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SC98412

IN THE SUPREME COURT OF MISSOURI

MISSOURI NATIONAL EDUCATION ASSOCIATION, *et al.*,
Plaintiffs/Respondents,

v.

MISSOURI DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, *et al.*,
Defendants/Appellants.

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

BRIEF OF AMICI CURIAE LABOR LAW AND SOCIOLOGY PROFESSORS IN SUPPORT OF RESPONDENTS

CHARLOTTE GARDEN
Fred T. Korematsu Center for Law & Equality
Seattle University School of Law*
901 12th Avenue
Seattle, WA 98103
(206) 398-4073
GardenC@seattleu.edu

JOSEPH SLATER
University of Toledo*
1825 W. Rocket Drive
Toledo, OH 43606
Telephone: (419) 530-2008
Email: Joseph.Slater@utoledo.edu

JAMES P. FAUL
Mo. Bar No.: 58799
Hartnett Reyes-Jones, LLC
4399 Laclede Avenue
St. Louis, Missouri 63108
Telephone: (314) 531-1054
Facsimile: (314) 531-1131
Email: jfaul@hrjlaw.com

Counsel for Amici Curiae

*Institutional affiliation for identification only

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Interest and Identity of Amici

Amici are the following faculty members, each of whom has expertise in labor law and labor relations. (Their university affiliations are provided for identification purposes only.) Amici aim to assist this Court by providing information about the development of the law of collective bargaining and unionization, and about states' experiences with collective bargaining.

Professor Matthew Bodie is the Callis Family Professor and Co-Director of the Wefel Center for Employment Law at Saint Louis University School of Law, where he has taught Labor Law numerous times. He is a co-author of the treatise *Labor Law*, now in its second edition, and has authored more than a dozen articles on labor and employment law, including multiple articles on the law and policy of union organizing. He also served as a reporter on the American Law Institute's Restatement of Employment Law. Before entering academia he was a field attorney for the National Labor Relations Board.

Professor Miriam Cherry is a Professor of Law at Saint Louis University School of Law, a Co-Director of the William C. Wefel Center for Employment Law, and a member of the American Law Institute. She regularly teaches classes on employment law, and has authored or co-authored more than twenty books, articles, and book chapters on topics related to workers' rights.

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Professor Marion Crain is the Wiley B. Rutledge Professor of Law at Washington University in St. Louis School of Law. She has taught Labor Law numerous times, and is a co-author of the casebooks *Labor Relations Law: Cases and Materials*, now in its thirteenth edition; and *Work Law: Cases and Materials*, now in its fourth edition. Professor Crain is the author of more than thirty academic articles and book chapters on aspects of labor and employment law, including several articles on the law of union organizing and collective bargaining.

Professor Charlotte Garden is a Professor of Law at Seattle University School of Law. She regularly teaches courses on Labor Law, and is a co-author of the casebook *Modern Labor Law in the Public and Private Sectors: Cases and Materials*, now in its second edition. She has authored more than a dozen articles on aspects of labor and employment law, including several articles on the First Amendment rights of labor unions.

Professor Marcia McCormick is a Professor of Law at Saint Louis University School of Law. She teaches courses on labor and employment law, including Labor Law, and has served as director of the Wefel Center for Employment Law. Professor McCormick has authored more than a dozen articles on aspects of labor and employment law, including on teachers' and police unions. Before becoming an academic, Professor McCormick was an Assistant Attorney General in Illinois, where she represented Illinois' two public sector labor boards.

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Professor Jake Rosenfeld is a Professor of Sociology at Washington University in Saint Louis. He is the author or co-author of more than twenty books, articles, and book chapters on the US labor movement, the effects of unionization on working conditions, and related topics. Professor Rosenfeld's publications include the 2019 article, *What Do Government Unions Do? Public Sector Unions and Nonunion Wages, 1977-2015*, and the 2014 book, *What Unions No Longer Do*.

Professor Joseph Slater is the Eugene N. Balk Professor of Law and Values at the University of Toledo College of Law and a Distinguished University Professor at the University of Toledo. He is the author of *Public Workers: Government Employee Unions, the Law, and the State: 1900-1962*, which is the leading monograph on the history of public-sector unions and public-sector labor law. He is also a co-author of two casebooks on the topics of public- and private-sector labor and employment law. He has published multiple articles on public-sector labor law doctrine, policy, and history. He has testified as an expert witness in two cases in Missouri state court regarding the interpretation of Article I, Section 29 of the Missouri Constitution.

