No. SC99179

In the
Supreme Court of Missouri

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL CIO, COUNCIL 61; COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, LOCAL 6355; SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1,

Respondents,

v.

STATE OF MISSOURI; MISSOURI OFFICE OF ADMINISTRATION; MISSOURI PERSONNEL ADVISORY BOARD; MISSOURI DEPARTMENT OF SOCIAL SERVICES; MISSOURI DEPARTMENT OF HEALTH AND SENIOR SERVICES; MISSOURI DEPARTMENT OF AGRICULTURE; MISSOURI DEPARTMENT OF CORRECTIONS; MISSOURI DEPARTMENT OF MENTAL HEALTH; MISSOURI DEPARTMENT OF NATURAL RESOURCES; MISSOURI DEPARTMENT OF REVENUE; MISSOURI STATE HIGHWAY PATROL; MISSOURI VETERANS COMMISSION; ADJUTANT GENERAL,

Appellants.

Appeal from the Circuit Court of Cole County
The Honorable Jon E. Beetem

REPLY BRIEF

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INTRODUCTION

The Unions fail to offer any convincing argument for affirmance. They do not discuss the State's historical arguments. They do not want this Court to consider what current, longstanding statutes might become unconstitutional, so they suggest pushing off such determinations to another day. Instead, they insist that this Court interpret article I, section 29 without consideration of the difficulties this will wreak within the State, without consideration of how State business has been done since 1945, without consideration of how the Legislature has historically had the power to limit agency directors' discretion, and without consideration of how all these changes will ultimately affect Missouri citizens.

If article I, section 29 is as broad as the Unions say, the State cannot make any changes to the employment conditions of union-represented employees without first bargaining about those changes with the Unions. What changes does this include, on their view? Every mandatory-bargaining subject applicable to private employers, including but not limited to: wages, overtime, seniority, pensions and retirement plans, holidays, sick days, hours, work schedules, work from home, grievance procedure, workloads, promotions, transfers, layoff and recall, discipline and discharge, work rules, work assignments, training, parking, legal services, union activity on employer property, jury duty pay and leave, bereavement pay and leave, on-call pay, severance pay, health insurance, leaves of absence, tuition reimbursement, rest and lunch breaks, social events, bargaining unit work, subcontracting, strikes, lockouts, dues deductions, outside employment, and dental and vision plans. 10 Emp. Coord. Labor Relations § 34:7 (updated May 2022) (A1815) (checklist of mandatory bargaining subjects). If the Unions have their

way here, then the General Assembly will no longer have a say in any of these things. Neither will the Personnel Advisory Board (PAB). Neither entity will even be able to *increase* State-employee benefits without bargaining first with the Unions. And the agencies themselves will face a logjam. Article I, section 29 does not impose this level of micro-management on state government.

Imagine what would happen if these rules existed during another pandemic. Suppose that during the pandemic's early days, cross-agency groups of State employees put their normal work on the backburner and worked together to buy ventilators and PPE, set up testing, and support small businesses. Under the Union's (and circuit court's) interpretation of article I, section 29, absent a contractual provision allowing a change of work assignments during emergencies, union-represented State employees could not be asked to change their work assignments without first bargaining to impasse with the Unions.

Consider the recent 5.5% raise given to all State employees in response to inflation and the typical cost-of-living adjustments given yearly to State employees. Missouri House Bill 3014 (2022) (A1830). Those pay increases could not be given to union-represented State employees. Of course, if the State passed a bill that covered everyone but Union-represented employees, the Unions no doubt would argue that this is illegal and retaliatory. *See SEIU, Local 2000 v. State*, 214 S.W.3d 368, 373-74 (Mo. App. W.D. 2007). The result is that many State employees will live in a world where they will never get a raise unless the Unions bargain for a raise for them.

As another example, the Governor often tells State employees that they may take off Christmas Eve or the day after Thanksgiving. *See, e.g.*, Executive Order 21-11 (A1828). Unless this is included in the CBAs, this would violate the right to bargain collectively. The same may be true for increases or decreases in State-employee retirement or health insurance benefits. § 103.110 (healthcare); § 104.374 (retirement).

The Unions' proposed interpretation of article I, section 29 entails that neither the Legislature nor the PAB may limit department-director discretion with respect to employer-employee relations or employee benefits. This would cripple article IV, section 19 without a clear statement from article I, section 29 and cripple the General Assembly's historic power. For more than 70 years, since the very year of article I, section 29's ratification, the General Assembly has limited department directors' discretion in dismissing employees. SB 1007's limitation is no different. Under the Unions' interpretation of article I, section 29, the General Assembly could no longer limit department-director discretion regarding employee removal in any way—not the way it did under the Merit System, and not the way it did under SB 1007. And the PAB could no longer limit the benefits to which State agencies may agree, as it has done for more than 75 years.[1]

In the end, if the Unions' view is adopted, the definition of "bargain collectively" in the Missouri Constitution will become unmoored—unmoored by the text of article I, section 29, unmoored by the text of the NLRA, unmoored by the NLRB's rulings (which,

[1] *See infra* Part II.3.C.ii.

by the way, may change[2]), and unmoored by the Supreme Court's review of the NLRB's rulings. It will require the Missouri courts to treat the sparse language of article I, section 29 as a comprehensive labor-relations act, contrary to its plain text and manifest purpose.

