SC99179

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IN THE SUPREME COURT OF MISSOURI

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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,

*Plaintiffs/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,

*Defendants/Appellants*

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

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# BRIEF OF PLAINTIFFS/RESPONDENTS

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## INTRODUCTION

The Missouri Constitution guarantees that all employees "shall have the right to organize and bargain collectively through representatives of their own choosing." Mo. Const. art. I, §29. For decades, the employees of many state agencies have exercised their collective bargaining rights through Plaintiff Unions, which have entered into labor agreements with the agencies governing the workers' terms and conditions of employment. The labor agreements have consistently included provisions requiring "cause" for discipline, use of seniority to determine the order of layoffs and for selection for promotions, grievance/arbitration procedures, and many other important topics. These labor agreements co-existed alongside the State's Merit System law, which provided that "regular" (non-probationary) employees could only be terminated "for cause" and after a hearing, and mandated that layoffs be based on seniority and ability.

Everything changed in 2018, when the General Assembly enacted SB 1007 (merit reform legislation) and HB 1413 (public sector collective bargaining legislation). SB 1007 abolished statutory "for-cause" and seniority protections for most state employees, instead making them "at will." HB 1413, since invalidated by this Court, sought to limit collective bargaining for most public employees including State employees. *Mo. Nat'l Educ. Ass'n v. Mo. Dep't of Labor & Indus. Rels.*, 623 S.W.3d 585, 591 (Mo. 2021).[1]

[1] HB 1413 excluded "employees of a public body who are members of a public safety labor organization" and, important to understanding the scope of SB 1007, also the Department of Corrections and its employees. §105.503.2 (2018) (A0071).

SB 1007 says nothing about collective bargaining. It merely rescinds large portions of the prior statutory protections for State merit employees and sets a default rule of at-will employment that can be modified by contract. Notwithstanding, Defendants have used SB 1007 as an excuse to abrogate Plaintiffs' labor agreements, unilaterally change terms of employment without bargaining, and refuse to bargain about core subjects of employment. Defendants would have this Court believe that SB 1007 imposes a rigid mandate of at-will employment and prohibits the State from bargaining over job protections and grievance procedures.

Notwithstanding the voluminous briefs and evidentiary record in this case, the issue before the Court is quite simple: *does SB 1007 – without ever saying so – gut the constitutional collective bargaining rights of State employees?* The circuit court properly construed SB 1007 and concluded that the law had no intended effect on collective bargaining. The court then reviewed Defendants' conduct and ruled they had bargained in bad faith; and found the PAB's rules, implementing SB 1007, unauthorized by that law. The court granted judgment for all Plaintiffs on Count I (violation of Article I, Section 29) and Count III (invalidating the PAB's rules under §536.050, RSMo.). The court dismissed Count II (impairment of contract under Article I, Section 13) as moot. To preserve judicial economy, the court also issued alternative holdings and ruled that, if SB 1007 restricts bargaining, then the application of SB 1007 and the PAB rules to Plaintiffs' labor agreements and the parties' collective bargaining relationships would violate Article I, Sections 29 and 13.

The trial court's rulings were anchored in this Court's trilogy of cases construing Missouri's constitutional right of collective bargaining. *Independence Nat'l Educ. Ass'n v. Independence Sch. Dist.*, 223 S.W.3d 131 (Mo. 2007); *AFT v. Ledbetter*, 387 S.W.3d 360 (Mo. 2012); *Eastern Mo. Coal. of Police v. City of Chesterfield*, 386 S.W.3d 755 (Mo. 2012). Taken together, *Independence* and *Ledbetter* establish that Article I, Section 29 imposes an affirmative duty on public employers to bargain "in good faith" in a sincere effort to reach agreement, before changing or unilaterally imposing core terms and conditions of employment such as discipline/discharge and grievance procedures. The duty to bargain in good faith applies whether or not a labor agreement is in effect. Even in the absence of implementing legislation, the courts have the power and duty to order an employer to comply with its affirmative obligations under Article I, Section 29.

Put simply, SB 1007 does not say what Defendants say it does. Under the black letter holdings of *Independence*, *Ledbetter*, and *Chesterfield*, Defendants decimated Plaintiffs' labor agreements and denied employees bargained-for job protections, and forced the Unions to bargain from scratch without the possibility of reaching agreement on important subjects like "for-cause" and seniority protections and grievance procedures. As the trial court colorfully put it, "'Talk to the hand' cannot be said to be a sincere undertaking to reach agreement." D270, p. 5; D334, p. 40.

Defendants fail to raise any basis in their voluminous opening brief for setting aside any ruling by the trial court. Plaintiffs respectfully urge the Court to affirm the trial court's judgment in all respects.

## STATEMENT OF FACTS

A. Plaintiff Unions.

Plaintiff Unions are associations of dues-paying members, including Missouri state employees. Jt. Stip. at ¶¶ 1-3 (A1026-A027). They bargain labor agreements for employees, service those contracts, and educate members on job-related issues. Tr. I at 104:7-22; Tr. II at 373:11-18; Tr. III at 509:7-19.

The Unions are the certified representatives of bargaining units of employees employed by various Missouri agencies. Jt. Stip. at ¶¶ 1-3 (A1026-A1027). State employees serve on the Unions' bargaining teams. Tr. I at 118:16-20,121:15-122:3, 156:4-157:3; Tr. II at 375:12-17, 384:15-17; Tr. III at 444:17-25, 517:5-20. They also serve as union stewards. Tr. I at 105:13-106:5; Tr. II at 395:23-396:7; Tr. III at 509:7-19.

American Federation of State, County and Municipal Employees, AFL-CIO, Council 61 ("AFSCME") represents two bargaining units of state employees -- a "Craft and Maintenance Bargaining Unit" and a "Direct Care Bargaining Unit." AFSCME and multiple state agencies are parties to a single collective bargaining agreement ("AFSCME CBA"). Jt. Stip. at ¶¶ 18-19 (A1028-A1029); Jt. Ex. 41 (A0689.) The most recent CBA expired on December 31, 2018,[2] but, pursuant to its terms, remains in effect during successor negotiations. Jt. Ex. 41 at Article 37, Section 1 (A0743).

[2] By the term "expired," the Unions refer to the end date of a contract. A number of things can happen upon expiration. A contract may remain in effect per its terms. Alternatively, labor law principles require an employer to bargain with a union before making any post-contract expiration changes.

Communications Workers of America, AFL-CIO, Local 6355 ("CWA") represents employees of the Department of Social Services (DSS), the Department of Health and Senior Services (DHSS), and the Office of Administration (OA). Jt. Stip. at ¶¶ 24-25 (A1029). The most recent CWA CBA expired on December 31, 2018. Id. The CWA CBA includes a "full force and effect" clause under which the terms of the agreement remain in effect after expiration during bargaining for a new contract. Jt. Ex. 58 at Article 34.B.2 (A0803).

Service Employees International Union, Local 1 ("SEIU") represents three bargaining units of state employees: the "Probation and Parole Officers Bargaining Unit" (PPO) and the "Probation and Parole Assistants Bargaining Unit" (PPA) consisting of different employees of the Department of Corrections (DoC); and, the "Patient Care Professionals Bargaining Unit" (PCP) consisting of employees of the Department of Corrections (DoC), Department of Mental Health (DMH), and the Missouri Veterans Commission. The PPO CBA expired on September 14, 2018; the PPA CBA expired on April 14, 2018; and, the PCP CBA expired on May 31, 2018. Jt. Stip. at ¶¶ 20-23 (A1028-A1029); Jt. Exs. 69, 73 & 75 (A0854, A0854 & A0883).

B. Defendants.

Defendants are the State of Missouri and various state departments and agencies that employ employees in the AFSCME, CWA, and SEIU units. Jt. Stip. at ¶¶ 4-16, 18-25 (A1026-A1029). Office of Administration ("OA") negotiates collective bargaining agreements on behalf of the State with AFSCME, CWA and SEIU, and employs employees

in the AFSCME and CWA units. Jt. Stip. at ¶ 5 (A1027). The Personnel Advisory Board ("PAB") prescribes the procedures for merit selection, uniform classification, and pay for state employees. Jt. Stip. at ¶ 6 (A1027).

C. Collective bargaining before SB 1007.

Prior to the effective date of SB 1007, the Missouri merit system provided certain minimum workplace protections for state employees including enumerated causes for dismissal and the right to a hearing and provisions concerning hiring, promotions, demotions, layoffs, and recalls. *See, e.g.*, §§ 36.150 and 36.240-.390, RSMo. (2017) (A1072, A1075-A8103). Within this scheme, the Unions bargained collective bargaining agreements (CBAs) with Defendants, setting forth terms and conditions of employment for union-represented employees. The CBAs included terms similar to those in the Merit Law as well as additional protections, such as progressive discipline, comparable for "cause" discipline protections, extra seniority considerations in certain employment decisions, and grievance procedures. Jt. Exs. 41-78; Jt. Stip. at ¶¶ 18, 20, 24 (A1028-A1029); Tr. I at 136:3-13; Tr. III at 516:6-9, at 524:18-525:18. Some of these provisions have been in CBAs dating back forty years or more. An AFSCME CBA from 1987 includes a provision stating that "Disciplinary action shall only be imposed for cause" and places the burden on the employer to establish cause. Jt. Ex. 54 at Section 4.03 (A1189). The SEIU PPO and PCP CBAs from 2002 and 2003 include grievance procedures culminating in binding

arbitration. Jt. Ex. 72 at Article 17 (A1236); Jt. Ex. 78 at Article 17 (A1279).[3]

The current AFSCME CBA requires progressive discipline and for "cause" discipline and requires Defendants to take seniority and service years into consideration when making certain employment decisions. The AFSCME CBA includes a grievance process which, in the case of serious discipline, gives employees the option of either appealing to arbitration or through the state merit system. Jt. Ex. 41 (A0689) at Article 5, Sections 10-11, Article 7, Section 2, Article 9, Section 5, Article 12, Section 4, and Article 16, Section 1.B & Section 4; Tr. II at 384:22-387:18.

The most recent SEIU CBAs include clauses on progressive discipline and cause for discipline, seniority and service for filling vacancies, layoffs and recalls, and the arbitration of disputes including the discharge of employees. Jt. Ex. 69 (A0814) at Sections 14.1 & 14.2, Sections 15.6 - 15.8, Section 20.3; and Section 21.1; Jt. Ex. 73 (A0854) at Article 8, Section 9.1, and Sections 12.6-12.8; Jt. Ex. 75 (A0883) at Section 12.1, Sections 14.6-14.8, Section 24.3.b; Section 24.8; and Article 26; Tr. I at 122:4-132:4.

The most recent CWA CBA includes provisions on progressive discipline and "cause" for discipline, provisions requiring the State to take seniority and service years into account when making certain decisions and a provision for the arbitration of disputes. Jt. Ex. 58 (A0756) at Article 12.D & 12.E, Article 13.A, Article 18.A, Article 19.B, Article 25.A, and Article 21.E.

Union witnesses testified about the collective bargaining process. Nancy Cross

[3] The Unions have deposited with the Court copies of past CBAs that were exhibits. Plaintiffs include in their Appendix copies of past CBAs which they specifically cite.

from the SEIU testified that, to convince the State to give employees what they want, the union will "constantly just keep coming back" to an issue and "present its case as to why this is in the interest of the State, as well as the employees, to move the language this way." Tr. I at 165:5-10. Danny Homan from AFSCME testified that he looks for common areas between the parties and starts a conversation with the employer about the parties' differences. Tr. III at 447:4-448:1. The union wants to know the employer's justification for its positions. Tr. III at 447:18-22. The union will explain to the employer what the problems are, offer a solution, and try to convince it to make a change. Tr. III at 452:12-18.

To get to agreement, Cross testified that the union may tweak its proposals in response to employer concerns to make them more acceptable. Tr. I at 165:20-25. At times, the State will then move toward the union by softening its proposal. Tr. I at 162:12-22, 165:2-4 & 166:7-10. Cross also testified to a process called "packaging," where one party offers the other a one-time trade in one or more articles of the contract. The offer does not look like what either side wanted but what the offering party thinks "each side will live with." Tr. II at 321:6-23. Homan stated that both the employer and the union make concessions in bargaining. Tr. III at 451:2-12 & 452:7-18. To get the employer to move from its position, the union may present a "supposal," asking if the employer makes this change and the union makes a different change can the parties reach agreement. Tr. III at 453:8-19.

The unions seek job protections because that is "one of the pillars" of what a union should do – to "try to provide as much financial and job security benefits that we can offer

to the members of our bargaining unit." Tr. III at 448:6-10. The unions seek for "cause" discipline language to protect employees from being arbitrarily dismissed and seek progressive discipline so employees have the opportunity to correct their behavior before termination. Tr. II at 226:12-16 & 227:13-18. The unions seek seniority language to protect employees from favoritism. Tr. II at 228:13-18; Tr. III at 449:21-450:25. Natashia Pickens from the CWA explained that seniority benefits both employees and the employer as a reward to employees for longer service. Tr. III at 552:14-553:8. The unions seek grievance language because the parties need a mechanism to protect employee rights and to address contract interpretation issues. Tr. II at 227:21-24; Tr. III at 449:13-17.

D. The processing of grievances before SB 1007.

Prior to August 28, 2018, Plaintiffs regularly filed grievances against Defendants seeking to enforce terms of the CBAs, including over promotions, overtime, wages, and discipline. Tr. I at 139:24-140:6, 141:7-18 & 147:6-22; Tr. II at 399:16-24; Tr. III at 403:23-404:19 & 522:1-4; Jt. Ex. 79-89, 91-92, 94-96.[4] On multiple occasions, AFSCME convinced state agencies to reduce employee discipline, including to re-instate a terminated employee with backpay. Tr. III at 402:7-403:11; Jt. Ex. 79, 80 & 83 (A1316, A1317 & A1318). CWA persuaded the State in one case to revise an employee's five day suspension to a three day suspension, Jt. Ex. 85 (A1332), and in another case successfully grieved and settled a denial of promotion getting the employee a pay increase, Jt. Ex. 92 (A1342). In

[4] Plaintiffs have deposited copies of Jt. Exs. 81-82, 84, 86-91 & 95-96 with the Court. The Unions include the other examples of past grievances cited below in their Appendix.

2016, the SEIU arbitrated and won a pay dispute against DMH, with the arbitrator awarding backpay to employees. Tr. I at 144:8-10; Jt. Ex. 94 (A1354).

Witnesses testified to the benefits of a grievance process. In some cases, management realizes the information they were given by a lower-level supervisor was not accurate. Tr. II at 397:23-398:18. Employees may get a favorable outcome, such as a reduction in discipline; but, even if not, employees get the benefit of telling their side of the story. Tr. III at 406:12-407:3. Employees "get to say what they need to say in a situation where they think it is a safe environment because it is a protected activity" and do not have to go someplace else to make their case like court. Tr. I at 153:25-154:13. The union benefits from a grievance procedure in ensuring that management is reading contract language the same way the union does and in holding management accountable. Tr. I at 153:2-9; Tr. III at 450:22-451:1 & 532:13-533:20. The employer benefits because the grievance procedure is a less costly way to resolve issues than having to go to employees individually. Tr. I at 153:12-16.

E. SB 1007 and the PAB's Rules.

SB 1007 was passed on May 17, 2018, with an effective date of August 28, 2018. Jt. Exs. 1-2 (A0269, A0316). SB 1007 made a number of changes to Missouri's civil service law, including:

- Eliminating the merit system's appeals process to protest dismissals, demotions and other discipline for cause, compare § 36.150.1 and § 36.390.5 (2017) with § 36.150.1 and § 36.390.2 (2018);

- Designating all employees of the state as "at-will," who may be discharged for

no reason or any reason not prohibited by law; see § 36.025 (2018);

- Deleting factors the state must consider, including seniority, when making promotions, layoffs, recalls, and other employment actions, see §§ 36.340 & .380 (2017).

Starting in June 2018, OA Commissioner Sarah Steelman sent a series of e-mails to state employees about SB 1007, telling them, including union-represented employees, that they were at-will. Jt. Exs. 3, 4 & 5 (A0320, A1112, A1114). AFSCME sent a letter to OA explaining that employees covered by the AFSCME CBA could only be fired for cause and that SB 1007 did not alter the State's contractual commitments or duty to bargain. Jt. Ex. 20 (A0471); Tr. II at 395:6-11. AFSCME got no response. Tr. II at 395:6-8. Natashia Pickens at the CWA contacted Guy Krause in mid-July 2018, asking for a meeting about SB 1007. Tr. III at 535:2-15; Tr. V at 829:7-18. Pickens wanted to make sure the State would not put policies in place that would conflict with the CWA CBA. Tr. III at 533:11-14. Krause did not respond until September 4, 2018, after the law was in effect. Tr. V at 829:7-22.

The PAB promulgated Emergency Rules on August 17, 2018, purporting to implement SB 1007. Jt. Ex. 7 (A0322). The PAB published proposed Final Rules around August 31, 2018, which went into effect on February 28, 2019. Jt. Ex. 8 (A0373) & Jt. Ex. 10 (A0407).