Professor Peggie R. Smith is the Charles F. Nagel Professor of Employment and Labor Law at Washington University in St. Louis School of Law, where she teaches courses related to employment law. She is a prior Secretary of the ABA Section on Employment & Labor Law, and a member of the American Law

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Institute. She is a co-author of the hornbook *Principles of Employment Law*, and has authored more than a dozen articles and book chapters on labor and employment law, many of which focus on unionization and collective bargaining by domestic and home-care workers.

Position of All Parties to Filing of This Brief

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

Jurisdictional Statement and Factual Background

Amici adopt the State's/Appellants' jurisdictional statement, and the Plaintiffs'/Respondents' statement of the facts.

Points Relied On

I. "Bargain Collectively Through Representatives of Their Own Choosing" Was a Well-Understood Term of Art In 1945, and HB 1413 is Fundamentally Incompatible With that Understanding

Independence-Nat'l Educ. Ass'n v. Independence Sch. Dist., 223 S.W.3d 131 (Mo. 2007).

Am. Fed'n of Teachers v. Ledbetter, 387 S.W.3d 360 (Mo. 2012).

National Labor Relations Act, 29 U.S.C. § 151 *et seq*.

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National Treasury Employees Union v. Chertoff, 452 F.3d 839, 844 (D. C. Cir. 2006).

II. HB 1413 Does Not Satisfy Heightened Scrutiny Because the State Has Not Demonstrated a Sufficiently Important Actual Interest Justifying HB 1413, or That the Statute is Tailored to Achieve Such an Interest

US v. Virginia, 518 U.S. 515 (1996).

Manoney v. Doerhoff Surgical Servs., Inc., 807 S.W.2d 503 (Mo. Banc 1991).

Summary of Arguments for Each Point Relied On

Since 1945, the Missouri Constitution has protected employees' right to "bargain collectively through representatives of their own choosing." But HB 1413 undermines this right in a list of ways. Among them, it imposes unprecedented obstacles for public sector workers to select a bargaining representative; it limits the scope of bargaining by requiring broad "management rights" clauses; it permits employers to unilaterally change a bargained agreement; and it burdens public sector employees and their unions' speech and political activity.

I. This Court has written that the contours of the state constitutional right to collective bargaining through representatives of employees' own choosing is delineated in light of how that phrase would have been understood in 1945.

Independence-Nat'l Educ. Ass'n v. Independence Sch. Dist., 223 S.W.3d 131, 137 (Mo. 2007). HB 1413 is inconsistent with what "collective bargaining through representatives of [workers'] own choosing" was understood to mean in 1945 in a variety of ways.

"Collective bargaining" is a term of art that refers to a system of workplace governance. In 1945 and today, that system requires elected unions and employers to bargain in good faith over a wide variety of workplace topics, including many that are foreclosed by HB 1413. Moreover, the concept of bargaining in good faith has never given one side the authority to reach a tentative agreement and then selectively repudiate parts of that agreement without opportunity for further bargaining—but HB 1413 allows public employers to do just that.

Additionally, collective bargaining "through representatives of employees' own choosing" would have been understood to give employees the option to select their union representative free of employer interference. But, by encumbering only some unions—those that do not "wholly or primarily represent[]" public safety employees—with the obligation to comply with HB 1413's restrictions, the State has placed a heavy thumb on the scale that could give employees—even those whose jobs do not have a public safety component—a strong incentive to choose representation by public safety unions over other unions.

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Finally, HB 1413 burdens employees' abilities to choose union representation in several ways that could not have been anticipated by Missouri voters in 1945. It bars public employers from voluntarily recognizing covered unions, even though this is a time-tested and common way for employees to elect representation. And it requires that elected unions also win periodic recertification elections, based not on a majority of voters, but instead on a majority of all employees in the bargaining unit—a requirement that turns a non-vote into a "no" vote.

II. The state's asserted justifications for HB 1413 cannot survive any level of heightened scrutiny. First, heightened scrutiny should apply because the right to engage in collective bargaining is enumerated in the Missouri Constitution. Heightened scrutiny requires the state to advance its actual interests, and to show that HB 1413 is tailored to meet those interests. Here, the state relies on hypothetical interests that were advanced in litigation. This alone is reason to affirm the lower court's conclusion that HB 1413 violates the Missouri Constitution.