ARGUMENT

I. SB 1007 (Point I)

In short, the term "shall" should be interpreted as an at-will mandate for all State employees because it is a legal term of art, it is not a legal floor or legal default, reading it otherwise is superfluous, and it does not conflict with HB 1413. The Unions challenge these reasons, but their arguments fail.

First, the Unions propose a convenient way to avoid the hard question of whether SB 1007 violated article I, section 29: affirm the circuit court, and hold that SB 1007 does not require all State employees to be employed at-will. This is incorrect on the law, and it does not avoid the hard question. If this Court determines that SB 1007 mandates at-will employment, then it must determine whether SB 1007 violates article I, section 29. But if this Court determines that SB 1007 does not mandate at-will employment, it still must decide whether the State's *actions* violate article I, section 29.

A. Response Brief Issues

The Unions challenge the meaning of section 36.025's "at-will" mandate in several ways, to no avail.

[2]*First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 675-76 (1981).

1. The fact that SB 1007 did not amend Chapter 105 does not mean that SB 1007 has nothing to do with Unions.

The Unions claim that chapter 36 does not address unions, chapter 105 is the only chapter that does, and therefore SB 1007 cannot affect unions' rights. Resp.[3] pp.41-44. This claim has no basis in these statutes' text or history.

For instance, chapter 36 addresses unions in section 36.510, where it states that:

> [T]he director [of the division of personnel in OA] may perform the following functions in some or all agencies of state government: ... (6) Establish a direct central labor relations function for the state which shall **coordinate labor relation activities in individual state agencies, including participation in negotiations and approval of agreements relating to uniform wages, benefits and those aspects of employment which shall have fiscal impact on the state**[.]"

§§ 36.510.1-.1(6), 36.020(6) (defining "director"). Thus, union bargaining is not *exclusive* to chapter 105. The case *SEIU Local*, 214 S.W.3d at 373-74, also does not demonstrate that chapter 36 is not about unions or that only chapter 105 is—it does not even mention chapter 36. Resp. p.43.

2. Reading section 36.025 as an at-will mandate that also applies to unions does not conflict with section 36.510.

The Unions claim that section 36.510's text requires this Court to read section 36.025 as a default because section 36.510.1(6) contains mandatory union bargaining subjects, some of which could not be bargained for if section 36.025 was a mandate. Resp. p.44. The Unions argue that section 36.510.1(6) requires OA's director of personnel ("Director") to be able to bargain for all "those aspects of employment which shall have

[3] "Resp." refers to "Respondents' Brief," and "App." refers to "Appellants' Brief."

fiscal impact on the state," but that under the State's reading of section 36.025, the Director cannot do so. *Id.* This is incorrect.

Section 36.510 does not set forth mandatory bargaining topics. The statute allows the Director to be involved when employment agreements will have a fiscal impact on the state (but not otherwise). It does not require the State agencies or the Director to be able to bargain for anything listed. Thus, the State's reading of section 36.025 does not conflict with section 36.510.1(6).

3. SB 1007 may affect collective bargaining even if it does not expressly mention it.

The Unions claim that, if SB 1007 intended to divest employees of the right to bargain collectively, it would have had to do so expressly, citing *Zeller v. Scafe*, 498 S.W.3d 846, 853 (Mo. App. W.D. 2016). Resp. pp.44-45. Contrary to the Unions' contentions, the statement that "all employees of the state shall be employed at-will" is not "legislative silence." Nor is *Zeller* on point—it addresses when a statute implicitly abrogates case law, not the effect of statutory amendments on a statute. 498 S.W.3d at 853. Nor does the State's reading of section 36.025 "divest" employees of the right to bargain collectively.[4] SB 1007 only limits agency discretion in a way expressly permitted by article IV, section 19, as demonstrated by the Merit System's 70+ years of limitations on director discretion regarding employee termination that went beyond what article IV, section 19 required. App. p.63; 1945 Mo. Laws 1177, § 37 (A1819) (permitting employee dismissal

[4]The Unions claim they cannot bargain over any grievance procedures, but that is not true. The grievance procedures barred by section 36.025 relate to seniority, for-cause protections, and selection, not other CBA disputes.

only for-cause); 1973 Mo. Laws 521-22 (A1823-24) (same); 1977 Mo. Laws 152 (A1825) (same); § 36.380 (2010) (A1826) (same); § 36.380 (2018) (A1827) (same).

4. SB 1007 is not a default rule.

The Unions claim that at-will employment is, if not a floor, then a default because English common law presumed an agreement to one-year employment when there was no contract between employer and employee. Resp. pp.45-46 & n.11. The Unions cite no case showing that Missouri's default is a 1-year contract. Missouri's default is at-will employment. *Cole v. Conserv. Comm'n*, 884 S.W.2d 18, 20 (Mo. App. W.D. 1994). At-will employment cannot be a statutory default because it is already the default.

Relatedly, the Unions claim that section 36.025 had to state that all employees must be employed at-will just to get rid of the old Merit System, but that the new language does not prevent the State from bargaining greater protections. Resp. p.46. Not so. If the General Assembly wanted to exempt unionized employees, it could have easily done so by stating that employees "shall be at will *unless those employees bargain for additional protections*" or expressly excluding them, as it did other groups. § 36.025.