The Emergency and Final Rules made significant changes to existing rules on personnel matters, including:

- 1 CSR 20-3.070(2)-(5), deleting language requiring cause for dismissals and demotions and including new language stating that employees "do not have the

right to notice, opportunity to be heard, or appeal" from a suspension, demotion, or dismissal and that the appointing authority may take such action against employees for "no reason or any reason not prohibited by law."

- 1 CSR 20-3.070(1), deleting language on the order of layoffs and recalls based on service date.

- 1 CSR 20-4.020(1), including new language that "no state agency may establish a grievance procedure permitting a state employee… to grieve any discipline, suspension, demotion, notice of unacceptable conduct . . . or any employment action taken by an appointing authority that is alleged to have an adverse financial impact on a state employee or enter into an agreement with a certified bargaining unit providing for the same or any alternative dispute resolution procedure regarding matters prohibited herein."

Jt. Exs. 7 & 10 (A0322 & A0407).

Defendants' witness testified that the changes were "required" by SB 1007. Tr. IV at 730:2-6. The State stopped honoring provisions in the AFSCME and CWA CBAs that were allegedly in conflict with the law and the Rules on August 28, 2018, and did not attempt to bargain with any of the Unions before the law and the Rules went into effect. Tr. V at 845:15-847:14.

F. Policies issued on SB 1007 and the Rules.

Shortly after the promulgation of the Emergency Rules, state agencies began changing their personnel policies. Tr. I at 179:13-15; Tr. III at 409:1-25. The Department of Mental Health ("DMH") amended its policies by adding that *all* employees were "at will," deleting language stating that disciplinary action may be appealed "according to the appropriate union agreement," and adding new language that discipline may not be grieved. Jts. Ex. 13 at DMH 103, 105 & 136 (A0429, A0431, A0440). OA amended or rescinded

seven personnel policies in light of SB 1007, including policies on discipline and the employee grievance procedure. Jt. Exs. 15 & 17 (A0444 & A0463).

AFSCME filed grievances over the new DMH policies and sent a letter to OA contesting its policy changes. Jt. Exs. 18, 128 & 130 (A0467, A0992 & A0995); Tr. III 412:10-19. A grievance noted that "we [employees represented by AFSCME] are supposed to have rights too per the contract." Jt. Ex. 130 (A0995). In the letter to OA, AFSCME argued that "public employers must engage in collective bargaining prior to changing terms and conditions of employment," and questioned whether OA was seeking to change terms in the AFSCME CBA. Jt. Ex. 18 (A0467). In response, DMH and OA stated the changes were "necessary updates resulting from new legislation," Jt. Ex. 131 (A0997), and made because of "SB 1007 (2018) and its implementing regulations." Jt. Ex. 19 (A0470).

Over the next several months, AFSCME and OA exchanged multiple letters over the DMH and OA policies. Jt. Exs. 137, 138 & 141 (A1426, A1428 & A1430). AFSCME disagreed that OA's offer to meet and confer with the Union met the State's legal obligations. Jt. Ex. 137 (A1426). AFSCME argued the policy changes were ineffective to the extent they conflicted with the CBA and that, if DMH or OA wanted to make changes to terms of employment, they had to do so in bargaining for a successor agreement. Jt. Ex. 141 (A1430).[5]

When SEIU received DMH's new policies, it wrote back that DMH was required to

[5] Defendants' Brief at p. 32 stating that OA had not received a response to its November 29, 2018 letter by January 17, 2019 is misleading. AFSCME sent letters on January 17, 2019 and on March 29, 2019, responding to and refuting OA's positions. Jt. Ex. 137 & 141 (A1426 & A1430).

bargain over the changes. Pls' Ex. 262 (A1813). At that time, the SEIU's CBA with DMH had expired and the parties had started the process of bargaining a successor labor agreement. Tr. I at 182:13-17 & 184:3-14. DMH did not respond to SEIU's demand to bargain over the policies. Tr. I at 185:8-10.

G. Defendants' handling of grievances after SB 1007.

After August 28, 2018, state agencies began rejecting employee grievances. Tr. III at 415:4-12. Defendants cited SB 1007 and the Emergency Rules for the proposition that employees were now at-will and did not have the right to pursue grievances over adverse employment decisions. *Id*.

By example, AFSCME filed a grievance on September 4, 2018, over a written reprimand given to employee "J.F." Jt. Ex. 104 (A0938). In response, DMH wrote that "per Senate Bill 1007 and 1 CSR 20-4.020, DMH employees can no longer grieve disciplinary actions." Id. at PLF RQP #12 – 003 (A0943). In another case, where DMH fired an employee, DMH responded that "Being an at-will employee negates the right to file a grievance for discipline." Jt. Ex. 108 at PLF RQP #12 – 0022 (A0969); see also Jt. Exs. 106-107 (A0948-A0943) & Jt. Exs. 109-111 (A0972-A0985).

In response to grievances filed by CWA-represented employees, DSS said the grievances were being placed in "pending status" because the "Labor Agreement Grievance Procedure" was being reviewed to determine the impact of changes to Chapter 36, RSMo., by SB 1007. Jt. Exs. 118, 119 & 121 (A1389, A1390 & A1395). See also Tr. III at 540:4-8.

Managers told SEIU-represented employees that they were at-will and there was not a grievance process. Tr. II at 233:19-24. DMH's response to SEIU-filed grievances was: "Per Senate Bill 1007 and 1 CSR 20-4.020, DMH employees can no longer grieve disciplinary actions and therefore there is no longer a due process." Jt. Ex. 125 at PLF RQP #12 – 0100 (A1425). DoC similarly rejected grievances filed by PPA and PPO employees. Tr. II at 240:19-241:6.

H. Bargaining after SB 1007.

At the time that SB 1007 and the Emergency Rules went into effect, the three unions were either preparing for negotiations with the State (AFSCME and CWA) or about to hold their first bargaining sessions with the State (the SEIU).

Shortly after SB 1007 went into effect, Guy Krause met with AFSCME representatives Danny Homan and Don Zavodny to discuss bargaining a new CBA. Tr. III at 436:5-15 & 437:9-11. When the conversation turned to SB 1007, Krause said that everybody was an at-will employee and that SB 1007 trumped the contract and the State was going to enforce the law. Tr. III at 437:4-11.

The SEIU had difficulties getting the State to come to bargaining table. In February 2018, Nancy Cross sent letters to DoC, with copies to Guy Krause, requesting one-year extensions of the PPA and PPO CBAs. Jt. Exs. 150 & 151 (A1434-A1436). Krause did not respond until May 23, 2018, stating that DoC would not agree. Jt. Ex. 152 (A1437).[6] The SEIU then sent requests to Krause for bargaining dates for all three of the CBAs. Jt.

[6] SEIU's request to extend the PPO CBA was timely, and the State still denied the request.

Exs. 153 & 154 (A1439 & A1442). After another couple of months, and another request by SEIU, Krause finally scheduled initial meetings. Jt. Ex. 156 (A1444-A1446); Tr. I at 174:6-23. By that time, SB 1007 and the Emergency Rules were in effect.

SEIU and the State met for bargaining for the PPO and PPA CBAs on September 24, 2018. Krause told Nancy Cross that employees were "at will," that the contract had to be in "congruence" with SB 1007, that the grievance process "did not exist," that the State "viewed the law as all encompassing," and that the State's position on the contract was compelled by SB 1007. Tr. I at 188:14-189:6. Krause also stated that, because the CBAs had ended, the SEIU would have to submit a new agreement in its entirety and the State would not honor anything that was currently in place. Tr. I at 189:21-190:3. Cross disagreed, saying the State had to bargain any changes. Tr. I at 190:7-12. Krause asked for case law, and Cross had one of the union's attorneys send Krause a letter on the issue. Jt. Ex. 158 (A1447-A1448).

The SEIU and the State met on October 10, 2018 to bargain over the PCP CBA. Krause told Cross that proposals would "have to be congruent" with SB 1007. Tr. I at 199:2-3. The parties also discussed DMH's amended policies. Krause said the State was "compelled" by the law to make the changes, and gave no indication that the State could agree to anything other than at-will employment. Tr. I at 198:17-199:10. See Jt. Ex. 23, at p. 11 (A1129) ["Defendants are not in a position to agree to provisions in new CBAs that conflict with Missouri statutes or regulations . . . ." (citing Affidavit of Guy Krause)].

Pickens from the CWA spoke to Krause in fall 2018 about bargaining. They talked about HB 1413 because they were unsure of the requirements under that law.[7] Tr. III at 546:11-20. Pickens also told Krause that she did not understand where the Rules were coming from because SB 1007 did not mention anything about a grievance process. Krause replied that OA had to enforce the law and that he did not think the CWA could have a grievance process under OA's interpretation. Tr. III at 546:25-547:12.

The SEIU sent its initial proposals to the State in fall 2018. Tr. I at 199:20-23; Jt. Exs. 167, 169 & 172 (A1495, A1537 & A1683).

The State provided its responses to the PCP CBA proposal on January 10, 2019. Jt. Ex. 170 (A1609). The State struck every reference to dismissal and discharge for cause (p. 4 and p. 26), a probationary period (pp. 8 & 26), progressive discipline (p. 26), prior notice of discipline against an employee (p. 27), the entire grievance-arbitration procedure (pp. 30-36), employee appraisals (pp. 51-54), the use of seniority in promotions (p. 58), and layoffs by seniority (pp. 62-63). Id.

When the SEIU and Defendants met for bargaining on the PCP CBA proposals, Krause told the SEIU bargaining team that the State was striking the language noted above "because of SB 1007" and because the State was "lining up the language [of the contract] with the language from SB 1007" and was "compelled to follow the law." Tr. II at 206:23-

[7] As explained in detail below, HB 1413 was a re-write of Missouri's public sector labor law, enacted on the same day as SB 1007. §§ 105.500, RSMo, et seq. (2018). A number of unions challenged the law, and the Missouri Supreme Court struck it down on equal protection grounds. *Mo. Nat'l Educ. Ass'n v. Mo. Dep't of Labor & Indus. Rels.*, 623 S.W.3d 585, 591 (Mo. 2021).

211:19 and 325:9-15 and 353:8-11. Krause said, "there is not a grievance procedure under SB 1007." Tr. II at 325:25-325:2. At trial, Krause testified that he cited SB 1007 for striking these provisions because he thought it was an "argument that settles it." Tr. V at 883:16.

The SEIU and the State met a second time for bargaining on the PCP CBA before the trial court issued the preliminary injunction. The State did not change its position on the language it had struck because of SB 1007. Tr. II at 216:6-12. Krause told Cross that the State would be "open" to hear what the Union said on proposals but did not say the State could make any movement. Tr. II at 216:15-22.

Just as it had for the PCP CBA proposals, the State struck the language in the SEIU's proposals for the PPA and PPO CBAs on discipline and discharge, the use of seniority in layoffs, recalls, and promotions, and grievance-arbitration. Jt. Exs. 166 & 173 (A1449 & A1731). When the parties met on January 30, 2019 to discuss the PPA CBA, Krause gave the same reasons for the deletions - because of SB 1007. Tr. II at 206:23-207:7 & 353:8-11.

I. The Unions file suit.

AFSCME, CWA, and SEIU filed suit against Defendants on October 5, 2018, and filed an Amended Petition on October 17, 2018. D168 & D169. Plaintiffs' allegations are in the alternative -- SB 1007 does not "supersede terms of a negotiated labor agreement and the right to collectively bargain 'for cause' protections, seniority considerations for layoffs, demotions, transfers, and promotion, and grievance arbitration procedures;" and,

if SB 1007 does, it violates the constitutional right to collectively bargain. D169 at ¶¶ 80-83. Defendants are either misinterpreting the statute to permit them to make unilateral changes and to preempt bargaining in violation of the right to collectively bargain or the law itself as applied to Plaintiffs infringes on the right to collectively bargain. D169 at ¶¶ 122-124; *see also* id. at ¶¶ 131-132 (contracts clause claim) & 141-143 (MO APA claim).

Defendants filed their Answer on November 19, 2018. D180. They denied many of the allegations and raised multiple affirmative defenses including the savings clause in each CBA. Notably, nowhere does Defendants' Answer refer to Article IV, Section 19 of the Missouri Constitution.

J. The status of each collective bargaining agreement.

The AFSCME CBA contains what is called an "evergreen" clause. Article 37, Section 1 of the CBA states in full:

> The Labor Contract shall become effective upon ratification and signature of the parties, and shall expire on December 31, 2017. It shall automatically be renewed from year to year thereafter, unless either party provides written notification of its intent to modify or amend the Labor Contract to the other party by July 1 of the calendar year prior to expiration. These one-year extensions shall not exceed three years in total. *If bargaining is reopened under this paragraph, all provisions of this Labor Contract shall remain in full force and effect during any such successor negotiations*.

Jt. Ex. 41 (A0689) at p. 49 (emphasis added). It is undisputed that AFSCME and the State mutually agreed to extend the CBA for one year, until December 31, 2018.

The State sent a letter on June 28, 2018 to AFSCME stating its intent to modify or amend the AFSCME CBA "per Article 37, Section 1." Jt. Ex. 135 (A0998); Tr. III at 433:18. By virtue of this letter, bargaining was "reopened;" and, as determined by the trial

court, the terms of the AFSCME CBA continued beyond the December 31, 2018 expiration date and remain in "full force and effect" during successor negotiations. D334, p. 20.

The CWA CBA also contains an evergreen-like clause. Article 35, Section B.2 of the CWA CBA states: "All provisions of the Agreement shall remain in full force and effect during any successor negotiations, provided that the parties are negotiating in good faith." Jt. Ex. 58 (A0756) at p. 46.

In late fall 2018, Guy Krause asked Natashia Pickens whether the CWA intended to negotiate a successor contract and said, if so, that she needed to send notification to the State. Tr. III at 579:9-21. Krause also told Pickens that he did not know how the parties would negotiate a contract with HB 1413. Id. Based on those conversations, Pickens sent a letter to Krause, more than 30 days before the expiration of the CWA CBA, asking "to postpone a meet and confer and meeting for negotiating a successor contract" until the lawsuit challenging HB 1413 had been resolved by the courts. Jt. Ex. 146 (A0999). Pickens thought the letter was doing what Krause told her to do, saying the CWA intended to negotiate a successor contract. Tr. III at 577:1-14.

Krause sent a response to Pickens' letter on December 8, 2018, contending that Pickens' letter was not "a request to meet and confer" and thus the CWA CBA would expire on December 31, 2018. Krause also wrote that Defendants "agree that reaching a new agreement could be complicated by the on-going lawsuits concerning House Bill 1413 and SB 1007," and "[a]ccordingly, accept your offer to postpone meeting to negotiate a new contract." Jt. Ex. 147 (A1433).

SEIU's CBAs do not contain evergreen clauses. Tr. II at 257:5-7. They expired on

dates in 2018. SEIU does not contend that its CBAs remained in effect as a matter of contract. Rather, SEIU claims that the State must, as a matter of law, maintain the *status quo* - established terms of employment - pending bargaining to overall impasse. D169, ¶¶ 9, 52, 87, 109, 124 & 126.

K. Court's issuance of a Preliminary Injunction Order.

Plaintiffs moved for a preliminary injunction on November 26, 2019. After a hearing, the trial court granted it. The court found that Plaintiffs were likely to succeed on the merits and in particular that Defendants were not bargaining in good faith: "Talk to hand cannot be said to be a sincere undertaking to reach agreement." D270, p. 5. The trial court ordered Defendants to bargain with Plaintiffs over the terms of successor CBAs, without any constraint from SB 1007, the Rules, or polices and to process grievances filed by AFSCME. Id. at 6-7.

L. Defendants' Responses to Plaintiffs' Requests for Admission.

In discovery, Plaintiffs requested Defendants to admit that they could lawfully agree to provisions in a new CBA on for cause discipline, progressive discipline, prior notice of charges, grievances, arbitration, and the use of seniority in layoffs, recalls and reinstatement. Defendants denied the requests, indicating that they could not lawfully agree to such provisions. Jt. Ex. 34 at Tab 5, Responses to Requests Nos. 1-3, 5-11 (A1010). While Defendants admitted that they could use seniority as a "factor" in filling vacancies and promotions, (Requests Nos. 5 & 6), along with skills and ability, Krause testified at trial that the State could not agree to such a clause if seniority was a "deciding

factor." Tr. V 854:13-23.

M. Events up to trial.

After the preliminary injunction, AFSCME continued to file grievances. In one instance, the Union contested a written reprimand given to an employee for insubordination. Jt. Ex. 112 (A1379). The first line supervisor denied the grievance. Tr. Trans III at 430:7-20. The Union then took the grievance to the next step, and the upper-level manager agreed with the Union's arguments and reversed the first line supervisor's decision. Tr. III at 431:4-21; Jt. Ex. 112 (A1382).

The CWA and SEIU also continued to file grievances. Jt. Ex. 122 (A1403); Tr. II at 223:12-14. The State continued to reject them, arguing the relevant CBAs had expired. Pls.' Ex. 274 (A1814).