The State's argument also fails on tailoring. The State's evidence consists mainly of expert reports, three of which were drafted in support of another statute that covers a different issue. And they do not establish that HB 1413 will promote even hypothetical state interests, such as effective workforce management. Finally,

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the State's affidavits are incomplete, in that they ignore research showing that collective bargaining can benefit public-sector employers and employees.

Argument

I. "Bargain Collectively Through Representatives of Their Own Choosing" Was a Well-Understood Term of Art In 1945, and HB 1413 is Fundamentally Incompatible With that Understanding

In 1945, Missouri added to its Constitution Art. I § 29, guaranteeing employees the right to "bargain collectively through representatives of their own choosing." At the time this Section was adopted, the meanings of "bargain collectively" and "through representatives of their own choosing" were already well-established terms of art under both the rules and practice of the National Labor Relations Act (29 U.S.C. §§ 151–169, "NLRA"). While Art. 1 § 29 does not require all NLRA rules on every facet of modern labor law to be imported wholesale, *AFT v. Ledbetter*, 387 S.W.3d 360, 367, n.5 (Mo. 2012), it does incorporate the core meaning of "collective bargaining" as it was understood at the time Art. 1 § 29 was adopted. *See Independence-Nat'l Educ. Ass'n v. Independence Sch. Dist.*, 223 S.W.3d 131, 137 (Mo. 2007) (looking to the original public meaning of this constitutional provision to determine its meaning).

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As this Court has noted, "collective bargaining" is a "term of art." *AFT v. Ledbetter*, 387 S.W.3d 360, 364; *accord National Treasury Employees Union v. Chertoff*, 452 F.3d 839, 844 (D. C. Cir. 2006). HB 1413's restrictions cannot be reconciled with the established meaning of that term of art as it was understood in 1945.

The State relies on the dictionary definition of the single word "bargain" to suggest that Art. I § 29 guarantees only the opportunity to negotiate in some fashion. Appellant Br. at 61-62. But the term "collective bargaining" has long had a special and specific meaning distinct from other types of bargaining or contracting. In *Steelworkers v. Warrior & Gulf Navigation*, the Court stressed that the collective bargaining process is different from ordinary commercial contracting because, among other things, a "collective bargaining agreement is an effort to erect a system of industrial self-government" in which the parties are compelled to continue dealing with one another, whereas in a regular commercial setting, the parties can both define the scope of what is being bargained, and choose to walk away and deal with other parties if they are dissatisfied. 363 U.S. 574, 580 (1960); *see also id.* at 578 (stating that arbitration cases outside the labor context were "irrelevant" to determining rules for labor arbitrations).

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The restrictions of HB 1413 are in basic conflict with well-established principles of collective bargaining as understood both in 1945 and today. Among these conflicts:

- The rules of HB 1413 are incompatible with how union representatives have traditionally been chosen under collective bargaining systems.
- The fact that HB 1413 permits employers to unilaterally alter union contracts at the employer's discretion is not only irreconcilable with the history and basic purpose of collective bargaining, it also violates the essence of contract law.
- Barring voluntary recognition is also counter to long-established rules and practice in labor law.
- Requiring mandatory recertification elections would have been contrary to NLRA rule and policy at any point in that Act's history, and the same is true for requiring a majority vote of the entire bargaining unit (as opposed to those voting) for certification or recertification.

As the remainder of this section discusses, these multiple and compounding restrictions turn "collective bargaining" into a sham process that would not have been understood as collective bargaining by those who voted to include Art. I § 29 in the Missouri Constitution.

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A. *HB 1413's Limits on Subjects of Bargaining is Contrary to the Law and Practice of Collective Bargaining in 1945*

HB 1413 prohibits bargaining over a wide variety of work-related topics that, in 1945, were clearly understood to be core subjects of bargaining. Specifically, the statute dictates that every collective bargaining agreement must include a term "reserving to the public body the right to hire, promote, assign, direct, transfer, schedule, discipline, and discharge public employees," and also "reserve to management the right to make, amend, and rescind reasonable work rules and standard operating procedures." § 105.585(1), RSMo. But, as the Circuit Court correctly observed, "in 1945, the term 'bargain collectively' was well understood to require negotiations over working conditions broadly defined—including such issues as promotion, assignment, discharge, schedule, work rules, and other similar topics." D107, at 19, (citing *NLRB v. Westinghouse Air Brake Co.*, 120 F.2d 1004, 1006 (3d. Cir. 1941), and *NLRB v. Reed & Prince Mfg. Co.*, 118 F.2d 874, 881 (1st Cir. 1941)).