Finally, the Unions wrongly claim that "shall" does not mean "must" when a statute governs agency action unless there is a penalty for the agency not abiding by the rule, citing *Frye v. Levy*, 440 S.W.3d 405, 410-11 (Mo. banc 2014). Resp. pp.46-47. *Frye* is inapposite—it discusses two ways statutes direct State agencies: (1) using "directory" rules, which direct agency action, and (2) using "mandatory" rules, which direct agency action and "prescribe the result that will follow" if the agency fails to comply. 440 S.W.3d at 409. *Frye* held that when a statute created "directory" rules, a court cannot create its

own sanctions for administrative noncompliance. *Id*. at 406. *Frye* never says that when a statute uses the word "shall" in directing agency action, it really means "may."

5. HB 1413 does not require reading "shall" in section 36.025 as "may."

Preservation: This Court may consider whether HB 1413 affects the reading of "shall" in section 36.025 because the State expressly argued that "shall" meant "must," not "may" below. D308, pp.33-34; D309, p.10. Even if the issue was not preserved, the State may respond to it because the Unions raise it in their Response Brief. *See State ex rel. AJKJ, Inc. v. Hellmann*, 574 S.W.3d 239, 244 n.6 (Mo. banc 2019).

The Unions incorrectly claim that reading section 36.025 as an at-will mandate "hopelessly conflict[s]" with HB 1413. Resp. p.48; App. pp.48-51. Nor does *Missouri National Education Association v. Missouri Department of Labor and Industrial Relations* change the analysis—it addressed HB 1413, not SB 1007. 623 S.W.3d 585 (Mo. banc 2021). Unlike HB 1413, which *expressly* exempted public safety labor organizations from that bill's changes, *id*. at 596, section 36.025's express exemptions do not include unions. Thus, this Court should hold that section 36.025 contains an at-will mandate.

II. Article I, Section 29 (Points II, V)

However this Court rules on the meaning of section 36.025, it must decide the meaning of article I, section 29. If SB 1007 contains an at-will mandate for all State employees, this Court must decide whether SB 1007 violates article I, section 29. If SB 1007 does not contain an at-will mandate, this Court must decide whether the State's actions violated article I, section 29.

A. Article I, section 29 does not prevent the General Assembly from passing laws that limit the State's ability to agree to certain terms in a CBA.

SB 1007 does not violate article I, section 29's right to bargain collectively. App. pp.51-80. Reading article I, section 29 otherwise—as requiring the State to be able to agree to any term relating to mandatory bargaining subjects—incorporates the NLRA where it makes no sense to do so. The NLRA (and the NLRB, which interprets the NLRA with great discretion) applies to private employers, not government employers. 29 U.S.C. §§ 152(2), 160. It is difficult to believe that article I, section 29, which addresses both private and public employers, intended to apply the NLRA/NLRB rules about private employers to public ones, especially because government employers have different interests at stake.

1. No Missouri Supreme Court case addresses whether article I, section 29 prevents the General Assembly from passing a law that limits the State's ability to agree to certain CBA terms.

The Unions claim that the holdings in (1) *Ledbetter*,[5] (2) *Independence*,[6] and (3) *Chesterfield*[7] govern whether SB 1007 violates article I, section 29. Resp. pp.69-74. But none of these cases addresses whether a statute violates article I, section 29 by limiting the types of terms to which the Department may agree.

[5]387 S.W.3d 360 (Mo. banc 2012).
[6]223 S.W.3d 131 (Mo. banc 2007).
[7]386 S.W.3d 755 (Mo. banc 2012).

2. History is a powerful tool for understanding how article I, section 29 interacts with article IV, section 19.

a. Article IV, section 19 is context to understand article I, section 29.

Preservation: Faced with an argument they cannot contradict, the Unions mischaracterize the State's argument about how article IV, section 19 informs the interpretation of article I, section 29 and claim that the State cannot make such an argument on appeal.[8] Resp. p.52. The State preserved its argument that the right to "bargain collectively" simply means the right to bargain with one's employer in good faith. D308, p.37. This Court should review article IV, section 19 as informing the meaning of article I, section 29 because the meaning of article I, section 29 is preserved for appeal.

Land Clearance does not compel the opposite result. 805 S.W.2d 173, 175 (Mo. banc 1991). Unlike the appellant in *Land Clearance*, the State's argument does not assert that a statute is unconstitutional for the first time on appeal. *Id*. *Land Clearance* is also inapplicable because, in that case, the new issue raised on appeal encompassed a fact issue that the trial court needed to determine in the first instance. *Id*. at 175-76. Not so here. The case *State v. Davis*, 348 S.W.3d 768, 769-70 (Mo. banc 2011), also is inapplicable because in *Davis* the appellant raised a new *issue* on appeal—whether article I, section 13 applied to criminal statutes—when all it raised below was whether the statute at issue (section 566.150) was retrospective. Here, the same issue was raised below and on appeal—the interpretation of article I, section 29's right to bargain collectively.

[8]The State does not claim that article IV, section 19 "trumps" article I, section 29. Resp. p.52.

Reading these cases to mean that the Court cannot consider contextual clues when interpreting statutes and the Missouri Constitution over-reads them. The *allegation of error* is the interpretation of article I, section 29—the same below as here. This Court is the Court of last resort on issues of Missouri constitutional law. It should not read its own precedent to mean it must be willfully blind to relevant statutory and constitutional text. This Court could have noticed article IV, section 19 by itself. Amici could have brought it up as context and to demonstrate consequences. This Court should consider article IV, section 19 as context.

b. 1945 Constitutional Convention

The Unions claim that the 1945 Constitutional Convention's minutes show that article I, section 29 was intended to apply to the State as an employer. Resp. p.55. First, this Court does not consider the Convention's minutes when determining the Constitution's meaning. *Independence*, 223 S.W.3d at 137. Second, the Unions misstate the question. The State is not challenging public employees' right to bargain collectively—it is contesting that right's scope.