At the time of trial, the Unions were still in bargaining with the State and had not reached agreement. Tr. II at 242:1-18; Tr. III at 444:15-443:3, 548:21-549:2 & 593:9-13.

N. Irreparable Harm.

When the State started treating union-represented employees as at will employees, it had a "chilling effect" because employees thought they had their protections through the bargaining process. Tr. II at 242:1-7. Employees were concerned about what was going to happen if "they didn't have a good relationship with a particular supervisor." Tr. II at 242:11-18; Tr. III at 457:9-12. Employee attendance at union meetings also began to drop. Tr. III at 553:8-13.

When Defendants rejected grievances, employees were denied information, the

opportunity to tell their side of the story, and the possibility of a favorable outcome. *Compare* Jt. Ex. 108 (A0964) with Jt. Ex. 112 (A0985). DSS's decision to place grievances on hold was problematic because it led to delay. Tr. III at 543:24-544:3.

Without a grievance process, employees cannot enforce their contract rights. Tr. II at 229:23-230:3. In addition, employees lose "confidence in there being a fair and just system." Tr. III at 554:12-15. A grievance procedure for discrimination claims is not sufficient because federal and state law already covers those types of claims most workplace disputes do not involve discrimination. Tr. II at 333:19-334:6 & 338:21-342:14 & 347:11-351:8; Tr. III at 553:3-18.

The State's position in bargaining about SB 1007 and the Rules changed what the parties were bargaining over and removed important subjects from bargaining. Tr. II at 232:6-21. Once the State says it cannot lawfully agree to a provision, "[t]here is nothing [the unions] can offer that [the State] will agree to if they're telling me it cannot be done before we actually meet to compromise, like we can't work out any trades . . . I don't know of any proposal that we could send across the table that they could agree to if they are already telling me it can't be done." Tr. III at 555:23-556:3. It does not make a difference that Defendants are still "open" to seeing proposals like a grievance-arbitration procedure, because "no matter what [the union is] going to propose, if that is their position, I'm not going to get very far." Tr. II at 218:17-219:5. The union cannot reason with the employer on the advantages of job protections if the employer claims it cannot legally agree to them and the union cannot offer a package to get the State to move on the language the union wants. Tr. II at 219:8-19 & 231:16-24; Tr. III at 455:9-12. Bargaining becomes "meeting

just for the sake of meeting." Tr. III at 555:21-556:3.

O. Expert testimony on merit reform and collective bargaining.

Over Plaintiffs' objections, Defendants offered expert testimony, describing the supposed benefits of merit system reform. Tr. I at 33:19-37:12 & 62:5-8.

Dr. Robert Maranto is a professor in education policy with a background in public administration. Tr. V at 946:24-947:4, 949:1-3. He gave five reasons why he believes that merit systems do more harm than good, including protecting low performers, hurting morale, damage to public faith in government, and limits on re-making struggling organizations. Tr. V at 965:25-974:17. His views on merit reform are in the "minority" of scholars. Tr. VI at 1030:8-11.

Dane Stangler used to work for the Kauffman Foundation. Tr. V at 892:19-895:4. According to Stangler, research comparing the U.S. to other countries shows that "strong employment protections that make it harder to dismiss or address performance" lead to "stagnant performance." Tr. V at 914:2-14.

Defendants offered a report from Dr. Aaron Hedlund, an economics professor at the University of Missouri. Drawing from "optimal contract theory," Dr. Hedlund believes that at will employment facilitates an employer's ability to recruit, retain, and develop talent because it expands the set of permissible contracts that an employer can offer. Jt. Ex. 35, Tab 16 (A0662), at ¶10.a. For instance, an employer can offer a more risk averse worker a contract with higher job security and a lower wage, and can offer a less risk averse worker a contract with lower job security and a higher wage. Id. (A0662) at ¶11.a. When

asked how an employee can negotiate for higher job security in an at-will environment, Hedlund stated that the employee can seek unwritten assurances as to how secure the job is. Jt. Ex. 35, Tab 15 (A1158), at 59:23-60:5 & 63:24-64:17.

Defendants' experts were not given any Missouri-specific data on management practices, the difficulties in firing an employee, the compensation of state employees, the length of probationary periods, or the productivity of state employees before writing their expert reports. Tr. V at 926:24-928:8; Tr. VI at 1021:15-1025:11; Jt. Ex. 35, Tab 15 (A1158), at 86:25-87:9, 89:14-18, 96:13-21, 102:10-15, & 104:11-107:21. They admitted to little to no expertise in collective bargaining. Tr. V at 921:12-922:5 & 925:18-926:5; Tr. VI at 1067:22-1068:19; Jt. Ex. 35, Tab 15, at 21:24–23:20.

Plaintiffs offered rebuttal expert testimony from Professor Marcia McCormick, a professor at St. Louis University Law School specializing in employment and labor law. Tr. VI at 1058:13-1059:16. Based on the vast literature on the subject, there is near "universal consensus" that at-will employment is bad for: (a) workers because employers can take advantage of their precariousness, (b) employers because it inhibits the flow of information to employers since employees are fearful of complaining, and (c) the public because it keeps wages low. Tr. VI at 1068:25-1071:19. McCormick also testified to the benefits of collective bargaining. Among other things, it is possible to achieve more managerial flexibility through collective bargaining because the parties can come to an agreement that suits each of their needs. Tr. VI at 1078:13-17.

Plaintiffs also offered the deposition testimony of Dr. Heidi Shierholz, a senior economist at the Economic Policy Institute in Washington D.C. Because SB 1007

mandates at-will employment (in Defendants' view), employers cannot offer and employees cannot seek contracts that trade incentives (higher pay) for insurance (for cause job protections). Jt. Ex. 35, Tab 20 at p. 3 (A1175). As a result, SB 1007 actually denies employers and individual employees the possibility of a "more optimal contract." Id. By contrast, collective bargaining is a "highly flexible process that allows employers and employees to agree to terms that make sense for the workplace." Id. at p. 2 (A1174).

P. Judgment of the trial court.

Following a four-day trial, the trial court entered judgment in Plaintiffs' favor.

On the meaning of SB 1007, the trial court concluded that the law "does nothing more than establish a default rule of at will employment." D334, pp. 17-18. The court further found that the AFSCME and CWA CBAs remained in effect by their evergreen clauses and that the savings clauses in those contracts did not allow Defendants to repudiate their terms. D334, pp. 20 & 22.

The trial court next concluded that Defendants violated Article I, Section 29 when they (1) abrogated "for cause' and grievance-arbitration provisions in the AFSCME and CWA CBAs by adopting new policies and rejecting grievances, D334, p. 29 & 41, (2) refused to bargain with the Unions over discipline, seniority considerations, and grievance procedures based on the belief that the State could not legally agree to such provisions, id., pp. 30-31 & 41, and (3) made unilateral changes to existing terms of SEIU-represented employees even after the SEIU CBAs had expired, id., pp. 26, 41-42. In the alternative,

the court ruled that, if SB 1007 did restrict collective bargaining, then the law prohibits the State from bargaining over core subjects in violation of Article I, Section 29. Id., p. 36.

The trial court determined that it was not necessary to determine whether SB 1007 impaired contracts in violation of Article 1, Section 13. However, the court ruled that, in the event its reading of SB 1007 was incorrect, then SB 1007 did substantially impair contracts because it caused Defendants to repudiate important terms in the AFSCME and CWA CBAs on "cause" for discipline and grievances. D334, pp. 36-37. Similarly, the court found the PAB's rules unauthorized to the extent Defendants applied them to abrogate provisions in CBAs and to preclude bargaining over discipline, seniority, and grievances, because SB 1007 does not restrict bargaining. Id., pp. 38-39.

The trial court concluded that Plaintiffs and their members would be irreparably harmed in the absence of an injunction and that Plaintiffs lacked an adequate remedy at law. Among other things, the court found that Defendants' conduct impeded bargaining and rendered the Unions "impotent to bargain meaningful protections." D334, p. 40. The court ordered Defendants to bargain without constraint from SB 1007 and the Rules and without unilaterally modifying existing terms during bargaining and to comply with the AFSCME and CWA CBAs, including by processing grievances. Id., pp. 42.

# ARGUMENT

I. The circuit court correctly concluded that SB 1007 does not restrict subjects of collective bargaining or invalidate collective bargaining agreements, avoiding the need to determine whether SB 1007 infringes on the right to collectively bargain. (Responds to State's Point I).

Standard of Review: This Court reviews the circuit court's interpretation of SB 1007 *de novo. Gross v. Parson*, 624 S.W.3d 877, 884 (Mo. banc 2021).

Preservation: Plaintiff Unions preserved this point. D304, pp. 2, 16-19; D306, pp. 40-44; D307, pp. 15-18. While Defendants preserved Section A of their first Point, they did not preserve Section B, as explained below.

The parties agree that the threshold issue before this Court is one of statutory interpretation: whether SB 1007 restricts subjects of collective bargaining between the parties or invalidates any provisions in their CBAs. The answer to that question determines the analysis the Court applies to the lower court's judgment on all three counts of the lawsuit. If SB 1007 does not do these things, then the Court must decide whether the State's ***conduct*** (abrogating CBAs and refusing to bargain over core terms of employment) was constitutional. If SB 1007 does these things, then the Court must decide whether it is constitutional as applied.

The circuit court correctly determined as a matter of statutory construction that SB 1007 has nothing whatsoever to do with collective bargaining. Defendants' arguments to the contrary are meritless.

A. The trial court correctly determined that SB 1007's "at will employment" provision simply abrogates merit system protections for most State employees and sets a default floor that may be modified by contract. (Responds to State's Point I.A)

The at-will provision of SB 1007 states:

> Except as otherwise provided in section 36.030,[8] all employees of the state shall be employed at-will, may be selected in the manner deemed appropriate by their respective appointing authorities, shall serve at the pleasure of their respective appointing authorities, and may be discharged for no reason or any reason not prohibited by law, including section 105.055.

§36.025, RSMo. (2018) (A0056). According to Defendants, the word "shall" plainly "mandates at-will selection and removal of employees," and prohibits the State from bargaining over "for-cause" discipline, seniority protections, and grievance procedures.

The primary rule of statutory construction is to ascertain the intent of the lawmakers from the language used, to give effect to that intent if possible, and to consider words in their plain and ordinary meaning. *Eminence R-1 Sch. Dist. v. Hodge*, 635 S.W.2d 10, 13 (Mo. 1982). It is appropriate to consider the law's history, the presumption that the legislature had knowledge of the law, the surrounding circumstances, and the purpose and object to be accomplished. *Person v. Scullin Steel Company*, 523 S.W.2d 801, 803 (Mo. 1975).

Missouri's merit statute was enacted in 1945. 1945 MO. LAWS 1157-1182 (A1043). Prior to the effective date of SB 1007, the merit statute required that employees

[8] Section 36.030.1(1), RSMo. (2018), provides that, "Employees in eleemosynary or penal institutions shall be selected on the basis of merit." Section 36.030.1(2), RSMo. (2018), requires the State to continue providing complete merit system protections to employees whose positions are funded by federal grants which by their terms require merit protection. (A0057). This case does not concern hiring procedures or federal grant-funded positions.

be hired and promoted based on merit as determined by an exam, and provided that "regular employees" who completed a probationary period could only be terminated or demoted for cause and after a hearing. §§36.020(14), 36.150, 36.170, 36.240, 36.250, 36.380, 36.390, RSMo. (2017) (A1070-A1083). The law prohibited the State from making appointments, promotions, demotions, or dismissals based on "favoritism, prejudice or discrimination." §36.150, RSMo. (2017) (A1084). "Regular employees" were protected from layoff while provisional temporary employees were still employed and, as between "regular employees," layoffs were to be determined based on seniority and ability. §36.360, RSMo. (2017) (A1080).

The merit statute coexisted for decades with Missouri's Public Employee Labor Law, which was enacted in 1965. 1965 Mo. Laws 232 (A1069). The Public Employee Labor Law, §§105.500 – 105.530, RSMo. (2017) (A10886-A1090)[9], authorizes public employees (with certain exceptions not relevant here, *see* § 105.510, RSMo. (2017)) to request an election before the Missouri Board of Mediation and to select a union to represent them in collective bargaining. The chosen union and the public employer are to discuss proposals "relative to salaries and other conditions of employment," and if the

[9] The Public Employee Labor Law was modified extensively in HB 1413 (A1791). Signed the same day as SB 1007. In 2021, this Court struck down one provision of HB 1413 as unconstitutional, found that it was not severable from the rest of the laws, and consequently invalidated the entire law. *Missouri Nat'l Educ. Ass'n v. Mo. Dep't of Labor and Indus. Rels.*, 623 S.W. 3d 585. 595-596 (Mo. 2021). Although the Missouri codified statutes still set forth the full text of HB 1413, the version of the law that is currently in effect is the 2017 version, §§105.500-105.525, RSMo. (A1086-1089). HB 1413 is addressed further in Section I.B. below.

parties reach agreement and the public body adopts it, they may enter into a collective bargaining agreement. *Id.*

The Unions and the Defendant agencies employing the unit employees bargained multiple labor agreements over the years that provided for progressive discipline and "for-cause" job protections, due process, seniority rights in layoffs, recalls and transfers, and grievance/arbitration procedures. Jt. Exs. 41-78; Jt. Stip. at ¶¶ 18, 20, 24 (A1026); Tr. I at 136:3-13; Tr. III at 516:6-9 and 524:18-525:18. The pre-2018 version of the merit law did not by its language preclude Unions and Defendants from bargaining over and agreeing to protections similar to or even more robust than statutory provisions concerning dismissals, appeal rights, and seniority. Rather, the merit system and the Public Employee Labor Law operated in harmony with each other, as shown by *SEIU Local 2000 v. State*, 214 S.W.3d 368, 373-374 (Mo. App. W.D. 2007) (affirming judgment for employees and their union and overturning legislature's decision to deny across-the-board raise to one bargaining unit whose union negotiated a pay adjustment in the preceding year).

SB 1007 modified the merit law by restricting the definition of "regular employee" to "those employed by agencies required by federal grants to maintain merit systems." §§36.020(16), 36.030.1(2), RSMo. (2018) (A0054, A0057). Apart from this small group, state employees lost job protections and the right to a hearing prior to dismissal. §§36.380, 36.390, RSMo. (2018) (A0064, A0066). The layoff provision in the earlier statute was repealed entirely. §36.360, RSMo. (2018) (A1038). Except for a narrow category of state

employees,[10] hiring need not be based on merit. §36.240, RSMo. (2018) (A1037). The intent of §36.025, RSMo. (2018) (A0056), providing (with a few exceptions not relevant here) that "all employees of the state shall be employed at-will," was obviously to overturn the prior statutes requiring hiring based on merit, protecting the vast majority of "regular employees" from termination without cause or a hearing, and giving "regular employees" seniority protections in the event of layoffs. §§36.020(14), 36.150, 36.170, 36.250, 36.360, 36.380, 36.390, RSMo. (2017) (A1070-A1083).

SB 1007 says nothing about collective bargaining. In fact, the statute leaves unchanged the only mention in Chapter 36, RSMo, relating to labor "agreements." The law stated -- and continues to state -- that one of the functions of the director of personnel for the Office of Administration may be to "coordinate labor relations activities in individual state agencies, including participation in negotiations and approval of agreements relating to uniform wages, benefits, and those aspects of employment which have a fiscal impact on the state." *Cf.* §36.510(6), RSMo. (2017) (A1084) and §36.510(6), RSMo. (2018) (A1040). Job protections like cause for discipline and seniority and grievance/arbitration procedures clearly have a "fiscal impact on the state." Defendants' experts agree as much. See Defs' Brf. at p. 89 ("Contractual requirements that impede at-will employment impose costs on employers").

If the legislature had intended to abrogate labor agreements and prohibit State

[10] The exceptions are positions that are required by the terms of federal grants to retain full merit system protections and employees in eleemosynary or penal institutions who must be selected on the basis of merit. §36.030.1, RSMo. (2018) (A0057).

agencies from bargaining collectively with unions representing state employees over discharge protections, seniority, and grievance procedures, as they had been doing for decades, surely it would have said that expressly in SB 1007. It did not. The courts will not lightly infer from legislative silence an intent to abrogate existing law. *Zeller v. Scafe*, 498 S.W.3d 846, 853 (Mo. App. W.D. 2016). SB 1007 removed statutory protections for most State employees, but it did not purport to divest State employees, *sub silentio,* of their constitutional right of collective bargaining.

The trial court properly interpreted §36.025, RSMo., to establish a default rule of "employment at will" that may be modified by contract. That is consistent with the well-established rule that government employment is "at will" absent "statute, ordinance, regulation or employment contract." *Cole v. Conservation Comm'n,* 884 S.W.2d 18, 20 (Mo. App. W.D. 1994) (non-merit system employee had no contract or statutory protection and was therefore at will).