The original Wagner Act of 1935, which was the version of the NLRA and was in effect in 1945, contained two sections relevant here. First, Section 8(5) required an employer to "bargain collectively with the representatives of his employees." Second, Section 9(a) provided that such bargaining should be "in respect to rates of pay, wages, hours of employment, or other conditions of

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employment." It was clear well before 1945 that employers had a duty to bargain in "good faith" with unions about such topics. *See, e.g.*, *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940).

It was also clear well before 1945 that the employer's obligation to bargain in good faith extended to a wide variety of work-related topics. In 1940, *Stinger Manufacturing Co.*, 24 NLRB 444, 470, *modified on other grounds and enf'd*, 119 F.2d 131 (7th Cir. 1941) explained that:

> [p]aid holidays, vacations, and bonuses constitute an integral part of the earnings and working conditions of the employees and . . . are matters which are generally the subject of collective bargaining. . . . [I]nsistence upon treating such matters as gratuities to be granted and withdrawn at will, constitutes a refusal to bargain.

By 1945, the National Labor Relations Board (NLRB) had decided a variety of cases requiring collective bargaining on a host of workplace topics. *See, e.g.*, *NLRB v. Bachelder*, 120 F.2d 574 (7th Cir. 1941) (discharges); *Woodside Cotton Mills Co.*, 21 NLRB 42 (1940) (workloads and work standards); *Inter-City Advertising Co.*, 61 NLRB 1377 (1945), *enf. den. on other grounds,* 161 F.2d 949 (6th Cir. 1946) (work schedules).

Notably, not long after Article 1, Section 29 was adopted, in the discussions that led to the Taft-Hartley Act of 1947 (Pub. L. 80-101) (amending the original

Wagner Act), Congress rejected a proposal in the House version of the Taft-Hartley bill to limit the subjects of bargaining to "(i) [w]age rates, hours of employment, and work requirements; (ii) procedures and practices relating to discharge, suspension, lay-off, recall, seniority, and discipline, or to promotion, demotion, transfer and assignment within the bargaining unit; (iii) conditions, procedures, and practices governing safety, sanitation, and protection of health at the place of employment; (iv) vacations and leaves of absence; and (v) administrative and procedural provisions relating to the foregoing subjects." *See First National Maintenance v. NLRB,* 452 U.S. 666, 675 & n. 14 (1981) (*citing* H.R. 3020 § 2(11), 80th Cong., 1st Sess. (1947)). This congressional rejection of a specific list of core subjects shows both that the pre-existing scope of bargaining was broader than the limited list of topics, and also a congressional judgement, roughly contemporaneous to the enactment of Article 1, Section 29, that the broader view of scope of bargaining was the correct one. And obviously, even the list of topics in the failed amendment went far beyond the subjects that HB 1413 would allow.

This understanding of collective bargaining has remained to the present era. The D.C. Circuit in *Chertoff* struck down similar restrictions on the scope of bargaining for federal employees in the Department of Homeland Security as inconsistent with the statutory right for such employees to bargain collectively:

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> The regulations effectively eliminate all meaningful bargaining over fundamental working conditions . . . thereby committing the bulk of decisions concerning conditions of employment to the Department's exclusive discretion. In no sense can such a limited scope of bargaining be viewed as consistent with the Act's mandate that DHS "ensure" collective bargaining rights for its employees. . . . 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. 452 F.3d 839, 844, 860.

B. *HB 1413 Makes Collectively Bargained Contracts Unenforceable by Unions, Contrary to the Rules and Purpose of Collective Bargaining*

For the unions it covers, HB 1413 gives employers the unilateral right to reject, rewrite or void altogether any portion of a collectively bargained agreement with a union. *See* § 105.580.5, RSMo. The statute requires that, before a proposed collective bargaining agreement can be presented to a public body for approval, it must first be ratified "by a majority of [union] members." Then, "[t]he public body may approve the entire agreement or any part thereof. If the public body rejects any portion of the agreement, the public body may return any rejected portion of the agreement to the parties for further bargaining, adopt a replacement provision

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of its own design, or state that no provision covering the topic in question shall be adopted." *Id.*

This Court, in *Independence-Nat'l Educ. Ass'n,* 223 S.W.3d at 141, held that it violates Art. I § 29 for an employer to unilaterally alter a collective bargaining agreement. As this Court put it, collective bargaining agreements must be "enforceable as any other contractual obligations" undertaken by government. *Id*.