If this Court decides that the minutes are relevant, they support the State's position that article I, section 29 *does not require* governments to engage with their employees exactly as private employers do. At the Convention, Mr. Wood, a supporter of article I, section 29, clarified that article I, section 29 "does not require City Governments or municipalities to deal in collective bargaining with their employees in the same manner as is required by private employers" because "[t]he City Council, who enacts the ordinances is the bargaining agent in the final analysis." (A1099). As an example, he noted that

"[w]ages of state employees cannot be lowered or raised without enactment of legislation or the power and authority granted to any state department, administrative department, by the Legislature." *Id*. The same is true for the State. The legislature enacts the statutes and so is the bargaining agent in the final analysis. Thus, even supporters of article I, section 29 agreed that it does not incorporate the NLRA.

3. Scrutiny level.

When a party alleges that a statute violates the Constitution, this Court must determine whether to apply no scrutiny, rational-basis scrutiny, or strict scrutiny to the statute.

a. No scrutiny applies because SB 1007 does not infringe a constitutional right.

Preservation: The Unions claim that the State did not preserve its argument that SB 1007 is subject to no scrutiny. Resp. p.78 n.18. The State's argument that SB 1007 is subject to no scrutiny is based on its claim that SB 1007 does not infringe a constitutional right. The State argued that below. D308, p.33 ("SB 1007 does not infringe on public employees' constitutional right to 'bargain collectively through representatives of their own choosing' as provided by Article I, § 29—it merely provides context to the right where no context previously existed."). On appeal, the State made this argument more explicit by citing cases where this Court applied no scrutiny when the statute did not burden a constitutional right. This Court should apply no scrutiny to SB 1007.

b. In the alternative, rational-basis scrutiny applies, and SB 1007 passes.

When a court determines that a statute substantially burdens a fundamental right, it applies strict scrutiny. Here, strict scrutiny does not apply because either the right to bargain collectively is not "fundamental," or SB 1007 does not substantially burden it. The Unions do not appear to challenge that, if rational-basis scrutiny applies, SB 1007 does not violate article I, section 29.

i. Not a Fundamental Right.

The Union states that, under *Weinschenk v. State*, 203 S.W.3d 201 (Mo. banc 2006), rights are fundamental if explicitly guaranteed by the constitution. Resp. p.76. Not so. The better read of *Weinschenk* is that, if the right to vote is fundamental in the federal system, where voting qualifications are left to legislative determination, it is even more fundamental in Missouri, where voting qualifications are found in the Constitution. 203 S.W.3d at 210-11. Further, *Weinschenk* did not overrule *State ex rel. Nixon v. Powell*, 167 S.W.3d 702, 705 (Mo. banc 2005), which this Court issued only the year before, and whose holding this Court reiterated in *Committee for Educational Equality v. State*, 294 S.W.3d 477, 490-91 (Mo. banc 2009). Both *Powell* and *Educational Equality* held that "fundamental" rights are those "deeply rooted in the nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Nixon*, 167 S.W.3d at 705; *Educational Equality*, 294 S.W.3d at 490. Voting fits that definition; collective bargaining does not, under both U.S. and

Missouri constitutions. *Sweeney v. Pence*, 767 F.3d 654, 669 (7th Cir. 2014) ("Collective bargaining is not a fundamental right . . . .").

Neither *Chesterfield* nor *Kuehner v. Kander*, 442 S.W.3d 224, 230 (Mo. App. W.D. 2014), demand the opposite. Resp. p.76. *Chesterfield* quotes old treatises from 1937 and 1868 and states that those sources recognize that "a Bill of Rights is generally a list of fundamental rights." 386 S.W.3d at 761. But *Chesterfield* does not claim that every right in *Missouri's* Bill of Rights is fundamental or address what makes a right fundamental. *Kuehner* refers to article I, section 29 as a fundamental right only in passing—it is not necessary to the case's outcome or at issue in the case. Thus, the right to bargain collectively is not fundamental, meaning rational-basis scrutiny applies. *Educational Equality*, 294 S.W.3d at 490-91.

ii. Not a Severe Restriction or Heavy Burden.

The Union claims that SB 1007 severely restrict or heavily burden article I, section 29 because State employees are carved out of article I, section 29's right to bargain collectively. Resp. pp.53-55. Not so. Article I, section 29 applies equally to public and private employees. Similarly, the Unions argue that article I, section 29 is severely restricted or heavily burdened because, if the State is unable to agree to for-cause, seniority, and related grievance protections, there is nothing left to bargain about. Resp. pp.65-66. That is wrong too, as demonstrated by their own CBAs, which include terms like: union activity and workplace access, release time for union activities, bulletin boards, information provided to the union, union meetings, union orientation, notice to new employees, successor labor contracts, union stewards and officers, deductions, card

availability, workforce diversity committees, certain grievances, staffing, overtime, scheduling, standby time, on-call time, breaks, scheduling practices, flex time, job-opportunity announcements, training, temporary assignments, performance appraisals, personnel records, health, safety, uniforms, equipment, educational leave, service-connected injuries or illnesses, contracting out, and tuition reimbursement. Jt. Ex. 41 (A0689-0803).

