but make no counteroffer;

(c) Partially reject, keep what portions it likes as binding upon the bargaining unit, and without counter, demand the union amend its offer on the rejected portions;

[2] In this instance, as well as in the original certification provisions in HB 1413 the demands requiring "a majority of its members" ratify the agreement and a "majority of public employees in a bargaining unit" vote in favor of representation themselves violate art. I, § 29. As both requirements implicitly count any non-vote as a "no" vote these provisions result in the public employer choosing (or not choosing) employees' representative and organization for them. More than assuming a non-vote is a "no" vote for either ratification or representation, by process of law these provisions directly coerce an employee to have made an affirmative choice. Any coercion violates employees' rights and is not tolerated under Missouri's Bill of Rights. *See*, *Quinn v. Buchanan*, 298 S.W.2d 413, 418 (Mo.banc 1957) overruled on other grounds by *Eastern Missouri Coalition of Police, Fraternal Order of Police, Lodge 15 v. City of Chesterfield*, Mo.banc 2012).

(d) Partially reject, keep what portions it likes as binding upon the bargaining unit, and without counter, impose its own provisions to replace the rejected portions;

(e) Partially reject, keep what portions it likes as binding upon the bargaining unit, and consider all bargaining on the rejected portions over by stating "no provision covering the topic in question shall be adopted." (HB 1413 pg. 13-14; §105.580.5, ln. 20-26).

Further, unlike nearly all other public contracts wherein proposals and documents related to negotiations are closed until the contract is executed or all proposals are rejected (§610.021(12), RSMo 2013) all collective bargaining proposals are open for scrutiny and public comment. HB 1413 pg. 14; §105.583.1, ln. 4. Despite this Court's prior pronouncement that "If public employers were not required to negotiate in good faith, they could act with the intent to thwart collective bargaining so as never to reach an agreement—frustrating the very purpose of bargaining and invalidating the right." *Am. Fed. of Teachers v. Ledbetter*, 387 S.W.3d 360, 364 (Mo. 2012) HB 1413's above provisions does just that.

Rather than a robust back and forth negotiation, HB 1413's own text codifies bad faith bargaining by explicitly not allowing the employer to have an agent with bargaining authority at the table. In 1942 the National Labor Relations Board was already declaring an employer refuses to "bargain collectively" when the employer's agent at the bargaining table does not have sufficient authority to make bargaining meaningful.

In *V-O Milling Company* the employer's designated negotiator did not have authority to vary the employer's policies and was required to report back to the employer before any commitment could be made on any proposal. *V-O Milling Company*, 43 NLRB

p. 348, 368 (1942). Simply, the Board held that if bargaining is frustrated because an employer's agent has so little authority to make bargaining meaningful, the employer is, per-se, bargaining in bad faith. *Id.* This holding expanded and repeated throughout the 1940's leading to a Missouri labor organization's eventual 1949 charge against one of its bargaining unit's employers.

Standard General Services Co. of Missouri Inc., is directly on point. In that case, starting in January 1949 the employer's attorney began to negotiate with a United Auto Workers bargaining committee. Though the employer's agent attorney would meet the union, his role was only to repeat the company's position. When the union made proposals, or counter-proposals, the attorney had to take each back to his principal for direction. The NLRB instinctively realized, as many people familiar with collective bargaining in the 1940s did, that an employer's "failure to invest sufficient authority in its sole negotiator, which tended unduly to protract the negotiations" frustrated and denied employees their right to bargain collectively with an employer acting in good faith. *Stand. Generator Serv. Co. of Missouri, Inc.*, 90 NLRB 790, 791 (N.L.R.B. 1950) citing, *Brown and Root, Inc.,* 86 NLRB 520 (1949); *Webster Manufacturing, Inc.,* 27 NLRB 1338 (1940); *V-O Milling Company,* 43 NLRB 348 (1942); *Republican Publishing Company,* 73 NLRB 1085, 1090 (1947).

HB 1413's provisions frustrate bargaining more than simply not granting an employer's negotiator *enough* authority to meaningfully discuss wages, hours, terms and conditions of employment. Rather, HB 1413 explicitly takes many terms and conditions of employment off the table completely and demands *every public employer* in Missouri (with

the narrow exception of bargaining with public safety unions) not have *any* authority to meaningfully discuss *any* collective bargaining item and *impose* its own terms on the bargaining unit. Ignoring a constitutional right to bargain collectively, the trial court correctly found HB 1413 enshrines band faith into the law. This Court would not find the right to collectively bargain permits HB 1413's structure an employer demands in the private sector (also protected in Mo. Const. art. I, § 29) and the analysis does not change when the right to bargain collectively applies to the public sector. The Missouri Constitution protects all Missouri's employees irrespective of and employee's employer. *Independence-National Education Association v. Independence School District*, 223 S.W.3d 131 (Mo. 2007).

CONCLUSION

HB 1413 transforms the meaning of collective bargaining to a point it would be unrecognizable to the women and men who adopted article I section 29 into Missouri's Constitution. This Court should affirm the judgment of the Trial Court in its entirety.

Respectfully submitted,

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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 26th day of October, 2020.

CERTIFICATE 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 3,822 words.

James P. Faul, MoBar 58799