Article I, Section 29 "necessarily requires" a public employer to meet and confer with the union in good faith. *Am. Fed'n of Teachers v. Ledbetter*, 387 S.W.3d 360, 362, 366 (Mo. 2012). Good faith bargaining is inconsistent with a rule that first allows an employer to extract concessions from a union in exchange for concessions of its own, then has the union membership ratify the agreement, possibly at the union's urging—only to tear the rug out from under both the union and the employees by unilaterally revoking its concession, leaving the union no opportunity to respond in kind. Unsurprisingly, this concession-by-surprise process is also inconsistent with any understanding of "collective bargaining," or with "good faith bargaining" that existed before or after 1945.

In addition to a fundamental principle of contract law, in labor law it has long been clear that unilateral rejection of an agreed-upon term is a violation of the duty to bargain in good faith. *See, e.g.*, *NLRB v. Crompton-Highland Mills*, 337 U.S. 217 (1949).

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The principle that collective bargaining necessarily includes a requirement to bargain in good faith predates even the NLRA. The National Labor Board, an agency set up under the National Industrial Recovery Act, explained that in labor negotiations, both sides should approach negotiations with an open mind and make reasonable efforts to reach common ground. *National Lock Co.*, 1 NLRB (old series) 15 (1934); *Hall Baking Co.*, 1 NLRB (old series) 83 (1934); *Dresener & Son*, 1 NLRB (old series) 26 (1934); *Budd Mfg. Co.*, 1 NLRB (old series) 58 (1933). Indeed, the National Labor Board announced that it was following the principles that the even older War Labor Board announced in 1919, by adhering to the "incontestably sound principle that the employer is obligated by the statute to negotiate in good faith with his employees' representatives." *Houde Eng'g Corp.*, 1 NLRB (old series) 35 (1935).

Faced with the question of whether a similar rule allowing employers to unilaterally alter or reject contract language violated a statutory right to bargain collectively, the D.C. Circuit in *Chertoff* explained:

> [W]e agree with the District Court that the Department's attempt to reserve to itself the right to unilaterally abrogate lawfully negotiated and executed agreements is plainly unlawful. If the Department could unilaterally abrogate lawful contracts, this would nullify the Act's specific guarantee of collective bargaining rights, because the agency cannot "ensure" collective bargaining without affording employees the right to negotiate binding agreements. . . .
>
> As noted above, "collective bargaining" is a term of art, defined in other statutory schemes, and DHS was not free to treat it as an empty linguistic

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> vessel. . . . None of the major statutory frameworks for collective bargaining allows a party to unilaterally abrogate a lawfully executed agreement. *See, e.g.,* 5 U.S.C. §§ 7102(2), 7103(a)(12) (2000) (federal sector bargaining); 29 U.S.C. § 158(a)(5), (b)(3) & (d) (2000) (private sector bargaining); 39 U.S.C. § 1206 (2000) (U.S. Postal Service); 45 U.S.C. § 152 (Fourth) (2000) (common carriers). Indeed, no statutorily mandated *collective bargaining* system that we are aware of dispenses with the premise that negotiated agreements bind both parties. . . . Finally, the Government's position not only defies the well-understood meaning of collective bargaining, it also defies common sense. As noted above, collective bargaining is a method of structuring the formation of labor contracts, and the notion of mutual obligation is inherent in contract law. 452 F.3d at 844, 860.

C. *HB 1413 Vitiates the Basic Right of Employees in any System of Collective Bargaining to Freely Choose Their Union Representative*

HB 1413 exempts from its various restrictions "public safety labor organizations"—those that "wholly or primarily represent[]" public safety employees. § 105.501, RSMo. The Department of Corrections and its employees are also completely exempt from HB 1413's restrictions. *See* §§ 105.500(6) and 105.503. This means a group of school bus drivers who voted for representation by a teachers' union would have to contend with HB 1413's restrictions—but if they instead voted for representation by a union that mainly represents firefighters and paramedics, they would not.