The default rule of at-will employment established by Section 36.025 functions as a floor much like the minimum wage statute at issue in *Cooperative Home Care, Inc. v. City of St. Louis*, 514 S.W.3d 571 (Mo. 2017). The employer in *Cooperative Home Care* challenged a local ordinance setting a minimum wage that was higher than the state minimum wage, arguing that the local ordinance was preempted by Section 290.502, RSMo., that every employer "*shall* pay to each employee wages at the rate of [the current state minimum wage standard]." *Cooperative Home Care*, 514 S.W.3d at 583 (emphasis added). The Court explained, "To conclude that the law was intended to protect *employers* from ever being required to pay a higher wage is at odds with the

statute's recognized purpose, which is to ameliorate the "'unequal bargaining power as between employer and employee' and to 'protect the rights of those who toil.'" *Id.* at 583-584.

Defendants attempt to distinguish *Cooperative Home Care* on the grounds that it is theoretically possible to pay a lower wage than the state minimum wage but it is not possible to afford an employee less rights than employment at will. Even if accurate,[11] Defendants fail to explain why that matters. Logically, an absolute ground floor can serve as a default rule. Defendants also argue that reading Section 36.025 as merely a floor would render the provision superfluous, which is to be avoided. This point is unpersuasive. Section 36.025 obviously expresses the legislature's intent to clearly abrogate the prior statutory merit system protections afforded to most state employees. The legislature's intent would not have been as clear had it merely narrowed the definition of "regular employees" who still enjoy merit protections. §§36.020(16), 36.030.1(2), 36.380, 36.390, RSMo. (2018) (A0053, A0057, A0064, A0066). In fact, the effect of SB 1007's bracketed deletions and bolded additions to the Merit System statute would be extremely difficult to decipher in the absence of the new Section 36.025. (A0157-A0203).

If the legislature had intended SB 1007 to prohibit collectively bargained job

[11] At English common law, if the parties did not specify a period of employment, the law presumed a one year contract binding on both parties. *See* Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, U. PA. JOURNAL OF LAB. & EMP. LAW 3:1, at 66 & n.5, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1065&context=jbl (last visited 4/12/2021).

protections for state employees, it would have also set forth a consequence for violating that prohibition. *See Frye v. Levy*, 440 S.W.3d 405, 410-411 (Mo. 2014) (statute providing that agency "shall" make a determination in 90 days was not mandatory, because law declared no sanction for missing the deadline and did not divest the agency of jurisdiction outside of the 90-day window). SB 1007 imposes no sanction on the State for agreeing to negotiate contractual protections with its employees. Rather, SB 1007 continues to authorize such contracts by giving the Office of the Administrator the function of "participating in negotiations and approval of agreements" with unions. §36.510(6), RSMo. (2018) (A1040).

B. The circuit court correctly determined that HB 1413 comprehensively addresses public sector collective bargaining while SB 1007 does not address bargaining at all. (Responds to State's Point I.B).

Beyond the plain language of SB 1007, the Court should consider HB 1413 (A0204-A0220), a public employee bargaining bill passed the same day as SB 1007.[12] HB 1413 included[13] a section limiting subjects of bargaining and, in particular, a management rights provision specifying that every labor agreement must reserve to the public employer "the right to hire, promote, assign, direct, transfer, schedule, discipline, and discharge public employees," §105.585(1) (2018) (A0073). Notably, HB 1413

[12] The court may take judicial notice of the enactment of HB 1413. *See Schweich v. Nixon*, 408 S.W.3d 769, 778 & n. 11 (Mo. 2013). HB 1413 is also an exhibit. Pls.' Exs. 251-252 (A1791-A1808).

[13] Plaintiffs use the past tense, because in 2021, the Supreme Court struck down HB 1413 in its entirety. *See* note 9, *supra*.

expressly exempted the Department of Corrections (DOC) and its employees. §105.503.2(2) (2018) (A0071). By contrast, SB 1007 covers the DOC and its employees. *See* §36.020(1), RSMo. (2018) (A0053) ("state agency" includes "each department… of the state… except for offices of elected officials, the general assembly, the judiciary and academic institutions").

In determining legislative intent, courts should take into consideration "statutes involving similar or related subject matter when those statutes shed light on the meaning of the statute being construed." *State v. Knapp*, 843 S.W.2d 345, 347 (Mo. 1992). "This principle that statutes should be construed harmoniously when they relate to the same subject matter is all the more compelling when the statutes are passed in the same legislative session." *Id.* According to Defendants' own experts, the provision in HB 1413 on a public body's right to hire, promote, and discipline involves the same issues as in this case. Jt. Exs. 187 & 190 (A1787 & A1789); Jt. Ex. 35 at Tab 18 (A1169); Tr. V pp. 938:18 - 939:2, 940:3 - 942:7; Tr. VI pp. 1015:16 - 1019:12, 1042:3 - 1043:4, 1050:24 - 1051:15. It makes little sense for the General Assembly to pass a provision in HB 1413 that prohibits public employers from bargaining "for-cause" job protections, *but exempts employees of the Department of Corrections* (therefore allowing them to bargain such protections), and then, on the same day, pass a provision in SB 1007 that would preclude agreement on "for-cause" protections, *and includes employees of the Department of Corrections*. Read this way, HB 1413 and SB 1007 hopelessly conflict. The more logical interpretation, which harmonizes these statutes, is that the General Assembly intended HB 1413 to address collective bargaining and intended SB 1007 to separately address

statutory merit protections.

Defendants suggest that there is no conflict between HB 1413 and their construction of SB 1007, because HB 1413 *does not prohibit* DOC employees from being required to be at will. Defendants also speculate that there may be unknown and unstated reasons why the legislature exempted the DOC from HB 1413, apart from the management rights requirement in §105.585(1), RSMo. (2018) (A0073). A brief review of HB 1413 and this Court's decision in *Missouri Nat'l Educ. Ass'n,* 623 S.W.3d 585 (Mp. 2021) dispels these arguments.

HB 1413 dramatically restricted the process of public sector collective bargaining. Among other things, the statute: a) required public sector labor unions to be certified every three years, based on the vote of a majority of the bargaining unit, rather than of eligible voters, §105.575, RSMo. (2018) (A1091); b) required any tentative labor agreement to be ratified first by the union and then presented to the public body for any action it deemed appropriate, §105.580.5, RSMo. (2018) (A1094); and, c) mandated that every public sector labor agreement include a management rights clause and authorization for the public body to unilaterally modify the economic terms of a labor agreement if it deemed necessary "upon good cause," §105.585(1), (6), RSMo. (2018) (A0073-A0074). HB 1413 also created a cause of action for "whenever it shall appear that any labor organization… or any public body… has violated or is about to violate any of the provisions of" HB 1413. §105.595, RSMo. (2018) (A1096).

Shortly before HB 1413 passed the Senate, two law enforcement groups were carved out of the bill's coverage. *Missouri Nat'l Educ. Ass'n*, 623 S.W.3d at 594 & n.11. The first

carve-out was for "public safety labor organizations and all employees of a public body who are members of a public safety labor organization." §105.503.2(1) (2018) (A0071). The second was for the DOC and its employees. §105.503.2(2) (2018) (A0071). This Court found the carve-out for public safety labor organizations to violate Missouri's equal protection clause because it was based not on employees' job duties but on the union its employees choose to affiliate with. *Missouri Nat'l Educ. Ass'n,* 623 S.W.3d at 593. The Court found that the carve-out was not severable from the remainder of HB 1413 because the legislature clearly intended for public safety organizations to be exempted from the broad "public labor reform law" applicable to other labor organizations. *Id.* at 594-595.

The same rationale applies to the carve-out of the DOC and its employees. Given this Court's conclusion about severance in *Missouri Nat'l Educ. Ass'n*, it would make no sense to conclude that SB 1007, without expressly stating it, impliedly <u>allows</u> the DOC to impose restrictions on bargaining that the legislature was so intent to avoid in crafting HB 1413. Rather, when SB 1007 is read together with HB 1413, it is evident that the legislature intended to replace merit protections with a default rule of at-will employment and to allow employees to collectively bargain for job protections.

The last argument made by Defendants in their Point I.B is that SB 1007 itself exempts some DOC employees from some of the "at will" requirements of Section 36.025, which Defendants claim "lessens any perceived conflict between sections 105.585 and 36.025." (Def. Brf. at 51). SB 1007 provides that notwithstanding Section 36.025, employees of "eleemosynary or penal institutions" (certain residential facilities) are to be selected based on merit. §§36.020(9), 36.030.1(1), RSMo. (2018) (A0053, A0057). Of

course, eleemosynary and penal institutions are free under SB 1007 to *fire* employees without regard to merit. The preservation of merit selection for some DOC employees in no way reduces the fundamental conflict between HB 1413's DOC carve-out and the State's view that SB 1007 *sub silentio* accomplishes the same goal that HB 1413 sought for employers other than the DOC.

C. The circuit court correctly avoided a construction that would render SB 1007 unconstitutional.

If this Court harbors any doubt as to whether the "at will provision" in SB 1007 impliedly divests State employees of a meaningful constitutional right to bargain collectively, it must construe the statute so as to render it constitutional if it is reasonably possible to do so. *State ex rel. Union Elec. Co. v. PSC*, 399 S.W.3d 467, 470 (Mo. App. W.D. 2013). If one interpretation of a statute results in the statute being constitutional while another would cause it to be unconstitutional, the constitutional interpretation is presumed to have been intended. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 838-39 (Mo. 1991). Interpreting SB 1007 in the manner urged by the State would render the statute unconstitutional in violation of Article I, Sections 29 and 13. Since SB 1007 neither expressly nor impliedly curtails the right to collectively bargain, like HB 1413 did in a comprehensive fashion, it is "reasonably possible" to interpret SB 1007 to avoid these constitutional questions. This Court should therefore construe the law's provision for at-will employment to set a default rule or floor, allowing employees to bargain for more robust job protections.

II. The circuit court correctly ruled that Article I, Section 29 of the Missouri Constitution requires the State to bargain in good faith over core subjects of employment including "for-cause" and seniority protections and grievance/arbitration procedures. (Responds to State's Point II.A).

Standard of Review: This Court reviews *de novo* the trial court's rulings on questions of law. *Pearson v. Koster*, 367 S.W.3d 36, 43 (Mo. 2012).

Preservation: Plaintiffs preserved this point. D304, pp. 3, 19-22; D306, pp. 40, 59-66; D307, pp. 23-28. Defendants waived some of the arguments made in Point II.A of their Brief, as explained below.

A. Defendants waived their argument that Article IV, Section 19 of the Missouri Constitution, conferring authority on executive department heads to select and remove employees, trumps Article I, Section 29; and in the alternative, by its express terms, Article IV, Section 19 is limited by other provisions of the 1945 Constitution, including Article I, Section 29. (Responds to State's Point II.A.1).

Defendants argue that the Court erred by interpreting Article I, Section 29 to mandate bargaining by the State over core subjects of bargaining like "for-cause" and seniority protections and grievance procedures, because such a result is foreclosed by Article IV, Section 19, adopted by the voters at the same time.

Defendants did not assert this defense in their Answer (D180), and they never advanced it in discovery, by motion, in their pretrial brief, during trial, or in their post-trial brief. (D305, D308). It is therefore waived. *Land Clearance for Redev. Auth. v. Kansas Univ. Endowment Assoc.*, 805 S.W.2d 173, 175 (Mo. banc 1991); *State v. Davis*, 348 S.W.3d 768, 779 (Mo. banc 2011). In a transparent attempt to avoid this waiver, they weave this argument together in the same Point with others they made at trial concerning the meaning of Article I, Section 29. Defendants impermissibly attempt to raise a new legal

theory for the first time on appeal: whether, by virtue of Article IV, Section 19, State employees are carved out of the right of collective bargaining under Article I, Section 29. The trial court did not consider the issue, and this Court should not permit Defendants to advance it now. *Land Clearance*, 805 S.W.2d at 175.

If this Court nonetheless reaches the merits of this argument, it is not persuasive. Article IV, Section 19 provides:

> The head of each department may select and remove all appointees in the department except as otherwise provided in this constitution, or by law. All employees in the state eleemosynary and penal institutions, and other state employees as provided by law, shall be selected on the basis of merit, ascertained as nearly as practicable by competitive examinations….

Mo. Const. art. IV, §19 (A0101). Defendants argue that in the absence of statutory restrictions such as the Merit System statute prior to SB 1007, this provision confers absolute discretion on the heads of executive agencies to select and remove employees as they see fit.

Defendants acknowledge that Article IV, Section 19 reserves departmental discretion over selection and removal of employees "*except as otherwise provided in this constitution, or by law*" – and Article I, Section 29 is another provision of the 1945 Constitution (and Missouri's public employee labor law provides a means to exercise the right to collectively bargain). Nonetheless, Defendants urge this Court to find that Article IV, Section 19 trumps Article I, Section 29 because the former is specific to State executive agencies and the latter is general to all employers. Defendants also argue (Brf. at 58) that since both of these provisions were new to the Constitution of 1945, "it would be odd, and contrary to the intent of the citizens… to read article I, section 29 as allowing one

department head to remove a later department head's discretion, and thereby, nullify the powers expressly given to department heads in article IV, section 19."

The voters are assumed to have ratified a constitutional provision based on its plain and ordinary meaning. *Associated Indus. of Mo. v. State Tax Comm'n*, 722 S.W.2d 916, 920 (Mo. 1987). This Court has declared that Article I, Section 29 plainly applies to "*all employees*:"

> There is no adjective; there are no words that limit "employees" to private sector employees. The meaning of section 29 is clear and there is, accordingly, no authority for this Court to read into the Constitution words that are not there.

*Independence*, 223 S.W.3d at 137. Just as there is no silent carve-out for public sector employees, there is no implied loophole for state employees. Were this Court to accept Defendants' construction, it would drill a large hole in the constitutional right of collective bargaining in contravention of the provision's plain meaning.

Importantly, Article I, Section 29 does not require a public employer to agree to any particular bargaining proposal. *Independence*, 223 S.W.3d at 136. It only requires a public employer to bargain over core terms of employment, "in good faith," in a sincere effort to reach agreement. *Ledbetter*, 387 S.W.3d at 364-366. If the parties reach agreement after bargaining in good faith, then the employer has *exercised* its discretion rather than impermissibly delegating it away. *Independence*, 223 S.W.3d at 136. By construing Article I, Section 29 to require the State to bargain over certain core subjects of bargaining, the circuit court did not in any way undermine Article IV, Section 19.

In the alternative, if this Court were to find that Article IV, Section 19 created ambiguity as to the application of Article I, Section 29 to State employees, the Court should review "the minutes of the Constitutional Convention for their persuasive, though not binding, effect." *Associated Indus.*, 722 S.W.2d at 920. The framers of the 1945 Constitution thoroughly considered the potential for collective bargaining between the State and its employees. Delegate Righter proposed to amend Article I, Section 29 by adding, "provided however that this Section shall not apply to the state…." Debates of the Missouri Constitutional Convention of 1943-1944, Vol. VIII, p. 2542 (A1098). He argued: "I have no objection in the world to the employees organizing, but I do object to putting in the Constitution a limitation upon the state's sovereignty, that it must concede to them the right to organize whether it wants to or not…." *Id.* at 2547 (A1103). Delegate Meador responded, "I think we will find it is quite general now in the country for employees of the state… to have the right to organize…." *Id.* at 2549 (A1105). Mr. Righter's proposed amendment was defeated. *Id.* at 2554 (A1110). If there were any ambiguity created by Article IV, Section 19 as to whether State employees enjoy a Constitutional right to bargain collectively, the debates resolve it affirmatively.

B. The trial court correctly applied this Court's trilogy of public sector bargaining cases and concluded that Article I, Section 29 prohibits repudiation of labor agreements, requires the State to bargain in good faith over core subjects of bargaining including "for-cause" and seniority protections and grievance/arbitration procedures, and prohibits unilateral changes during bargaining. (Responds to State's Points II.A.2, II.A.3.i & ii).

This Court reviews *de novo* the determination that Article I, Section 29 prohibits repudiation of labor agreements, requires the State to bargain in good faith over core

subjects of bargaining, and prohibits unilateral changes to terms of expired labor agreements during bargaining. The trial court's rulings on these questions rest soundly on this Court's trilogy of public sector bargaining cases. *Independence*, 223 S.W.3d 131; *Ledbetter*, 387 S.W.3d 360; *Chesterfield*, 386 S.W.3d 755.

*Independence* held that a school district violated Article I, Section 29 by unilaterally rescinding bargaining procedures in two labor agreements and imposing a joint bargaining process with multiple unions without negotiating with any of them. The district also unilaterally rescinded discipline and dismissal provisions and a grievance procedure in one of the labor agreements. 223 S.W.3d at 134. The district admitted that it had not bargained with the unions before making unilateral changes to terms and conditions of employment, but argued pursuant to *City of Springfield v. Clouse*, 206 S.W.2d 539, 542 (Mo. banc 1947), that Article I, Section 29 did not apply to public employees. This Court reversed *Clouse*, holding that the language of Article I, Section 29 is plain and includes all employees. 223 S.W.3d at 137. The district also claimed that it was legally privileged to rescind portions of its labor agreements without bargaining under *Sumpter v. City of Moberly*, 645 S.W.2d 359 (Mo. banc 1982). The Court in *Independence* overruled *Sumpter* and held that collective bargaining agreements with public employers are just as enforceable as any other kind of contracts. 223 S.W.3d at 140.