Further, article I, section 29 is not severely restricted or heavily burdened because it does not require that the State be able to agree to terms that contradict State law, as the CBAs themselves recognize. App. pp.85-88.

c. If strict scrutiny applies, SB 1007 satisfies it.

i. A statute does not fail strict scrutiny simply because it has no findings and no record.

The Unions wrongly claim that a statute fails strict scrutiny whenever there are no legislative findings and no record, citing *Webster*, 968 F.2d 684, 689 (8th Cir. 1992). Resp. p.80. *Webster* says that because another statute "failed to articulate the type of violence that it deem[ed] harmful to minors," it was "virtually impossible to determine if the statute [was] narrowly drawn to regulate only that expression." 968 F.2d at 689. The vagueness issue in *Webster* does not exist here. *Id*. ("As drawn the statute covers all types of violence."). In this case, the statute mandates all employees be at-will. The General Assembly believed that removing limitations on management's ability to hire/fire/promote was of paramount importance. Thus, this Court should have no difficulty concluding that SB 1007 "is narrowly drawn to regulate only" limits on management's ability to

hire/fire/promote employees. *See id*. The exceptions to SB 1007 are those required by the Constitution or federal law. Mo. Const. art. IV, section 19; §§ 36.025, 36.030. Thus, SB 1007 satisfies strict scrutiny.

ii. The fact that the State's experts did not offer detailed opinions about collective bargaining does not mean their testimony is irrelevant.

The Unions second-guess the circuit court's decision to permit the State's experts to testify by claiming that their testimony was irrelevant to whether the State has a compelling interest in at-will employment and whether SB 1007 was narrowly tailored to address that compelling interest. Resp. p.80. By doing so, the Unions are re-litigating their motion to exclude expert testimony, which the circuit court rightly denied. *See* D271, pp.11, 18; D298. This argument has never had merit. The Unions cite no case suggesting experts must opine on a more specific topic when their broader testimony applies to the specific topic. Here, the experts' testimony unequivocally concludes that for-cause protections and other limitations on management's ability to hire/fire/promote decreases efficiency and public confidence in government. App. pp.76-80.

The Unions also argue that because the State's experts did not know SB 1007's intent for collective bargaining, this Court cannot rely on their testimony to determine compelling interest or narrow tailoring. Resp. p.80. First, one cannot fault the State's experts for not knowing the General Assembly's intent as it is made up of many people. Second, if intent can be determined, it is determined by statutory text, the meaning of which is a legal conclusion on which an expert could not opine. *Gross v. Parson*, 624 S.W.3d 877, 884-85 (Mo. banc 2021); *J.J.'s Bar & Grill, Inc. v. TWC Midwest, LLC*, 539 S.W.3d

849, 874 (Mo. App. W.D. 2017). This argument is irrelevant to compelling interest and narrow tailoring.

The Unions' citation to *Hillsborough*, 522 So.2d 358, 362 (Fla. 1988), clarifies why this Court should not determine that SB 1007 violates article I, section 29. *Hillsborough* applied strict scrutiny to and held unconstitutional a law prohibiting a public employer from implementing CBAs that conflicted with "applicable civil service board rules." 522 So.2d at 363. The Florida civil service board "began as a means of maintaining uniformity in wages, hours, and terms and conditions of employment among all public employees within the board's jurisdiction [and] . . . insur[ing] that some public employees did not receive more or less benefits than other public employees for doing essentially the same job." *Id*. at 361. The Florida civil service board is like Missouri's PAB, which since 1945 has been given enumerated powers by the General Assembly. 1945 Mo. Laws 1158, 1160, 1164, 1175 (A0130-41). The PAB was (and is) charged with issuing regulations governing annual, sick, and special leaves of absence for State-agency employees. *Id*. at 1175 (A0138); § 36.350. The PAB also prescribes procedures for "uniform classification and pay." § 36.070.2. If this Court reads article I, section 29 as the Florida Supreme Court reads its own right to bargain collectively, the 70-year-old statute directing the PAB to regulate certain conditions of employment also will violate article I, section 29.

The Unions claim that efficiency is not a compelling interest, citing *I.N.S. v. Chadha*, 462 U.S. 919 (1983). Resp. p.81. This is incorrect. *Chadha* addresses efficiency in the context of whether a federal statute could constitutionally allow one House of Congress to invalidate an Executive-Branch decision to allow a particular deportable alien

to remain in the United States. 462 U.S. at 923. *Chadha* does not address whether efficiency is a basis for surviving strict scrutiny in a fundamental-rights context, especially not when the government is the employer. Rather, *Branti v. Finkel*, 445 U.S. 507, 517 (1980), controls and holds that maintaining governmental efficiency may trump even State employees' fundamental rights.

The Unions also claim that *Williams-Yulee v. Barr*, 575 U.S. 433 (2015), is distinguishable from this case because it is about judicial accountability, not about executive-agency accountability. No doubt, *Williams-Yulee* is about the judiciary, but its principles apply at least equally here. App. pp.76-80 (describing how limitations on managers negatively affect public perception of public servants and the importance of public confidence in administrative agencies, which Missourians pay for, but do not vote for). Indeed, the Unions do not deny that this Court has recognized that efficiency is a compelling interest in the election context. *Peters v. Johns*, 489 S.W.3d 262, 275 (Mo. banc 2016). If efficiency of elections—the method by which citizens *select* government officials—is a compelling interest, then surely laws promoting the efficiency and effectiveness of governmental officials *running* the government are also compelling. *Branti*, 445 U.S. at 517.