The right Art. 1, § 29 grants to employees to bargain "through representatives of their own choosing" is fundamental to collective bargaining. As the Circuit Court observed, this was true in 1945. At that time, it was "well

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understood that 'freedom of choice' in the selection of a union representative was 'the essence of collective bargaining.'" D107, at 18, *quoting Machinists Lodge No. 35 v. NLRB*, 311 U.S. 72, 79 (1940).

The phrase "through representatives of their own choosing" was almost certainly taken from § 7 of the Wagner Act, which provided, in part, that covered employees had the right "to bargain collectively through representatives of their own choosing." The term "their own choosing" was partly designed to prevent employers from pressuring employees into "company" unions or a union the employer particularly favored, an important policy more specifically addressed in Wagner Act Section 8(2) (which became NLRA Section 8(a)(2) after the Taft-Hartley Amendments in 1947).

Notably in the context of HB 1413, the NLRB and courts have long held that Section 8(a)(2) bars employers from encouraging employees to choose one union over another union as their representative. *See, e.g.*, *Precision Carpet, Inc.*, 223 NLRB 329 (1976) (employer conduct that actively benefits a preferred outside labor organization over an incumbent union violates 8(a)(2)); *Arkay Packaging Corp.*, 221 NLRB 99 (1975) (same); *Ralco Sewing Indus.*, 243 NLRB 438 (1979) (employer conduct preferring one of two rival outside labor organizations violates 8(a)(2)); *Hartz Mountain Corp.*, 228 NLRB 492 (1977, *enf'd sub nom. Distributive Workers Dist. 65 v. NLRB*, 593 F.2d 1155 (DC Cir., 1978) (same). Here, the state

is the employer; by creating a more restrictive set of rules that applies to only some unions, HB 1413 puts the state's thumb on the scales favor of some unions over others.

Beyond that, employees have long had a broad, statutorily protected right to select the union representative of their choice. The NLRA has never encouraged or incentivized, workers to affiliate with a particular type of union. Section 2(4) of the NLRA broadly provides that the employee representative for purposes of collective bargaining can be "any individual or labor organization."

The NLRA contains only a few minor variations that turn on workers' jobs. For example, a union whose bargaining unit represents workers in the construction industry can legally enter into "pre-hire" agreements under Section 8(f) of the NLRA, while unions who represent other types of workers cannot enter into such agreements.[1] *See also*, *e.g.,* 29 U.S.C. § 159(b) (providing special rules for bargaining units that represent professional employees or guards).[2] It is worth noting that even these rare and minor distinctions were unknown when Article 1,

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[1] "Prehire agreements" are bargained and signed between an employer and a union that has not demonstrated that it has the support of a majority of workers. They are not permitted outside the construction industry.

[2] Specifically, "professional" employees, as defined in the NLRA, may not be combined into a bargaining unit with employees who are not professionals without the agreement of the professional employees as a sub-group. And "guards" may not be put in the same bargaining unit as other employees of the employer.

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Section 29 was added to the state Constitution, because they were added to the NLRA later: NLRA Section 9(b) was added by the Taft-Hartley Act in 1947, and Section 8(f) was added by the Landrum-Griffin Act (Pub. L. 86–257) in 1959.

Even more importantly, though, the few distinctions that the NLRA contains depend on the type of work done *by the employees in the bargaining unit*, not on the type of work done by other employees the union represents in *other bargaining units*. HB 1413, in contrast, not only makes distinctions between the rights of different types of unions, but—in a manner unprecedented in U.S. labor law history—the distinctions depend not on the type of work the employees in the bargaining unit do, but rather on the type of work done by other employees in other bargaining units represented by the same union.

These rules create immense pressure for a group of employees to affiliate with unions that are exempt from HB 1413. The pressure comes from the force of HB 1413's combined restrictions – they are tantamount to a choice between a union representative that can engage in a process that is recognizable as collective bargaining, and one that cannot.

D. *HB 1413 Eliminates the Long-Established Right of Voluntary Union Recognition*

HB 1413 bars public employers from voluntarily recognizing a covered union, no matter how strong and undisputed the level of employee support for that

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union is, and regardless of the preference of the employer. § 105.575, RSMo. This is contrary to longstanding rules and practices regarding "collective bargaining through representatives of their choosing" under the NLRA, which has always allowed employers to voluntarily recognize a union after that union has demonstrated that a majority of the relevant group of employees wishes that union to represent them.