This Court further fleshed out the contours of Article I, Section 29 in *Ledbetter*. The charter school employer there unilaterally changed the non-economic terms of a tentative first labor agreement reached with the union representing its teachers, and imposed new wages unilaterally, all without bargaining with the union. 387 S.W.3d at 362. The trial

court found that the charter school's conduct would have constituted "bad faith bargaining" if the National Labor Relations Act (NLRA) applied – but concluded that Article I, Section 29 imposed no affirmative duties on public employers whatsoever, much less a duty to bargain in "good faith." *Id.*

This Court reversed. Acknowledging that Missouri has no statutory duty to bargain "in good faith," the Court held that such a duty is necessarily implied by Article I, Section 29 – otherwise the right to organize and bargain collectively would be nullified, and the section would do no more than duplicate the right to petition for redress of grievances. "Both of those results are unreasonable." *Id.* at 364. "The ultimate purpose of bargaining is to reach an agreement…. 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." *Id.* The Court continued,

> "[C]ollective bargaining," as a technical term, always has been construed to include a duty to negotiate in good faith – even when it was not required explicitly by statute. When the constitution employs words that long have had a technical meaning, as used in statutes and judicial proceedings, those words are to be understood in their technical sense unless there is something to show that they were employed in some other way.

*Id.*

While acknowledging that "good faith" within the meaning of Article I, Section 29 is a question arising under state law, and federal law is not binding, *Ledbetter* devoted several pages to an analysis of the development of the concept of good faith bargaining under the NLRA and its predecessor statutes as well as the constitution of New Jersey. *Id.*

at 364-366 & n.5. The Court continued, "collective bargaining requires an employer to negotiate in good faith with his employees' representatives; to match their proposals, if unacceptable, with counter-proposals; and to make every reasonable effort to reach an agreement." *Id.* at 366. "Surely, employees do not organize in order to conduct a sewing circle." *Id.* at 367 (*quoting Comite Organizador de Trabajadores v. Levin,* 515 A.2d 252, 212 N.J. Super. 362, 367-68 (N.J. Super. 1985)). Ultimately, the Court held, "the course of a negotiation between parties acting in good faith should reflect that both parties sincerely undertook to reach an agreement." *Id.* at 367. "Federal law and cases can give guidance to the extent they are consistent with Missouri law." *Id.* at 367-68 & n.5.

Per *Ledbetter*, the duty to bargain in good faith is not contingent upon a contract. There was no CBA in *Ledbetter* – the parties were negotiating their first agreement. Yet, this Court held that the constitutional obligation to bargain in good faith applied when the employer unilaterally adopted new salaries without bargaining. 387 S.W.3d at 362. Parties must make a reasonable and sincere effort to reach agreements. It frustrates the bargaining process if an employer is free to alter the very terms and conditions of employment that are being negotiated.[14]

[14] *See also NLRB v. Katz*, 369 U.S. 736, 747 (1962) ("Unilateral action without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining…."); *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991); *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.6 (1988).

Judge Fischer dissented in *Ledbetter*, arguing that the majority opinion was inconsistent with *Quinn v. Buchanan*, 298 S.W.2d 413 (Mo. 1957). The Court in *Quinn* analyzed a private sector employer's duties under Article I, Section 29, and held:

> *Sec. 29, Art. I is not a labor relations act, specifying rights, duties, practices and obligations of employers and labor organizations, as plaintiffs seem to claim*…. This provision is a declaration of a fundamental right of individuals. It is self-executing to the extent that all provisions of the Bill of Rights are self-executing, namely: Any governmental action in violation of the declared right is void. As between individuals, because it declares a right the violation of which surely is a legal wrong, there is available every appropriate remedy to redress or prevent violation of this right. However, *the constitutional provision provides for no required affirmative duties concerning this right and these remedies can only apply to their violation*…. [I]implementation of the right to require any affirmative duties of an employer concerning it is a matter for the Legislature.

298 S.W.2d at 418-19. Judge Fischer maintained that *Independence* did not undermine *Quinn* in any way. 386 S.W.3d at 373.

The majority in *Ledbetter* did not see the need to expressly discuss *Quinn*, though its reasoning undercut it. However, in the companion case of *Chesterfield,* the Court expressly overruled *Quinn's* holding that Article I, Section 29 imposes no affirmative duties on employers. 386 S.W.3d at 762. The majority disagreed with two inferences underpinning the *Quinn* decision: (1) that a "Bill of Rights" merely declares those rights the people already possess independent of a government grant, and (2) that provisions in a Bill of Rights are merely "self-executing limitations on government that do not require any additional legislation to guarantee their observance." *Id.* at 761. These inferences set forth in the older treatises relied on by *Quinn* "do not encompass the breadth of modern constitutional law," the Court held. *Id.* "The people of Missouri may place anything they

wish within their constitution so long as it is not contrary to the federal constitution." *Id.* An example of an affirmative right contained in Missouri's Bill of Rights is Article I, Section 32, granting crime victim rights to information, restitution, and reasonable protection. *Id.* The Court also cited examples of rights contained in constitutions of other states. *Id.* (*citing Sheff v. O'Neill,* 678 A.2d 1267, 1284-85 (Conn. 1996) (affirmative duty to provide substantially equal educational opportunity for all students)). "Likewise," *Chesterfield* held, "article I, section 29 of the Missouri Constitution imposes on employers an affirmative duty to bargain collectively." *Id.*

The issue in *Chesterfield* was whether police departments had an affirmative duty to establish a framework for police to elect a union representative since they were exempt from the Public Employee Labor Law. The municipal employers relied on *Quinn* to defend their refusal to establish an election procedure. The trial court granted summary judgment for the union which had collected authorization cards from virtually all the police officers employed by both municipalities. As relief, the trial court ordered the municipalities to establish a framework for determining the scope of an appropriate bargaining unit, details of the election process, and procedures for the bargaining process. 386 S.W.3d at 762-763. This Court affirmed in part, overruling *Quinn* and ruling that the municipalities had an affirmative duty to bargain with the union. "Although legislative power remains the province of legislative bodies," the Court explained, "it is a proper role of the courts to compel legislative bodies to meet their constitutional obligations while leaving it to those bodies to determine how to meet them." *Id.* at 763. That is, the Court found that the Constitution compelled the municipalities to bargain with the union.

The trial court here properly considered the facts of *Independence* and *Ledbetter* and concluded that Article I, Section 29 requires employers to bargain over core subjects that go to the heart of employment, such as "for-cause" and seniority protections and grievance-arbitration. Whether an employee can be fired for any reason, or laid off instead of a less senior employee, or can seek to enforce their contractual rights by grievance, is critical to an employee's job and tenure. *Independence*, 223 S.W.3d at 144–45 & n. 6 ("Collective bargaining" means "negotiations between an employer and the representatives of organized employees to determine the conditions of employment, such as wages, hours, discipline, and fringe benefits.") (*quoting* Black's Law Dictionary (8th ed. 2004)). The case law shows that the right to collectively bargain encompasses these core subjects. The Court in *Independence* reversed the trial court's decision upholding the lawfulness of the district's rescission of discipline and discharge and grievance provisions of a labor agreement and rejected the district's unilateral imposition of a new bargaining procedure. 223 S.W.3d at 134-135, 141. Similarly, *Ledbetter* dealt with changes in tenure (a form of job protection) and salaries - whether the employer acted in "good faith" when it refused to bargain over tenure and salaries and unilaterally imposed new salaries. 387 S.W.3d at 368.

Taken together, this Court's three decisions on Article I, Section 29 establish the following principles relevant to this case:

1. Article I, Section 29 imposes an affirmative duty on public employers to bargain in good faith before changing or unilaterally imposing core terms and

conditions of employment such as discipline/discharge and grievance procedures (*Independence*, *Ledbetter*).

2. "Good faith" is to be determined under Missouri law, but the Court may look to federal cases under the NLRA or the constitutions and caselaw of other states for guidance. (*Ledbetter*).

3. The duty to bargain in good faith applies both during the term of a collective bargaining agreement (*Independence*) and in the absence of a collective bargaining agreement (*Ledbetter*).

4. Even in the absence of implementing legislation, the Court has the power and duty to order an employer to comply with its affirmative obligations under Article I, Section 29. (*Ledbetter*, *Chesterfield*).

Defendants miss the mark when they argue that Article I, Section 29 merely guarantees a bargaining *process* and not any particular outcome. Plaintiffs never claimed that the Constitution guarantees them a certain outcome. *Independence* precludes that. 223 S.W.3d at 136. However, *Ledbetter* and *Independence* make clear that Article I, Section 29 requires employers to bargain about core subjects of employment. Otherwise bargaining is nothing more than a "sewing circle." *Ledbetter*, 387 S.W.3d at 367.

The Court should reject Defendant's argument that Article I, Section 29 cannot be construed as requiring bargaining over certain subjects, because that would be inconsistent with multiple statutes that historically limited the State's authority to bargain about certain subjects. Defendants cites various provisions of the State merit law and the Public Employee Labor Law. Plaintiffs have not asserted that the legislature is powerless to enact

laws dealing with state employment either within or outside the context of collective bargaining. Whether a particular statute infringes on the constitutional right of collective bargaining has to be determined in a particular case. Plaintiffs simply argue that SB 1007 does not purport to address collective bargaining at all and Defendants' abrogation of Plaintiffs' labor agreements and refusal to bargain about three of the most important terms of employment renders collective bargaining empty and violates Article I, Section 29.

C. The trial court properly relied on the persuasive value of federal case law on bargaining and Florida cases on the Florida Constitution to support its holding that Article I, Section 29 requires bargaining over core subjects of employment. (Responds to State's Point II.A.3.iii).

Defendants argue that the text of Article I, Section 29 requires only a bargaining *process* and does not require an employer to discuss any specific subjects, and in this respect it is unlike the texts of the NLRA and Florida Constitution cited by the trial court. D334, pp. 31, 34-35.

Defendants' textual analysis is unpersuasive. Defendants focus on the absence of any language in Article I, Section 29 specifying required subjects of bargaining. They contrast that with Section 8(a)(5) of the NLRA, which makes it an unfair labor practice for an employer to refuse to bargain collectively, and Section 8(d), which defines collective bargaining as "the performance of the mutual obligation of the employer and the representative to meet… and confer in good faith *with respect to wages, hours, and other terms and conditions of employment.* 29 U.S.C. §158(a)(5), 158(d) (emphasis added). From this textual difference, Defendants conclude that Article I, Section 29 merely requires a bargaining process, not any particular subjects of bargaining.

The absence of an express requirement of "good faith" in Article I, Section 29 did not keep this Court from finding the requirement of "good faith" inherent in the constitutional right of collective bargaining. Rather, the Court in *Ledbetter* held that at the time Article I, Section 29 was adopted, "collective bargaining" was a technical phrase that was historically understood to "include a duty to negotiate in good faith — even when it was not required explicitly by statute." *Ledbetter*, 387 S.W.3d at 364. As support for this proposition, the Court reviewed the history of collective bargaining in the United States, starting with the War Labor Board in 1918, then the Transportation Act of 1920, the National Industrial Labor Act of 1933, the National Industrial Recovery Act of 1935, and the NLRA of 1935. 387 S.W.3d at 364-366. All of these statutes were construed consistently by labor boards and federal courts to inherently require "good faith bargaining" without any express statutory requirement. *Id.* The NLRA did not expressly require "good faith bargaining" until passage of the Labor Management Relations Act two years after the adoption of Article I, Section 29. *Id.*, 387 S.W.3d at 366, citing Pub. L. No. 101, 61 Stat. 136, 142 (1947).

Similarly, the federal labor statutes reviewed in *Ledbetter* did not definitively set forth the subjects that management and labor were to bargain about. 387 S.W.3d at 164-166. They merely required labor and management to bargain over their differences in an effort to decrease labor strife. Yet the governing labor boards and courts readily found that the collective bargaining obligation necessarily required employers to negotiate with the unions chosen by their employees about core subjects of employment such as wages, hours, discharge, seniority, and grievance/arbitration. *See In the Matter of Houde Engineering,*

1934 NLRB LEXIS 1, at *3 (NLRB August 30, 1934); *In re Atl. Refining Co.*, 1 N.L.R.B. 359, 368, 1936 NLRB LEXIS 96, *19-20, (N.L.R.B. March 19, 1936); *NLRB v. Westinghouse Air Brake Co.*, 120 F.2d 1004, 1006 (3rd Cir. 1941); *NLRB v. Reed & Prince Mfg. Co.*, 118 F.2d 874, 881 (1st Cir. 1941). Not until 1947, after the adoption of Article I, Section 29 of the Missouri Constitution, was Section 8(d) of the NLRA amended to expressly require bargaining over "wages, hours, and other terms and conditions of employment." Labor Management Relations Act, Pub. L. 80-101, §101, 61 Stat. 136, 142 (1947).[15]

Federal courts and the NLRB have long recognized the importance of "for-cause" protections, seniority, and grievance procedures, and consider them mandatory subjects of bargaining. *See, e.g., Hughes v. Pittsburgh Testing Lab*, 624 F. Supp. 54, 56 (N.D. Ill. 1985) (just cause is "central to the whole of federal labor law and thus an integral part of any collective bargaining agreement."); *Babcock & Wilcox Construction Co., Inc*., 361 NLRB No. 132, at n. 8 (2014) ("'just cause' provisions have been ubiquitous in collective-bargaining agreements"); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 766 (1976) ("seniority affects the economic security of the individual employee covered by its terms");

[15] Section 9(a) of the NLRA always contained an indirect reference to subjects of bargaining: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit… shall be the exclusive representatives of all the employees in the unit ***in respect to rates of pay, wages, hours of employment, or other conditions of employment***." Pub. L. 74-198, §9(a), 49 Stat. 449, 453 (1935) (A0123) (emphasis added). In Section 8(d), Congress adapted language from Section 9(a) on the role of an exclusive bargaining representative in order to codify the principle already implied by the NLRB and courts – that an employer commits an unfair labor practice if it refuses to bargain over "wages, hours, and other terms and conditions of employment." Pub. L. 80-101, §8(d), 61 Stat. 136, 142 (1947).

*Litton Financial Printing Div., Litton Business Systems, Inc. v. NLRB*, 501 U.S. 190, 199 (1991) ("[A]rrangements for arbitration of disputes are a term or condition of employment and a mandatory subject of bargaining"); *Socony Mobil Oil Co., Inc*., 147 NLRB 337, 340 (1964) ("Seniority for present and future employees in the bargaining unit is a mandatory subject of collective bargaining."). The trial court properly relied on these authorities for their persuasive value to support its conclusion that Article I, Section 29 requires bargaining over these core subjects. D334, p. 31 n.3. "The right to negotiate collective bargaining agreements that are equally binding on both parties is of little moment if the parties have virtually nothing to negotiate over." *Nat'l Treasury Employees Union v. Chertoff*, 452 F.3d 839, 860 (D.C. Cir. 2006).

Defendants also argue that Florida's constitutional right of collective bargaining is different from Missouri's. Florida's provision states: "The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged." Fla. Const. art. I, §6. Defendants offer no legal authority for their strange theory that because Missouri's right of collective bargaining is framed in the affirmative ("employees shall have the right… to bargain collectively"), and does not prohibit the "abridgment" of that right like Florida's does, the Missouri legislature is free to impose draconian restrictions on bargaining as long as some hollow shell remains. Defendants then recycle a variation of two prior arguments. They contend that Florida's provision is distinguishable from Missouri's because the Florida decisions do not mention any constitutional provision similar to Missouri's Article IV, Section 19, protecting the authority of executive

department heads over their employees.[16] And they reiterate the laundry list of Missouri statutes that they claim historically restricted the State's ability to bargain over certain issues. The first argument on Article IV, Section 19 was waived, and both were and still are unpersuasive on the merits.

III. The trial court properly granted judgment for Plaintiffs on Count I, finding that Defendants violated Article I, Section 29 by: a) abrogating the AFSCME and CWA labor agreements, b) refusing to bargain with Plaintiffs over "for-cause" and seniority protections and grievance procedures, and c) unilaterally changing the *status quo* terms of employment without bargaining following the expiration of the SEIU agreements. (Responds to State's Point V).

Standard of Review. Defendants do not challenge the factual findings underlying the trial court's judgment on Count I. Instead, they make three legal arguments that this Court reviews *de novo. Pearson*, 367 S.W.3d at 43 ("claim that the judgment erroneously declares or applies the law"); *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 204 (Mo. banc 2008) (interpretation of constitution).

Preservation: Plaintiffs preserved this Point. D306, pp. 66-71; D307, pp. 28-30. Defendants waived some of the arguments made in Point V of their Brief, as explained below.