Unable to defeat the State's arguments, the Unions create a more difficult test they say the State cannot satisfy. Resp. p.82. They argue that because their challenge is as-applied, the State must show that SB 1007 is narrowly "tailored . . . to accomplish a bargaining-related purpose." *Id*. They cite no case supporting this test, and it is incorrect. The proper inquiry is whether SB 1007 is "narrowly tailored to serve [a] compelling state

interest." *See, e.g.*, *State v. Clay*, 481 S.W.3d 531, 538 (Mo. banc 2016) (Teitelman, J., concurring) ("The principal opinion holds that the [statute's] ban on the possession of firearms by convicted felons is constitutional as applied to nonviolent felons because the restriction is narrowly tailored to serve the compelling state interest in public safety.").

B. The State's actions did not violate article I, section 29.

If this Court rules that SB 1007 is just a default, it will have to decide whether the State's actions violated article I, section 29. First, the State's decision to stop abiding by portions of the AFSCME and CWA CBAs did not violate article I, section 29 because it did not affect employees' ability to bargain with the State. Second, the State did not violate article I, section 29 by not bargaining with the Unions over for-cause, seniority, and related grievance protections the State believed SB 1007 prohibited because being honestly mistaken about what one can legally agree to does not constitute bad-faith bargaining.[9] Third, the State's decision to cease abiding by an expired CBA does not violate article I, section 29 because article I, section 29 does not require the State to bargain to impasse on all topics the NLRB labels "mandatory" before making any changes to employment conditions.

[9]The Unions claim that the State did not challenge the circuit court's "factual finding" that the State did not make a sincere effort to reach agreement with the Unions. Resp. p.70. This holding was an application of law to facts, reviewed *de novo*, and the State challenged it. App. p.100-01; *Zweig v. Metro. St. Louis Sewer Dist.*, 412 S.W.3d 223, 231 (Mo. banc 2013).

1. Neither *Ledbetter*, *Independence*, nor *Chesterfield* require the State to bargain to impasse on mandatory bargaining subjects before it makes changes to the employer/employee relationship.

Neither *Ledbetter*, *Independence*, nor *Chesterfield* require the State to bargain to impasse on all NLRB mandatory bargaining subjects before making any changes to the employer/employee relationship. *See supra*; *see* App. pp.96-104. In fact, *Ledbetter* clarifies that *Missouri law*—not federal law—governs "good faith." 387 S.W.3d at 367-68 (remanding on this issue). Further, both AFSCME and CWA *knew and believed* that the State was not required to bargain to impasse on mandatory bargaining subjects before making changes to the employer/employee relationship. If they had not, they would not have put evergreen clauses in their CBAs that allowed the parties to extend the CBAs beyond their end-dates, but only under *certain circumstances*. Jt. Ex. 41 at 49 (A0743); Jt. Ex. 58 at 46 (A0803).

Independence's citation to the Black's Law Dictionary definition of "collective bargaining" as "negotiations between an employer and the representative of organized employees to determine the conditions of employment, such as wages, hours, discipline, and fringe benefits" does not in any way suggest that article I, section 29 requires public employers to bargain to impasse on these topics before making changes to the employer/employee relationship. 223 S.W.3d at 138 n.6.

2. Federal law does not apply.

The Unions rely on *NLRB v. Katz*[10] and *Laborers Health*[11] for the proposition that freezing the status quo after a CBA expires protects the collective bargaining process. These federal cases simply do not apply here. *See* App. pp.67-68 (explaining why it makes no sense to apply the NLRA's terms to article I, section 29); *see also supra* Part II.A.

In the alternative, the Unions make a policy argument that unilateral changes to the status quo make bargaining more difficult (but not impossible). Resp. p.73. Adopting the NLRB's interpretation of "bargain collectively" here would cause worse policy problems. It would logjam the State by preventing any changes to employment conditions, including employees' job duties, without first bargaining to impasse with the Unions (often a lengthy process). Plus, tying article I, section 29's meaning to the NLRA defies logic. When the NLRB interprets the NLRA, it does so considering only the Act's application to private-sector employers, not separation-of-powers concerns in State constitutions. 29 U.S.C. § 152(2). The Unions essentially argue that article I, section 29 adopts a private-sector standard for public-sector bargaining, which does not consider the public sector's unique position.

3. The Unions' claim about the State violating CBA provisions is not an article I, section 29 claim.

Preservation: The Unions claim the State waived the above-captioned argument by failing to make it before the trial court. Resp. pp.67-68. Not so. The State's claim of

[10]369 U.S. 736 (1962).
[11]484 U.S. 539 (1988).

error is that the circuit court erred when it held that the State's alleged breach of the AFSCME and CWA CBAs violated article I, section 29. The Unions do not argue that the State failed to preserve this claim. When the State commented that the Unions' claim is really a breach-of-contract claim, the State was just clarifying that a union would have a remedy if this occurred—just not an article I, section 29 claim. This argument is preserved as part of the State's argument that its conduct did not violate article I, section 29.