A. Defendants waived the argument that Plaintiffs were required to bring a breach of contract claim to enforce the AFSCME and CWA CBAs; in the alternative, *Independence* makes clear that a public body violates Article I, Section 29 by unilaterally repudiating a labor agreement, and furthermore it would have been

[16] The Florida constitution requires the state legislature to create a civil service system for most state employees. Fla. Const. Art. III, §14. In exercising its constitutional authority, however, the legislature cannot abridge the state's constitutional right of collective bargaining. *Hillsborough County Gov't Employees Assoc. v. Hillsborough County Aviation Auth.*, 522 So.2d 358, 362 (Fla. 1988).

futile for Plaintiffs to bring a breach of contract claim. (Responds to the State's Point V.A)

The State seems to argue that a breach of contract claim was the exclusive remedy for AFSCME and CWA's challenge to Defendants' repudiation of their labor agreements. An argument that a claim is an exclusive remedy is an affirmative defense. *McCracken v. Wal-Mart Stores East,* 298 S.W.3d 473, 479 (Mo. banc 2009). Defendants failed to plead this defense, and they failed to present it to the court by motion, during the trial, or in any of their briefs. Accordingly, they waived it. *Land Clearance,* 805 S.W.2d at 175.

Even if the Court considers this argument, it should be rejected. *Independence* held that an employer violates Article I, Section 29 when it unilaterally repudiates portions of an agreement with a union. At the beginning of that opinion, the Court cited Article I, Section 29 and asked, "may the public employer unilaterally impose a new employment agreement that contradicts the terms of the agreements then in effect?" and then expressly answered, "no." 223 S.W.3d at 133. To explain this point, the Court reviewed the *Sumpter* case, where a public body reached an agreement with a union and then a few months later imposed a new work schedule on employees that conflicted with the agreement. *Sumpter* held that the terms of an agreement with a union "could be changed unilaterally" by a public body. *Id.* at 140. The Court in *Independence* disagreed and held that labor agreements are enforceable and that "*Sumpter's treatment of collective bargaining agreements is inconsistent with Article I, Section 29*." *Id.* (emphasis added).

In *Independence,* the public body rescinded provisions of a labor agreement dealing with grievances and discipline, and dismissal and it unilaterally imposed new terms. *Id.* at

134. The same thing happened here. The AFSCME and CWA CBAs include substantive provisions on grievances, discipline/dismissal, and seniority that were rescinded by the State's unilateral imposition of the new terms. The attempt by Defendants to distinguish *Independence* – by arguing that the school district there admitted its refusal to bargain – is unavailing. That admission reflects that an employer's unilateral modification of an agreement with a union is *by definition* a refusal to bargain with that union.

Defendants absurdly argue that they "misunderstood" the CBAs and cannot be in violation of Article I, Section 29 based on a misunderstanding. The State well understood the requirements in the CBAs to provide "cause" for discipline and to process grievances, as evidenced by the years of disciplinary grievances in the record and a prior arbitration it lost. Jt. Exs. 79, 80, 83, 92, & 94 (A1316, A1317, A1318, A1334, & A1354). See also Jt. Exs. 81-82, 84, 86-91, 95-96. Where the State failed was in its misunderstanding of SB 1007.

Finally, it would have been futile for Plaintiffs to bring a breach of contract claim. *Duncan v. Missouri Bd. for Architects, Professional Engineers & Land Surveyors*, 744 S.W.2d 524, 531 (Mo App. E.D. 1988) ("The law does not require the doing of a useless and futile act."). The parties agreed to grievance/arbitration to resolve contract disputes. Defendants' conduct – in unilaterally rescinding the grievance procedures after SB 1007 went into effect - flouted the heart of the CBAs and amounted to a repudiation of the CBAs. Jt. Ex. 41 at Art. 5, §1 (A0689); Jt. Ex. 75 at Art. 12, §12.1 (A0883); Jt. Exs. 104, 108, 119 & 125 (A0938, A0964, A1390 & A1416). Plaintiffs properly framed this as a constitutional violation.

B. Defendants do not challenge the trial court's factual finding that they did not make a sincere effort to reach agreement; alternatively, to the extent that Defendants honestly but mistakenly believed that they could abrogate labor agreements, refuse to bargain about core subjects, and unilaterally change the *status quo* of expired agreements, they still failed to bargain in good faith. (Responds to the State's Point V.B)

The record undermines Defendants' assertion that they sincerely sought to reach agreements with Plaintiffs. Defendants do not challenge the court's factual findings on this point.

Defendants undisputedly used SB 1007 as an excuse to refuse to bargain over important subjects. By closing off any ability to compromise on multiple terms important to employees, the State lacked an "open mind" and the ability to match proposals "with counter-proposals" necessary to bargain in good faith. The State went into negotiations with a fixed and pre-determined view that it could not legally agree to provisions on discipline and seniority protections and grievance procedures, leaving no ability to compromise to reach agreement.

Defendants' claim that they were "open" to hearing the Unions' proposals does not save them. There was nothing the Unions could say or offer to convince the State to compromise on terms it claimed it could not legally agree to. The State's negotiator, Guy Krause, testified that it might be possible to "thread the needle" to craft a permissible grievance procedure. Tr. IV at 795:8-24. Putting aside the usefulness of a procedure limited to discrimination-type claims already covered by law, bargaining is not about "threading needles" or "conducting a sewing circle." *Ledbetter*, 387 S.W.3d at 367. Rather, it involves a robust give and take with a mutual goal of reaching agreement. As

the trial court succinctly put it, "'Talk to the hand' cannot be said to be a sincere undertaking to reach agreement." D270, p. 5; D334, p. 40.

Assuming for the moment that Defendants subjectively believed that SB 1007 compelled their actions, such belief does not insulate them from liability. Accepting Defendants' suggested standard would do exactly what *Ledbetter* counsels against – "frustrating the very purpose of bargaining and invalidating the right." *Ledbette*r, 387 S.W.3d at 364. *See also NLRB v. Katz*, 369 U.S. 736, 747 (1962) (employer may violate duty to bargain in good faith even without a bad motive); *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1032-33 (2nd Cir. 1990) (same). Well intentioned or not, Defendants' conduct in this case frustrates collective bargaining just as much as the actions of the employers in the *Independence* and *Ledbetter* cases.

Nor were Plaintiffs required, as Defendants suggest, to seek a declaratory judgment on SB 1007's meaning or agree to the State's proposals contingent upon the results of litigation. That would mean that Plaintiffs would have to accept Defendants' bad faith bargaining in order to vindicate their rights. The law does not require such a concession even for a brief period of time. *See Rebman v. Parson*, 576 S.W.3d 605, 612 (Mo. 2019).

C. The trial court correctly ruled that Defendants violated Article I, Section 29 by making unilateral changes to the terms of SEIU's expired labor agreements, and it properly required Defendants to restore the *status quo*. (Responds to the State's Point V.C)

Defendants do not challenge the sufficiency of the evidence underlying the circuit court's ruling that they unilaterally changed terms of the SEIU's expired labor agreements without first bargaining to impasse. Instead, they make a purely legal argument – that

Article I, Section 29 contains no unfair labor practice provision comparable to Section 8(a) of the NLRA, and therefore Defendants were free to unilaterally change the terms of expired labor agreements.

*Ledbetter* dictates the opposite conclusion. The parties in *Ledbetter* did not even have an expired contract because they were bargaining their first agreement. Nonetheless, the Court held that Article I, Section 29 imposed on the employer a duty to bargain "in good faith," with a sincere commitment to reach an agreement. 387 S.W.3d at 367. The Court reasoned, "'[a] constitutional provision should never be construed to work confusion and mischief unless no other reasonable construction is possible.'" *Id.* at 363-364. "If public employers were not required to negotiate in good faith," the Court reasoned, "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." *Id.* at 364. The Court also relied on an extensive review of federal labor statutes and board and judicial precedent interpreting the technical term "collective bargaining" over the 25 years before Article I, Section 29 was adopted – laws which were consistently construed to impose a duty to bargain in good faith, despite the absence of any such express requirement in statutes at the time. *Id.* at 364-367.

A unilateral change violates the plain requirement of "*negotiations* . . . to determine conditions of employment, such as wages, hours, discipline, and fringe benefits." *Independence*, 223 S.W.3d at 138 n.6 (emphasis added). Moreover, a unilateral change injures the process of collective bargaining itself. Instead of making proposals and counter-proposals and trying to reach agreement with the union, the employer is bypassing the

union. This interferes with the right of employees to organize and deal with their employer "through representatives of their own choosing." Mo. Const. Art. I, § 29. When the employer makes a unilateral change, instead of dealing with the union, the employer is sending a message, intentionally or not, that it is not obligated to bargain with the representative of the employees' choosing. That damages employees and undermines the union.

Courts and scholars have made this point about unilateral changes for years:

> When taken during negotiations or upon subjects on which the union wishes to bargain it weakens the union by showing the employees that it is useless to try to negotiate. If the employer unilaterally raises wages or makes some other concession, his conduct effectively tells the employees that without collective bargaining they can secure advantages as great as, or possibly greater than, those the union can secure.

*NLRB v. McClatchy Newspapers*, 964 F.2d. 1153, 1162 (D.C. Cir. 1992) (Edwards, concurring). The point is not unique to Sections 8(a)(5) or 8(d) of the NLRA but follows the historical understanding of "collective bargaining" as described in *Independence* and *Ledbetter*. *See also May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945) (employer interfered with employees' right to bargain collectively when it sought approval from National War Labor Board for upward wage adjustment without bargaining with union; such unilateral action "interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent.").

Because of the damage that unilateral changes wreak on the bargaining process, it is appropriate for a court to order an employer to rescind such changes, restore the *status quo*, and bargain with the union over any changes going forward, even after a contract has

expired and until the parties reach overall impasse. That remedy follows *Ledbetter*. By making changes during negotiations and after contract expiration, to the very subjects about which the employer and union are bargaining, the employer moves the baseline and forces the union to first bargain back to what it had before. That "frustrat[es] the very purpose of bargaining and invalidat[es] the right." *Id.* at 364. Requiring employers to bargain from the *status quo* protects the collective bargaining process. *See Katz*, 369 U.S. at 747; *Laborers Health and Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 & n.6 (1988) ("Freezing the *status quo ante* after a collective bargaining agreement has expired," and prohibiting an employer from making unilateral changes, "promotes industrial peace by fostering a noncoercive atmosphere that is conducive to serious negotiations on a new contract.").

Defendants take umbrage with these principles and challenge the reasoning of the *Katz* decision, asking why an employer's decision to give some employees merit raises would indicate a refusal to bargain? The answer is found in the principles and history of collective bargaining and the court cases on which *Ledbetter* relies for the proposition that Article I, Section 29 requires a duty to bargain in good faith. Even if well intentioned, a unilateral wage increase denies employees the right to bargain through representatives of their choosing and thwarts collective bargaining. The appropriate remedy is to require the employer to rescind the changes at the request of the union and bargain.

IV. The trial court correctly ruled in the alternative that if SB 1007 were construed as urged by Defendants, the statute would be unconstitutional as applied to Plaintiffs, because collective bargaining is a fundamental right subject to strict scrutiny, and Defendants offered no evidence that SB 1007 was tailored in any way to accomplish a compelling or even important purpose of restricting collective bargaining. (Responds to State's Point II.B).

Standard of Review: This Court reviews *de novo* the circuit court's interpretation of the Missouri Constitution and its determination regarding the constitutionality of a statute. *Tourkakis*, 249 S.W.3d at 204 (Mo. banc 2008); *State v. Harris*, 414 S.W.3d 447, 449 (Mo. banc 2013).

Preservation: Plaintiffs preserved this point. D304, pp. 23-25; D306, pp. 71-78; D307, pp. 30-35.

A. If this Court agrees with the circuit court's construction of 1007, it need not reach the circuit court's determination that SB 1007 violates Article I, Section 29; in the alternative, the circuit court properly applied strict scrutiny rather than rational basis review, because the right of collective bargaining is a fundamental right, and SB 1007 as applied by Defendants severely restricts collective bargaining. (Responds to State's Points II.B.2 and II.B.3).

To preserve judicial economy, the trial court applied strict scrutiny and found in the alternative that SB 1007, as applied to the facts of this case, violates Article I, Section 29. Defendants argue that strict scrutiny does not apply because the right to bargain collectively is not "fundamental," and SB 1007 does not "heavily burden or severely restrict" the right of collective bargaining. Defendants urge that SB 1007 is subject to only rational basis review, a standard they say is easily met by their experts who opined that at-will employment has a beneficial effect on organizational performance.

Plaintiffs argue that SB 1007 is unconstitutional *as applied to their collective*

*bargaining relationships with Defendants*. When evaluating an as-applied challenge to a statute, courts are to examine how the specific parties before the Court are affected by the statute, not how the statute might apply to other parties not before the Court. *Phelps-Roper v. Ricketts*, 867 F.3d 883, 896 (8th Cir. 2017). *Cf. Strahler v. St. Luke's Hosp.,* 706 S.W.2d 7 (Mo. 1986) (as applied to minor, medical malpractice statute of limitations violated fundamental right of access to the courts); *Geier v. Mo. Ethics Comm'n,* 474 S.W.3d 560, 565-69 (Mo. 2015) (applying exacting scrutiny and upholding campaign reporting and disclosure statutes as applied to dormant PAC).

Contrary to Defendants' assertion, the right of collective bargaining is fundamental. Rights are fundamental if they are "explicitly . . . guaranteed by the Constitution." *Weinschenk v. State*, 203 S.W.3d 201, 211 (Mo. banc 2006). The fundamental status of the right of collective bargaining is further reinforced by its placement in Missouri's Bill of Rights, which "proclaim[s] the principles on which our government is founded." Mo. Const. art. I. *See also City of Chesterfield*, 386 S.W.3d at 761 (the "Bill of Rights is generally a list of fundamental rights."); *Kuehner v. Kander*, 442 S.W.3d 224, 230 (Mo. App. W.D. 2014) (in dicta, the protections of Article I, Section 29 create a "*fundamental* right to collectively bargain.").(emphasis added).

This result also comports with the history of Article I, Section 29's enactment. The delegates to Missouri's 1943–1944 Constitutional Convention proposed including protections for collective bargaining in the Bill of Rights with the very goal of securing those rights against "any future attack by the Legislature." *Ledbetter*, 387 S.W.3d at 364. As a proponent explained, "If [Article I, Section 29] is in our Constitution we will preclude

the possibility and the probability as has happened in the past [of], in future sessions of the legislature, many bills being introduced seeking to destroy collective bargaining." VIII Debates of the 1943-1944 Constitutional Convention of Missouri 2518 (A1097).

Treating the rights enshrined in Article I, Section 29 as fundamental is consistent with how the courts of other states have interpreted similar constitutional provisions. This Court often looks to such interpretations as persuasive. *See*, e.*g*., *Dotson v. Kander*, 464 S.W.3d 190, 197–98 (Mo. banc 2015); *Chesterfield*, 386 S.W.3d at 762. The courts in virtually every state with a constitutional right of collective bargaining have recognized that they create fundamental rights subject to strict scrutiny. *See Hillsborough County Govtl. Emps. Ass'n*, 522 So.2d at 362; *Hernandez v. State*, 173 A.D.3d 105, 113–15 (N.Y. App. Div. 2019); *George Harms Const. Co. v. N.J. Tpk. Auth.*, 644 A.2d 76, 87 (N.J. 1994).

This Court should reject any reading of the Constitution that would provide only for rational-basis scrutiny for infringements of Article I, Section 29. Such an approach does not heed this Court's instruction that "constitutional provisions are given a broader construction due to their more permanent character." *Ledbetter*, 387 S.W.3d at 363. It fails to recognize that "state constitutions may provide more protections than those afforded by the federal constitution." *St. Louis County v. River Bend Estates Homeowners' Ass'n*, 408 S.W.3d 116, 136 n.10 (Mo. banc 2013).[17]

Worse yet, Defendants would commit this Court to a reading of Article I, Section 29 that effectively renders the provision meaningless. This Court has repeatedly rejected

[17] *See Weinschenk*, 203 S.W.3d at 211–12 (voter qualifications); *State ex rel. J.D.S. v. Edwards*, 574 S.W.2d 405, 409 (Mo. banc 1978) (due process and equal protection).

interpretations of Article I, Section 29 that threaten to weaken or nullify its protections. *See, e.g.*, *Ledbetter*, 387 S.W.3d at 364 (construing Article I, Section 29 to require public employers to "negotiate in good faith" because without such a requirement the "right to bargain collectively would be nullified or redundant"); *Chesterfield*, 386 S.W.3d at 760 (reading Article I, Section 29 to impose on public employers "a duty to bargain collectively with [its] employees and, when necessary, adopt procedures to participate in that process" because the "absence of such a duty would render meaningless the rights [the provision] guaranteed to public employees"). "[I]f all that was required to overcome" protections explicitly guaranteed by a provision of the Constitution "was a rational basis, [those protections] would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." *Alpert v. State*, 543 S.W.3d 589, 598 (Mo. banc 2018).[18]

Defendants' other argument is that even if collective bargaining is a fundamental right, SB 1007 "does not severely restrict or heavily burden that right." To the contrary, the State's conduct – its refusal to bargain about "for-cause" and seniority protections and

[18] Defendants also make the novel argument, not made below, that SB 1007 is not subject to any level of scrutiny. (Defs' Brf. at 72.) Defendants are wrong when they say that the Court in *Etling v. Westport Heating & Cooling Servs., Inc.*, did not apply any level of scrutiny to a claim that a statute violated the open-courts provision. 92 S.W.3d 771 (Mo. banc 2003). This Court applied rational basis review. *Id.* at 775. As for *Velasquez v. Univ. Phys. Assocs.*, 625 S.W.3d 445 (Mo. banc 2021), the Court applied a standard of scrutiny appropriate to the text of Article I, Section 22(a) itself: "[T]he the right of trial by jury ***as heretofore enjoyed*** shall remain inviolate[.]" Mo. Const. art. I, §22 (emphasis added). Since the phrase "as heretofore enjoyed" refers to common law causes of action that existed before the state's first constitution, the Court had no need to decide whether the statute impermissibly burdened the constitutional right to a jury trial because by definition, Article I, Section 22 does not apply to statutory causes of action. 625 S.W.3d at 449.

grievance procedures, its abrogation of the AFSCME and CWA CBAs, and its unilateral changes to the *status quo* terms of SEIU represented employees without bargaining -- have had a devastating impact on the Unions and employees. The facts on these harms are described further in Point VII below, which Defendants do not dispute.