McCracken v. Wal-Mart Stores East, 298 S.W.3d 473 (Mo. banc 2009), does not require the opposite holding. *McCracken* states that when a party claims that sole *jurisdiction* lies within the Labor and Industrial Relations Commission, this is an affirmative defense and therefore must be pleaded in the answer. Here, the State's argument is not an affirmative defense. It is a denial that the facts here amount to a violation of article I, section 29. That is simply a defense, which need not be pleaded affirmatively. *Varsalona v. Ortiz*, 445 S.W.3d 137, 140-41 (Mo. App. W.D. 2014) (contrasting affirmative and traditional defenses).

The Unions argue that they do not have to concede or accept bad-faith bargaining to vindicate their rights, citing *Rebman v. Parson*, 576 S.W.3d 605 (Mo. banc 2019). Resp. p.71. *Rebman* is inapposite—it discusses when declaratory relief is available but does not address whether there is an adequate remedy at law here. 576 S.W.3d at 612. Additionally, parties may request preliminary relief in a breach-of-contract case. *See, e.g.*, *Hair Kraz, Inc. v. Schuchardt*, 131 S.W.3d 854, 854 (Mo. App. E.D. 2004). Thus, the Unions' arguments do not support their claim that the State's actions violated article I, section 29.

III. Article I, Section 13 (Point III)

Assuming this Court determines that SB 1007 mandates at-will employment, it also will need to decide whether SB 1007 violates article I, section 13. In order to bring a Contracts-Clause claim, the Unions must prove: (1) a contractual relationship; (2) a change in the law that impairs that contractual relationship; and (3) that the impairment is substantial. App. pp.81-82. But even if these three requirements are met, the law does not violate article I, section 13 if it was imposed for a significant and legitimate public purpose. *Id*.

A. Contractual Relationship

The parties disagree about whether there is a contractual relationship between the State and CWA. CWA disagrees with the State on two bases: (1) whether CWA CBA's evergreen clause is conditional, and (2) whether CWA's November 30, 2018 letter to the State satisfied that condition.

CWA's evergreen clause is conditional. Though by itself article 35, part B.2 sounds unconditional, *see* Resp. pp.85-86; (A0803), even the circuit court disagreed because it cannot be read in a vacuum. In article 35, part A.2, the parties have three options: (1) extend the contract "in increments of up to one year upon written mutual consent of the parties," (2) "request to meet and confer," or (3) do nothing. (A0803). If a party intends to utilize options (1) or (2), it must give the other party a "written notice of extension or request to meet and confer ... by certified mail at least thirty (30) days prior to the expiration of the Agreement." *Id*. at art. 35, part A.2. Thus, a written request to meet and confer is a

requisite condition to trigger the evergreen clause. Simply allowing the CBA to expire without requesting to meet and confer, as CWA did here, does not trigger article 35, part B.2 because no "successor negotiations" were initiated.

Next, the Unions argue that this Court should review the circuit court's determination about whether CWA's evergreen clause was invoked for substantial evidence. Resp. p.85. Not so. Whether the November 30, 2018 letter satisfied article 35, part A.2 is an application of law to fact, reviewed *de novo*. *Zweig*, 412 S.W.3d at 231. The question then becomes whether asking to "postpone" meeting and conferring is the same as asking to meet and confer. It is not. Common sense guides here: How often do postponed meetings *never* happen because they are *never* rescheduled? Thus, a request to postpone is not a request to meet and confer—it is a request *not to*.

B. SB 1007 did not impair, much less substantially impair, the AFSCME and CWA CBAs.

AFSCME and CWA claim SB 1007 substantially impaired their CBAs because for-cause, seniority, and related grievance protections are central to the employee/employer relationship and a union's ability to protect and represent its employees. As discussed *supra*, the AFSCME and CWA CBAs contained many other provisions. Jt. Ex. 41 (A0689); Jt. Ex. 58 (A0756). But more than that, the CBAs were not substantially impaired because they expressly contemplate that changes in the law could modify the CBAs and require the parties to bargain for replacement provisions. App. pp.86-87.

The Unions argue that the CBAs are nonetheless substantially impaired because there are no viable replacement provisions, Resp. p.91, but they cite to no case supporting

this argument. The fact that the CBAs contemplated changes in the law, allowed for modifications, and allowed replacement provisions show that the CBAs were not substantially impaired. *Energy Reserves Group, Inc. v. Kansas Power & Light*, 459 U.S. 400, 416 (1983).

The Unions point to *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307 (6th Cir. 1998), and argue that if the elimination of payroll deductions under a union CBA violates the Contracts Clause, then the elimination of for-cause, seniority, and certain grievance protections should too. Resp. p.84. But *Toledo* is unlike this case because, in *Toledo*, there was no evidence that the unions were on-notice that they could lose their contractual right to wage checkoffs during the CBA's term. 154 F.3d at 325. Here, there was. App. pp.86-87; *supra* Part II.A.3.

C. SB 1007 was imposed for a significant and legitimate public purpose.

Sensing defeat on the element of "significant and legitimate public purpose," Plaintiffs make the analysis harder than law supports. Resp. p.92. They claim that because the Unions are bringing an as-applied challenge to SB 1007, the State needs to show that the *abrogation of the CBAs* was "reasonable and necessary" to achieve an important state interest. Not so. It need only show that *the law* was "drawn in an appropriate and reasonable way to advance a *significant and legitimate public purpose*." *Sveen v. Melin*, 138 S. Ct. 1815, 1822 (2018) (cleaned up) (emphasis added) (containing no reference to any "reasonable and necessary" standard).[12] To determine whether the law was drawn in

[12]The wrong standard is also used in *University of Hawai'i Professional Assembly v. Cayetano*, 183 F.3d 1096, 1106-07 (9th Cir. 1999).

an appropriate and reasonable way to advance a significant and legitimate public purpose, courts generally defer to the legislature. *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 22-23 (1977).