B. The trial court correctly held that the State failed to show that SB 1007 was tailored in any way to accomplish a compelling or even important purpose of restricting collective bargaining. (Responds to State's Point II.B.4).

Defendants argue that even if strict scrutiny applies, SB 1007 passes muster because it is narrowly tailored to achieve a compelling state interest in "government effectiveness and efficiency, and public confidence in the unelected portion of the executive branch of government." (Def. Brf. at 77). Defendants' analysis is flawed.

Under strict scrutiny, the challenged provisions of SB 1007 lose any presumption of constitutionality, and the burden of proof shifts from the Plaintiffs to the Defendants to defend their validity. *See Witte v. Dir. of Revenue*, 829 S.W.2d 436, 439 n.2 (Mo. banc 1992). Under the most common formulation of the strict scrutiny standard, the government must show that the challenged statute serves "compelling state interests" and that the infringements are "narrowly tailored" to that objective. *See Weinschenk*, 203 S.W.3d at 211. The circuit court properly applied this standard.[19]

[19] If this Court finds that the traditional standard is inappropriate, it should still apply a slightly less rigorous form of heightened scrutiny. *State v. Clay*, 481 S.W.3d 531, 535 (Mo. banc 2016) ("[I]n other cases, depending on the extent the regulation burdens a particular right, the courts look to whether a regulation imposes 'reasonable, non-discriminatory restrictions' that serve 'the State's important regulatory interests' or whether the encroachment is 'significant.'").

SB 1007 contains no findings, no statement of purpose, nothing that suggests that it was intended to substantially restrict the right of collective bargaining. *See Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 689 (8th Cir. 1992) (the Missouri Legislature's failure to create findings or a record made it "virtually impossible" for the state to justify a restriction subject to heightened constitutional scrutiny). In fact, SB 1007 made no change to the reference in Chapter 36, giving OA the ability to participate in negotiations with unions for agreements relating to "uniform wages, benefits, and those aspects of employment which have a fiscal impact on the state." §36.510(6), RSMo.

Defendants' experts did not offer detailed opinions about collective bargaining, let alone opinions that the legislature had a compelling reason for restricting bargaining and that the legislature's restrictions are narrowly tailored. Defendants' experts candidly admitted that they are not experts on collective bargaining, they were not involved in drafting SB 1007, and they know nothing about the legislature's intent with respect to collective bargaining. As Dr. Hedlund testified, SB 1007 "is not a collective bargaining-centric bill." Jt. Ex. 35, Tab 15, at 72: 1-3 (A1163).

At best, Defendants' experts opined that at-will employment is a good thing because greater flexibility will enable the State to deliver services more efficiently. Greater flexibility may be a worthy goal, but it is not so compelling as to warrant the evisceration of collective bargaining. *Hillsborough County*, 522 So.2d at 362 (invalidating statute which empowered local civil service boards to veto provisions of CBAs, because "uniform personnel administration is not so compelling an interest as to warrant the abridgement of [the] express fundamental right" of collective bargaining); *Coastal Fla. Police Benev.*

*Assoc. v. Williams*, 838 So.2d 543, 552 (Fla. 2003) ("maintaining a traditional relationship such as that existing between a sheriff and a deputy sheriff" is not a compelling state interest sufficient to warrant denying collective bargaining rights to deputy sheriffs). *See also Immig. & Nat. Svc. v. Chadha,* 462 U.S. 919, 944 (1983) ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution").

Even if governmental efficiency was a compelling interest, the application of SB 1007 so as to truncate collective bargaining is not at all narrowly tailored to accomplishing such interest. As the Florida Supreme Court observed in *Hillsborough County,* uniform personnel administration and equal pay for equal work are noble goals, but they could be achieved through collective bargaining, rather than by allowing the local civil service board to unilaterally veto portions of a ratified labor agreement:

> The art of collective bargaining is one of give and take. It is probable that through the process of negotiation the employees were required to forfeit some benefit to which they were otherwise entitled in order to gain the personal holidays, funeral leave, and seniority benefits which they did receive, and which the Board eventually refused. Were an entity such as a civil service board allowed to strike provisions at will, the entire collective bargaining agreement would be of no value. We believe that this is far too great a price to pay for so-called uniform personnel administration.

522 So.2d at 363. *See also Chiles v. United Faculty of Fla.,* 615 So.2d 671, 673 (Fla. 1993) (legislature may reduce appropriations for salaries in collective bargaining agreement if it can demonstrate a compelling state interest, but only if it first demonstrates "no other reasonable alternative means of preserving its contract with public workers"); *Coastal Fla. Police,* 838 So.2d at 552 ("less restrictive means could be found to preserve the traditional

relationship between sheriffs and their deputies without depriving the latter of the right to collective bargaining."). Defendants did not even attempt to show that SB 1007's purported restrictions on collective bargaining are narrowly tailored to furthering any compelling state interest.

The *Williams-Yulee* case cited by Defendants is easily distinguishable. 575 U.S. 433 (2015). The Supreme Court there applied strict scrutiny and upheld against a facial First Amendment challenge a judicial canon that prohibited judges from soliciting campaign contributions. The intent behind the canon was to "preserv[e] the integrity of [its] judiciary and maintain[] the public's confidence in an impartial judiciary." 575 U.S. at 441. The Court found this interest to be compelling. The canon was narrowly tailored to serve that interest because it "'insulate[d] judicial candidates from the solicitation and receipt of funds while leaving open, ample alternative means for candidates to raise the resources necessary to run their campaigns.'" *Id.* at 442. In contrast to *Williams-Yulee* where the purposes and means of the canon were clear, Defendants here failed to show that SB 1007 was intended to have any effect whatsoever on collective bargaining, and they failed to show that the statute was tailored in any respect to accomplish a bargaining-related purpose.

V. The trial court correctly dismissed Plaintiffs' impairment of contracts claim in Count II as moot based on its determination that SB 1007 does not restrict collective bargaining, and correctly held in the alternative that if SB 1007 does restrict collective bargaining, then Plaintiffs are entitled to judgment on Count II, because SB 1007 as applied by Defendants impairs the AFSCME and CWA CBAs in violation of Article I, Section 13 of the Missouri Constitution, in that (a) those CBAs remain in effect during bargaining and SB 1007 eliminates important contractual job protections, (b) the savings clauses in those CBAs do not privilege Defendants to abrogate them, and (c) Defendants failed to show that abrogation of the CBAs was reasonable and necessary to serve an important public purpose. (Response to Defendants' Point III).

*Standard of review*: This Court reviews *de novo* the trial court's rulings on questions of law. *Pearson*, 367 S.W.3d at 43; *A. Zahner Co. v. McGowan Builders, Inc*., 497 S.W.3d 779, 783 (Mo. App. W.D. 2016) (questions of contract interpretation). When reviewing mixed questions of law and fact, the Court is to "defer to the factual findings made by the trial court so long as they are supported by competent, substantial evidence, but will review *de novo* the application of law to those facts." *Pearson*, 367 S.W.3d at 44.

Preservation: Plaintiffs preserved this point. D304, pp. 25-27; D306, pp. 48-57 & 78-81; D307, pp. 19-22 & 35-36.

Because the trial court correctly resolved the statutory construction issue in Plaintiffs' favor, it properly dismissed AFSCME and CWA's impairment of contracts claim as moot. D334, at p. 42. In the alternative, the trial court properly held that SB 1007 (as applied by Defendants to AFSCME and CWA) violates Article I, Section 13.

The Missouri Constitution guarantees "[t]hat no … law impairing the obligation of contracts… can be enacted." Mo. Const. Art. I, § 13. Agreements reached through collective bargaining are binding contracts. *Independence*, 223 S.W.3d at 140-41. Missouri courts interpret the state impairment of contract provision in the same manner as

the federal provision. *Educ'l Employees Credit Union v. Mutual Guaranty Corp.,* 50 F.3d 1432, 1437 n.2 (8th Cir. 1995). The Court must answer the following questions: "'(1) Does a contractual relationship exist, (2) does the change in the law impair that contractual relationship, and if so, (3) is the impairment substantial?'" *Koster v. City of Davenport*, 183 F.3d 762, 766 (8th Cir. 1999). "If a substantial impairment of a contractual relationship exists, the legislation nonetheless survives a constitutional attack if the "impairment is . . . justified as 'reasonable and necessary to serve an important public purpose.'" *Id.* at 766.

Here, Defendants relied on SB 1007 to repudiate binding contractual commitments to AFSCME and CWA by terminating employees without regard to cause and refusing to process grievances while their collective bargaining agreements remained in effect. It is undisputed that the AFSCME and CWA CBAs were in effect on August 28, 2018, when Defendants declared that all employees were at-will, changed policies on discipline and discharge, and started rejecting grievances. Tr. V at 845:15-846:7. To the extent SB 1007 compelled Defendants to take these actions, it eliminated important job protections in the CBAs, integral to the employee-employee relationship. Federal courts have held that state laws purporting to nullify clauses of lesser significance contained in collectively-bargained contracts violate the federal contracts clause. *Univ. of Haw. Prof'l Assembly v. Cayetano*, 183 F.3d 1096, 1107 (9th Cir. 1999) (statute creating a "pay lag" violates contracts clause); *Toledo Area AFL–CIO Council v. Pizza*, 154 F.3d 307, 319–320 (6th Cir. 1998) (elimination of payroll deductions under CBA violated contracts clause). Because job protections, seniority, and grievance procedures go to the heart of the employee-employer relationship and the union's ability to protect and represent employees, to the extent SB

1007 compelled the State to abrogate those terms in the AFSCME and CWA CBAs, it substantially impaired those contracts.

The trial court also correctly concluded that Defendants continued to impair the AFSCME and CWA CBAs after December 31, 2018, because by the terms of their "evergreen clauses," those contracts remained in effect after their expiration date. *See Monarch Fire Prot. Dist. v. Prof'l Fire Fighters of E. Mo., Local 2655*, 493 S.W.3d 916 (Mo. App. E.D. 2016) (phrase "remain in full force and effect" in a labor agreement means exactly that – the terms of the existing agreement remain in effect unless and until some condition as set forth in the CBA is met, be it the end of successor negotiations, a new agreement, or something else); *Medford Firefighters Ass'n Local No. 1431, IAFF v. City of Medford*, 588 P.2d 95 (Ore. Ct. App. 1978) ("full force and effect" clause means terms remain in effect following expiration of agreement and until negotiations end). Defendants have a continuing contractual commitment to process grievances under those contracts.

A. Substantial evidence supports the circuit court's determination that the CWA CBA continued in effect after its expiration in December, 2018, because CWA triggered the contract's evergreen clause by requesting to bargain a successor agreement following the outcome of litigation over SB 1007 and HB 1413. (Responds to State's Point III.A).

Defendants no longer argue that the AFSCME is not in effect. However, they continue to contend that the CWA CBA expired and was no longer in effect after December 31, 2018.

The evergreen clause in the CWA CBA states: "All provisions of this Agreement shall remain in full force and effect during any successor negotiations, provided the parties

are bargaining in good faith." Jt. Ex. 58 (A0803). No particular language is required to trigger the clause, nor is there a requirement to hold a first meeting by a certain date.

The trial court correctly concluded that the CWA and Defendants were in successor negotiations. This is a question of fact supported by competent, substantial evidence. Natashia Pickens from the CWA testified, without contradiction, that in fall 2018 she and Guy Krause began discussing how to bargain a successor labor agreement. Krause asked Pickens to send a notice if the Union intended to negotiate a successor contract, and he agreed that negotiations would be difficult given the lawsuits over HB 1413 and SB 1007. Tr. III at 546:11-20. Pickens sent the November 30, 2018 letter to Krause, asking "to postpone a meet and confer meeting for negotiating a successor agreement," because that is what she thought Krause wanted as notice of CWA's intent to bargain a new contract. Tr. III at 579:9-23; Jt. Ex. 146 (A0999). Pickens' letter does not say the CWA does not want to bargain at all. To "postpone" is "to put off to a later time," not to cancel. *See* Merriam-webster.com (last visited on April 13, 2022). In requesting a postponement, the CWA clearly put the State on notice that the CWA intended to actually meet and confer at a later time. The State further agreed by letter on December 8, 2018 to postpone the meeting, knowing that sometime in the future the parties would actually meet. Jt. Ex. 147 (A1433). It is inconsistent for the State to argue, on the one hand, that the CWA did not timely request to meet and confer but, on the other hand, agree to the CWA's request to postpone meeting and conferring knowing the parties would meet and confer in the future. The only reasonable interpretation of the CWA's request "to postpone a meet and confer" to a later date is as a request to meet and confer. Since the evergreen clause was triggered,

the terms of the CWA CBA continued in effect after December 31, 2018.

Defendants mischaracterize CWA's response to discovery requests. While CWA did admit that its CBA "expired" on December 31, 2018, CWA also stated in response to multiple Requests for Admission that the CWA CBA remained in effect after that date. Jt. Ex. 34, Tab 10, pp. 11-12, [Response to Request No. 32 (A1022)] (denying that the CWA CBA had no force and effect after December 31, 2018) & p. 13 [Response to Request No. 36 (A1024)] ("Plaintiffs admit that all five agreements are past their expiration dates, but the AFSCME *and CWA CBAs remain in full force and effect by their own terms during successor negotiations notwithstanding expiration*.") (emphasis added).

B. The circuit court properly held that the savings clauses in the AFSCME and CWA CBAs do not privilege Defendants to abrogate those contracts. (Responds to State's Points III.B and III.C).

Defendants also argue that AFSCME and CWA consented in advance, through the savings clauses in their CBAs, to the wholesale repudiation of core provisions of their CBAs, and waived bargaining in perpetuity over all of the subjects the State believes are excluded from bargaining under SB 1007. Under these circumstances, Defendants argue, there has been no "impairment" of the AFSCME and CWA CBAs. This is an unreasonable interpretation of the savings clauses, and leads to the absurd result that the State can modify its own contracts at any time by legislation, rending them illusory.

The savings clause in AFSCME CBA provides as follows:

> The parties recognize that the provisions of this Labor Contract cannot supersede law. Nothing in this Labor Contract is intended to amend, repeal, or *conflict* with state or federal laws. All terms shall be interpreted consistent with state and federal laws to the greatest extent possible. Should any part

> of this Labor Contract or any provisions contained herein *be rendered invalid, unenforceable or unlawful* by a decision of a court or other authority of competent jurisdiction or otherwise determined to be contrary to state or federal law or regulation, such portions shall not invalidate the remaining portions hereof, and they shall remain in full force and effect for the term of this Labor Contract. Under such circumstances, the Employer and the Union shall seek to develop a mutually satisfactory modification to replace the invalidated provision.

Jt. Ex. 41 (A0689) at Article 33 (emphasis added). The CWA CBA contains an "Effect of Law" provision with language that is substantially the same. Jt. Ex. 58 (A0756) at Article 33, Section B, p. 45.

"In interpreting a collective bargaining agreement," the court must construe it "as written, not as we may think they should have been written, and certainly not by interpolating words in them which are not there." *Allen v. Globe-Democrat Publishing Co.*, 368 S.W.2d 460, 467 (Mo. 1963). "Where the language of the contract is unambiguous, the intent of the parties will be ascertained from the language of the contract alone and not from extrinsic or parol evidence of intent." *Newco Atlas, Inc. v. Park Range Constr., Inc.*, 272 S.W.3d 886, 891 (Mo. App. WD 2008). Nonetheless, "the Court should consider the object, nature and purpose of the agreement" when interpreting it." *Jake C. Byers, Inc. v. J.B.C. Invs.*, 834 S.W.2d 806, 814 (Mo. App. E.D. 1991).