The Unions wrongly argue that the elements listed in *Energy Reserves* are inapplicable here because *Energy Reserves* only addressed what happens when a law affects a contract between private parties, not between a party and the government. Resp. p.90. Instead, *Energy Reserves* references a wrinkle that sometimes applies to the fourth element—whether SB 1007 was imposed for a significant and legitimate public purpose. 459 U.S. at 412 & n.14. All other elements remain unchanged.

With respect to the fourth element, *Energy Reserves* states that, "[w]hen a State itself enters into a contract, it cannot simply walk away from its financial obligations." *Id*. Thus, "[w]hen the State is a party to the contract, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." *Id*. (cleaned up). But *Energy Reserves* does not bar a State from ever impairing its own contracts.

The higher scrutiny referenced in *Energy Reserves* only applies when a State tries to avoid *financial obligations* by passing legislation. *Id*. (citing *U.S. Trust*, 431 U.S. at 24-25). But before applying higher scrutiny, the Supreme Court asks whether the State could enter into a binding contract on the topic in the first place. *U.S. Trust*, 431 U.S. at 23 ("When a State impairs the obligation of its own contract," a court must decide whether "the State[ ] [had a] power to create irrevocable contract rights in the first place, rather than [ ] inquir[e] into the purpose or reasonableness of the subsequent impairment" because "the

Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty.").

Here, *Energy Reserves*' dicta about using a different test for element (4) when the State is a party to the impaired contract does not apply because for-cause, seniority, and related grievance protections are not *financial* obligations. *See U.S. Trust*, 431 U.S. at 24-25 (differentiating between financial and non-financial obligations). But if this Court disagrees, SB 1007 still would not violate the Contracts Clause as applied to AFSCME's and CWA's CBAs because those CBAs would be "invalid ab initio." *Id*. at 23.

If this Court reaches element (4), it will have decided that the CBAs are substantially impaired. This is akin to finding that the parties *did not agree* that the General Assembly may modify the CBAs. This would unconstitutionally allow executive-branch agencies to "abridge the powers of" the General Assembly, *see id*., including its article IV, section 19 powers and its general legislative power, which the CBAs expressly recognize. App. p.86 (quoting CBA provisions stating that "[t]he parties recognize that the provisions of this [CBA] cannot supersede law"). Thus, to the extent that this Court reads SB 1007 as substantially impairing the CBAs, those CBAs are "invalid ab initio," and therefore cannot violate the Contracts Clause. *U.S. Trust*, 431 U.S. at 23.

In the alternative, if this Court determines that the State agencies *were permitted* to irrevocably bind the General Assembly regarding for-cause, seniority, and related grievance protections, then whether SB 1007 was "imposed for a significant and legitimate public purpose" would be subject to higher scrutiny. *Energy Reserves*, 459 U.S. at 412 & n.14. But SB 1007 would pass such a test. Not only is there no contract (with respect to

CWA) and no substantial impairment, *see supra*, but SB 1007 was imposed for a significant and legitimate public purpose. The purpose is public, not private, because it applies to all State employees, not just union employees. And there is ample evidence that the purpose was significant and legitimate—to promote governmental effectiveness and efficiency and public confidence in the unelected portion of the executive branch of government. App. pp.88-90.

IV. PAB Rules (Point IV)

In their Response Brief, the Unions slim down their claim that the PAB rules are unlawful. They restrict their argument to the following: (1) SB 1007 neither authorizes abrogation of the CBAs nor refusal to bargain with the unions about for-cause, seniority, and certain grievance protections, and therefore the PAB's rules are unlawful; and (2) if this Court determines that SB 1007 does authorize these things, then SB 1007 and the PAB's rules are unconstitutional. These arguments are incorrect for the reasons stated in Parts I-V of the Opening Brief and Parts I-III of this Reply Brief.

V. Injunction (Point VI)

The Unions claim that the correct standard of review for a granted injunction is "abuse of discretion." Not so. App. p.104. But even if it was, when a trial court errs on the law, this is a *per se* abuse of discretion. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

CONCLUSION

For the reasons above, and for those stated in the Opening Brief, this Court should reverse the circuit court's holding on the meaning of SB 1007 and hold that neither SB 1007 nor the PAB's rules violate article I, sections 29 and 13. This Court should also vacate the permanent injunction.

In the alternative, if this Court holds that the circuit court correctly interpreted SB 1007, it should reverse the circuit court's holding that the State's actions violated article I, section 29, affirm the circuit court's dismissal of the article I, section 13 claim, and vacate all parts of the permanent injunction except those listed in the Opening Brief's conclusion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 7,678 words, is in compliance with Missouri Supreme Court Rule 84.06(b), includes the information required by Rule 55.03, and includes information on how the brief was served on the opposing party.

/s/Maria A. Lanahan

CERTIFICATE OF SERVICE

I hereby certify that, on May 11, 2022, a true and correct copy of the foregoing was filed with the Court's electronic filing system to be served by electronic methods on counsel for all parties entered in the case.

/s/ Maria A. Lanahan