By the plain language of the contracts, the savings clauses do not come into play. Since SB 1007 does not restrict collective bargaining, the CBAs do not "supersede" or "conflict" with state law or regulation within the meaning of the savings clauses. SB 1007 sets a default rule of employment at will and does not prohibit the parties from enforcing their existing agreements or bargaining new ones.

Even if SB 1007 by its terms restricts collective bargaining, Defendants cannot use the savings clauses to abrogate terms of the CBAs. Courts have the authority to "render" a contractual provision unenforceable by determining that it conflicts with applicable law. It would be absurd, however, to interpret a savings clause as giving the State unfettered authority to legislate away the terms of its own contracts and "determine" for itself that they are "contrary to state or federal law or regulation." The Florida Supreme Court rejected such a construction of savings clauses in the case of *Chiles v. United Faculty of Fla.:*

> We do not agree that the savings clauses in the contracts are sufficient to nullify them. The savings clauses clearly were meant as a means of preserving the contracts in the event of partial invalidity; they are not an escape hatch for the legislature. Indeed, were we to accept the state's position on this point, we necessarily would be required to conclude that there was no contract here at all for lack of mutuality because one party could nullify the agreement at any time, and for any reason. Obviously the parties intended there to be a contract, and we will construe the provisions so as to achieve that result.

615 So.2d 671, 673 (Fla. 1993). This Court should do the same under standard principles of contract construction. *Wildflower Comm. Assoc. v. Rinderknecht,* 25 S.W.3d 530, 536 (Mo. App. W.D. 2000) ("When interpreting contracts, this court 'attempts to avoid absurd results.'").

Defendants contend that the clauses at least indicate that the Unions knew their agreements were subject to change by the General Assembly. But, the self-evident purpose of a savings clause is to preserve the contract in case part is invalidated, not to allow the state to repudiate terms of the contract. The record shows decades of CBAs between the parties. It makes no sense for the parties to expend so much effort on bargaining these

contracts if the State could enact a law to unilaterally modify the results at any time. In addition, other language in the CBAs shows that the parties recognized that changes made by the State do not automatically result in changes to a CBA. Article 32, Section 1 of the AFSCME CBA states that, if the Office of Administration grants wage or benefit increases for state employees, such grants "shall include the employees covered by this Labor Contract," Jt. Ex. 58 (A0756). Article 33, Section A.2 of the CWA CBA is similar. Jt. Ex. 41 (A0722). There would be no need for this language under Defendants' view because if the State enacted improvements to wages or benefits of state employees, the collectively bargained wages or benefits would, under the savings clauses, be "in conflict" with and have to yield to state law. This language is only necessary because the parties may bargain binding terms for union-represented employees that are different and better than those of other state employees, which cannot be abrogated through the savings clauses.

Defendants' reliance on *Energy Reserves Grp. Inc. v. Kansas Power & Light Co*., 459 U.S. 400 (1983), is unavailing. The court there was not called upon to construe the meaning of a contract provision as this Court is here. Moreover, *Energy Reserves* involved a contract between private parties in the context of a highly regulated industry. *Id.* at 412-413. The Court was deferential to the state in applying its impairment of contracts analysis. In contrast, courts apply a higher degree of scrutiny when the state repudiates its own contracts through legislation. "When a State itself enters into a contract, it cannot simply walk away from its financial obligations." *Id.* at 412 & n.14. In the same vein, the State cannot use SB 1007 to "simply walk away" from its contractual obligations to discipline only for cause, respect seniority, and process grievances.

Defendants' related argument – that the Plaintiffs could have avoided an impairment of their contracts by bargaining "replacement provisions" -- is also meritless. Given Defendants' conduct, any request to bargain over these issues would have been futile. State agencies denied multiple grievances, telling discharged and disciplined employees they were at-will and could not file a grievance. Defendants cut through the CBAs with a chain-saw, refusing to bargain cause for discipline, layoffs, recalls, and grievance/arbitration procedures, believing that SB 1007 "settle[d]" those issues. Tr. V at 887:16. There are not viable replacement provisions. Defendants' view of SB 1007 amounted to the "total destruction" of employee expectations under the CBAs. *Energy Reserves*, 459 U.S. at 411 (severity of impairment increases level of scrutiny).

C. The circuit court correctly found that SB 1007's purported restrictions on collective bargaining were not reasonable and necessary to serve an important public purpose. (Responds to State's Point III.D).

To determine the reasonableness of a state law's impairment of a contract, courts look at the extent of the impairment as well as the public purpose to be served. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 29 (1977). To determine necessity, courts ask if there is "an evident and more moderate course" of action that would serve the state's "purposes equally well." *Id.* at 31. Courts are less deferential when a state's legislation impairs the obligations of its own contracts." *Id.* at 30-31. *See Univ. of Haw. Prof'l Assembly*, 183 F.3d at 1107 (law imposing pay lag was not necessary and reasonable when other alternatives existed).

Defendants rely on their experts to argue that SB 1007's repeal of much of the Merit System statute is reasonable and necessary to serve an important public purpose of promoting governmental effectiveness and efficiency and public confidence in the unelected executive branch. This argument is not responsive to Plaintiffs' claim, which is that SB 1007, *as applied to collective bargaining*, unconstitutionally impairs the AFSCME and CWA CBAs. None of the State's experts have expertise in collective bargaining in Missouri. Tr. V at 921:12-922:5 & 925:18-926:5; Tr. VI at 1067:22-1068:19; Jt. Ex. 35, Tab 15, at 21:24–23:20. Dr. Maranto conceded that he was not the right person to address collective bargaining in terms of the State's interest. Tr. V at 996:1-7 & 999:14-16. Defendants' experts were not provided with information about the difficulties in firing an employee, the compensation of state employees, the length of probationary periods, or the effectiveness and productivity of state employees, and did not review the relevant collective bargaining agreements, so they could not have given an informed opinion about the State's interest in abrogating provisions in CBAs relating to these matters. Tr. V at 926:24-928:8 & 996:8-20; Tr. VI at 1021:15-1025:11; Jt. Ex. 35, Tab 15 (A1158), at 46:19-22, 86:25-87:9, 89:14-18, 96:13-21, 102:10-15, & 104:11-107:21. At most, Defendants' experts offered abstract opinions about the supposed evils of merit protections without regard to collective bargaining. Such evidence cannot support a finding that the abrogation of CBAs is reasonable and necessary to achieve an important State interest.

The State also had more moderate alternatives to SB 1007, namely bargaining in good faith with the Unions over standards for discipline and layoffs and a process for resolving contract disputes. As Plaintiffs' experts explained, bargaining is the preferred

course for addressing employer-employee problems because bargaining offers a flexible model where the State and the Unions can develop terms that fit a workplace. Tr. VI at 1077:19-1078:17; Jt. Ex. 35, Tab 20 (A1173) at p. 2.

Defendants' proffered interest in eliminating bureaucratic delays and reducing costs cannot justify the violation of a constitutional right. Even if SB 1007 makes it easier for the State to hire and retain employees and to get rid of poor performers to the betterment of taxpayers, employees have a far greater interest and expectation in the gains from a collectively bargained contract. The Court also cannot ignore the State's self-interest in SB 1007. As an employer, the State has an obvious interest in increasing its authority and diminishing the power of unions to enforce job protections. Accordingly, it is not due as much deference in how it seeks to achieve those goals. *Energy Reserves*, 459 U.S. at 412 n.14 ("When 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.'").

VI. The trial court correctly granted judgment to Plaintiffs on Count III, because SB 1007 does not restrict collective bargaining or permit abrogation of CBAs, and the PAB's rules are "unauthorized by law" to the extent they permit the same; in the alternative, to the extent that SB 1007 is construed to restrict collective bargaining and permit abrogation of CBAs in violation of Article I, Sections 13 and 29, then the PAB's rules are equally unconstitutional as applied to collective bargaining. (Response to Defendants' Point IV).

*Standard of review*: In reviewing a declaratory judgment on the validity of a rule, the court "must affirm the trial court's judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the

law. *Hankins v. Director of Revenue*, 998 S.W.2d 879, 880 (Mo. App. S.D. 1999).

Preservation: Plaintiffs preserved this point. D304, pp. 27-29; D306, pp. 81-84; D307, pp. 37-38.

Count III is a claim under Section 536.050 of the Missouri Administrative Review Act. If the Court agrees with Plaintiffs' construction of SB 1007, it must decide whether the application of the PAB's rules to restrict collective bargaining is "unauthorized by" SB 1007. If the Court agrees with Defendants' construction of SB 1007, the Court must decide whether the application of the PAB's rules to restrict collective bargaining violates Article I, Sections 29 and 13 to the same extent as SB 1007 itself.

A. The PAB's rules, as applied to collective bargaining, are unauthorized by SB 1007.

Section 536.050, RSMo., authorizes the courts to issue declaratory judgments respecting the validity, constitutional or otherwise, of an administrative rule adopted by a state agency. Missouri courts have recognized repeatedly that a regulation must be within the authority of a statute and "cannot expand or modify a statute." *Union Elec. Co. v. Dir. of Revenue*, 425 S.W.3d 118, 126 (Mo. 2014).

The PAB's rules as applied to collective bargaining and the CBAs are not authorized by SB 1007. This case is similar to *State Dep't of Labor v. Board of Public Utilities*, 910 S.W.2d 737 (Mo. App. S.D. 1995), where the court struck down a regulation imposing record-keeping requirements on public bodies. The statute in that case did not contain any reference to such a duty for public bodies, and the court concluded that the agency, in enacting the regulation, sought to expand upon the statute in an invalid manner. *Id*. at 742.

Properly construed, SB 1007 does not abrogate labor agreements or preclude bargaining over "for cause" or seniority protections or grievance procedures. The PAB's attempt through rulemaking to abrogate agreements and preclude bargaining over these subjects is unauthorized by law.

Defendants devote much of their Point V to arguing how the various rules implementing SB 1007 effectuate SB 1007's merit reforms. These are arguments about the rules' facial validity, which misses the mark. Plaintiffs allege that if SB 1007 does not restrict collective bargaining, then the PAB's rules, *as applied* to authorize abrogation of labor agreements and refusals to bargain about core subjects of employment, are "unauthorized by law." *See* First Amended Petition, D169 at ¶143. Defendants cannot accomplish through the application of a rule what the legislature has not sought to do under the authorizing statute.

B. Alternatively, the PAB's rules, as applied to collective bargaining, violate Article I, Sections 29 and 13.

To the extent this Court agrees with Defendants' construction of SB 1007, then the application of the PAB's rules to collective bargaining is unconstitutional for the same reasons that SB 1007 is unconstitutional – such application impermissibly fringes on the constitutional right to collectively bargain and the protection against impairment of contracts.

Defendants contend that rules are not "laws" for purposes of Missouri's contracts clause. They cite a few federal court cases with respect to the contracts clause in the federal constitution. However, Missouri case law is to the contrary with respect to Article I,

Section 13. *See Dep't of Social Svcs v. Villa Capri Homes, Inc.*, 684 S.W.2d 327, 332 (Mo. 1985) ("Duly promulgated substantive regulations have the force and effect of laws"); *State ex rel. Barnett v. Mo. State Lottery Comm'n*, 196 S.W.3d 72, 78 (Mo. App. W.D. 2006) (duly enacted regulation can violate Article I, Section 13's prohibition against enactment of any law that is "retrospective in its operation"). It would be absurd if Defendants could use a rule to repudiate a contractual obligation even though they could not constitutionally apply the authorizing statute to do the same. That would be an end-around the provision against impairment of contracts.

VII. The trial court correctly issued a permanent injunction requiring the State to bargain in good faith over the terms of successor contracts, maintain the *status quo* of the SEIU CBAs during bargaining, and continue to process grievances under the AFSCME and CWA CBAs as long as they remain in effect, because being subjected to an unconstitutional act results in irreparable harm and Defendants' actions undermined the Unions in collective bargaining and denied vital job protections to employees. (Responds to State's Point VI.)

*Standard of review*: "The standard of review in a court-tried equity action is the same as for any court-tried case; the trial court's judgment will be sustained unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *City of Greenwood v. Martin Marietta Materials, Inc.*, 311 S.W.3d 258, 263 (Mo. App. W.D. 2010). "To the extent that a trial court's grant of injunctive relief involves weighing the evidence presented, determining the credibility of witnesses, and formulating an injunction of the appropriate scope, this court reviews for abuse of discretion." *Id*.

Preservation: Plaintiffs preserved this point. D304, pp. 29-32; D306, pp. 84-88; D307, pp. 38-41.

Substantial evidence supports the trial court's determination that the Union employees have and will continue to suffer irreparable harm in the absence of injunction.

First, being subject to an unconstitutional law constitutes irreparable injury in itself. *Rebman*, 576 S.W.3d at 612. The State has "no significant interest" in an unconstitutional law or in applying a law in an unconstitutional manner; and, it is "always in the public interest to protect constitutional rights." *Traditionalist Am. Knights of Ku Klux Klan v. City of Desloge*, 914 F. Supp. 2d 1041, 1051 (E.D. Mo. 2012).

Second, the evidence demonstrates that Defendants' actions have had a "chilling effect" on employees. Employees expressed concerns to the Unions about not having job protections and a grievance procedure, and participation in and attendance at union meetings declined. Tr. II at 242:11-18; Tr. III at 457:9-12 and 553:8-13. *See SEIU Health Care Michigan v. Snyder*, 875 F.Supp.2d 710 (E.D. Mich. 2012) (union showed irreparable harm through "erosion of support" and increased impotence in bargaining process).

Third, the Unions and employees were also harmed when Defendants refused to process employees' grievances. The Union was denied the ability to hold the employer accountable, and employees were denied the opportunity to provide their side of the story and a potential remedy. CWA-represented employees were even harmed when their grievances were put on hold, because the Union was excluded from the process and the resolutions took longer than normal. Tr. III 543:24-544:3.

Fourth, by repudiating Plaintiffs' collective bargaining agreements, making unilateral changes to important terms of employment without bargaining, refusing to process grievances, and refusing to bargain over core issues like "for-cause" and seniority protections and grievance procedures, Defendants have eviscerated the parties' long history of collective bargaining. They have rendered the Unions impotent to enforce existing contracts or bargain any meaningful protections going forward. All three Union witnesses explained how meeting and talking, as envisioned by Defendants, is not really bargaining. Union witnesses also explained that bargaining over relatively minor items, like the use of seniority for shifts and a non-binding grievance procedure for discrimination claims, is insufficient. Tr. II at 218:17-219:19 & 231:16-24; Tr. III at 455:9-12 & 555:21-556:3. Because of Defendants' conduct, employees cannot bargain for what they care about and cannot protect their terms of employment through a grievance procedure, and lose confidence that they are being treated fairly. Tr. II at 229:23-230:3; Tr. III at 554:12-15.

The Unions and employees have no adequate remedy at law. Monetary damages are difficult to ascertain, particularly with respect to the harms associated with rendering the Unions impotent. So long as Defendants can make changes without bargaining and contrary to the CBAs, employees lose the intangible benefits of holding their employer to the give-and-take of bargaining and using union representation to effectively contest employment actions. *See Small v. Avanti Health Sys.*, LLC, 661 F.3d 1180, 1192 (9th Cir. 2011) ("monetary damages [for refusal to bargain with union] would not make the employees whole, because the value of the right to enjoy the benefits of union representation is immeasurable in dollar terms once it is delayed or lost.").

Defendants complain about the scope of the injunction, for instance arguing that they should not have to bargain in good faith with the Unions without constraint from SB 1007. (Defs' Brf. at 106-107.) This court reviews the trial court's formulation of the injunction for "abuse of discretion," *City of Greenwood,* 311 S.W.3d at 263 (Mo. App. W.D. 2010). The injunction here is appropriately tailored to remedy the Defendants' violations, and Defendants fail to demonstrate an abuse of discretion.

## CONCLUSION

For the foregoing reasons, the Unions request this Court to affirm the trial's courts judgment. As a matter of statutory construction, SB 1007 has nothing to do with collective bargaining. The statute simply rescinds prior statutory merit protections for most State employees and sets a default rule of employment at-will which may be modified through collective bargaining. The State violated Article I, Section 29 through its *conduct* of abrogating labor agreements, unilaterally changing terms of employment without bargaining, and refusing to bargain over core subjects such as "for-cause" and seniority protections and grievance procedures. Defendants' application of the PAB's implementing rules to Plaintiffs' collective bargaining relationship was "unauthorized by" SB 1007 and therefore unlawful under §536.050, RSMo. In the alternative, to the extent SB 1007 is construed to restrict collective bargaining, the application of the statute and rules to Plaintiffs violates Article I, Sections 29 and 13.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the above was filed electronically and served by operation of the electronic filing system through Missouri CaseNet on April 21, 2022, on all counsel of record.

*/s/ Loretta K. Haggard*

## CERTIFICATE OF COMPLIANCE

The Undersigned also certifies that the foregoing brief complies with the limitations in Missouri Supreme Court Rule 84.04(b) and 84.06(c)(1)-(4), and that the brief contains 27,548 words, excluding the portions exempted from the word count under Supreme Court Rule 84.06(b).

*/s/ Loretta K. Haggard*