As the Circuit Court correctly noted:

> In 1945, employees exercised that freedom of choice by acquiring recognition of an exclusive representative through (i) an election under the traditional standard of a majority of the votes cast or (ii) the employer's voluntary recognition based on a credible showing of majority support by the employees. D107, at 18, *citing, e.g., Wallace Corp.*, 323 U.S. 248 (1944).

Voluntary recognition of unions predated the NLRA. Indeed, before the NLRA created formal mechanisms for recognizing unions, it was the only way unions could deal with employers, and employers sometimes recognized unions even before there was any mechanism to legally require them to. Voluntary recognition continued in the early days of the NLRA. The standard process involved a union presenting an employer with cards signed by a majority of the relevant employees stating that they wished that union to represent them – a process often called "card-check recognition." As the U.S. Supreme Court noted *NLRB v. Gissel Packing*, 395 U.S. 575, 600 n. 17 (1969), "Cards have been used

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under the act for thirty years," and the Court had "repeatedly held" that certification elections were "not the only route to representative status."

Section 9(a) of the NLRA has always authorized this process. That section provides, in relevant part, that "[r]epresentatives *designated or selected* for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining." 29 U.S.C. § 159(a) (emphasis supplied).

Indeed, the law on voluntary recognition around the time Article 1, Section 29 was adopted made voluntary recognition easy. In *Joy Silk Mills, Inc.,* 85 NLRB 1263 (1949), the NLRB explained the rules governing voluntary recognition that existed before *Joy Silk* and at least until the 1969 decision in *Gissel Packing* signaled a bit of a change in the rules in this area. Under *Joy Silk*, and at the time Article 1, Section 29 was enacted, if a union presented an employer with proof that a majority of the relevant employees expressed their desire (typically through signed cards) that a union represent them, the employer was obligated to recognize the union with no election or other process involved, unless the employer could show it had "good faith doubt" as to the union's majority support.

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Gissel Packing began an evolution in the law that gave employers the right to insist on an election in most cases. But even still, employers have always retained the right to voluntarily recognize unions, and unions the right to be recognized voluntarily. Indeed, it was not clear that employers were not *required* to recognize unions based on a valid card-check majority until *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974).

Denying the traditional right of voluntary recognition to unions that have demonstrated majority support has been roundly rejected in labor law because it is bad policy. Requiring elections when, *e.g.*, it is clear that the union will win the election because of its majority support among employees, and when both the employer and union wish to begin their relationship, is a waste of time and resources, and it is not conducive to harmonious labor relations.

E. *HB 1413 Requires Mandatory Periodic Recertification Elections and Requires That Unions Must Receive Votes from a Majority of All Members of a Bargaining Unit in Certification Matters, Contrary to the History and Policy of Collective Bargaining*

For unions not covered by HB 1413, the union may gain recognition voluntarily or by an election at no cost, and it can prevail in the election by receiving a simple majority of the votes cast. This is also (and has always been) the

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practice under the NLRA. Unions that HB 1413 covers, however, must pay a fee for an election, and can prevail only by receiving a majority of the votes of all employees eligible to vote. *See* §§ 105.575(1)-(2), (12), (15), RSMo. Thus, for unions HB 1413 covers, *non*-votes in an election are treated as "no" votes against the proposed representative. Further, even if a union HB 1413 covers manages to win the initial certification election, it must still stand for a mandatory recertification election every three years, even if there is no expressed desire for such an election by any relevant employees, under the same standards. *See* § 105.575(12), RSMo. These rules impose an especially significant disadvantage on HB 1413-covered unions, and they are contrary to how collective bargaining worked under the NLRA in the era leading up to 1945, and since.[3]

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[3] It is true that the Railway Labor Act, 45 U.S.C.A. Secs. 151, et seq. ("RLA"), at one point had rules regarding vote-counting similar to those HB 1413 applies to unions it covers. First, though, the RLA covers only railway and airline workers, so the NLRA has long been the predominant labor law in the U.S. This was especially true in 1945, as the airline industry was in its infancy. Second, the RLA rule was later changed to be in conformance with the NLRA rule on this issue. In approving the newer RLA rule, *Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd.*, 663 F.3d 476, 480-81, (2011), the D.C. Circuit gave a strong defense of the traditional NLRA rule and the current RLA rule, counting only votes actually cast. This rule:

> allows employees to exercise [their] right through the most traditional of forums—an election. The fact that a majority of eligible voters decides to abstain—i.e., not exercise its right—hardly suggests that the majority was deprived of its right. This is how voting rights work. Citizens with the right to vote in a presidential election must register, show up to a polling place on the Tuesday after the first Monday in November, wait in line, enter the

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(1) ***The NLRA Has Always Determined Union Elections Based on the Majority of Votes Cast***

Counting non-votes as "no votes" is contrary to the way the both the NLRA and Missouri's State Board of Mediation (the body that regulates elections of unions covered by Missouri state law) have always conducted elections. It interferes with the ability of employees to choose a collective bargaining representative. Indeed, it is contrary to how political and the vast majority of other elections have traditionally been conducted in the U.S.

The NLRA rule is—and has always been—that "[e]lections to certify or decertify a union as the bargaining representative of a unit of employees are decided by a majority of votes cast." https://www.nlrb.gov/about-nlrb/what-we-do/conduct-elections. There was no reason in 1945 and is no reason now to assume non-voters in any type of election are "no" voters. Indeed, HB 1413, by counting non-voters as voting against union representation in both certification and

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booth, and pick a candidate in order to exercise their right. Those who fail to do so have not been deprived of their right. Indeed, . . . an abstaining majority unhappy with the outcome of a labor election can simply call for a new election and, by exercising its right through actually voting, produce a different result.

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decertification elections, goes further and effectively assumes that non-voters always oppose the union. It is unlikely that those who enshrined a constitutional right to bargain collectively in Missouri's Constitution would have endorsed election rules that made it much harder for unions to become certified and much easier for them to be decertified than the NLRA system that existed at the time (and since).

HB 1413 is also contrary to how Missouri's State Board of Mediation (the body that regulates union representation elections under state labor law) has functioned since its inception in 1965 until HB 1413 changed it. Before being amended by HB 1413, Section 105.500(2) stated: "(2) 'Exclusive bargaining representative' means an organization which has been designated or selected by majority of employees in an appropriate unit as the representative of such employees in such unit for purposes of collective bargaining. . . ." This language, based on NLRA language, was always interpreted as the NLRA has been interpreted, including how the NLRA was interpreted in 1945 when Article 1, Section 29 was enacted.

(2) *The NLRA has Always Provided that Decertification Elections, Like Certification Elections, Will be Scheduled If and Only If There is Evidence Justifying One*

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The State notes that decertification elections also require what it calls a "true majority" of employees. But it also requires triennial recertification elections that essentially adopt decertification as the default, which the union may try to overcome only by winning the votes of a majority of represented employees.

It has long been the policy of the NLRB that neither union certification elections nor union decertification elections may be authorized without evidence justifying one. Most importantly, before scheduling a certification election, the NLRB has required the union to make a "showing of interest": specifically, that at least thirty percent of the employees in a proposed bargaining unit favor an election. The NLRB has also long required that if employees wish to decertify a union, a petition for a union decertification election be signed by thirty percent or more of the employees in the unit covered by the agreement. *See* Seth Harris, Joseph Slater, Anne Lofaso, and Charlotte Garden, *Modern Labor Law in the Private and Public Sectors: Cases and Materials* 456 (2d ed., 2016).

Employers may file decertification petitions, but this has always also required evidence: specifically, the employer must show it has evidence that it has at least a good faith belief or actual proof that the union is no longer supported by a majority of employees in the bargaining unit. For a discussion of the evolution of the standard from "good faith belief" to "actual proof" and other details of this rule, *see Johnson Controls, Inc.*, 368 NLRB No. 20 (2019).

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The purpose of these rules has always been to balance two concerns: employee rights to certify or decertify unions on one hand, and the need for labor stability and efficiency on the other. Just as there is no good reason to have a union certification election if there is no evidence indicating that any significant number of employees wish to be represented by a union, there is no good reason to have a union decertification election if there is no evidence indicating that any significant number of employees wish to no longer be represented by the union.

It is inefficient and needlessly burdensome to unions to be forced to undergo decertification elections in the absence of any demonstrated desire for one by the employees the union represents. Indeed, under the onerous rules of HB 1413, a union would have to spend considerable resources (both time and money) every time an election is required, even if nobody in the bargaining unit desires such an election. This effort will not necessarily center on whether the union is doing a good job representing members of its bargaining unit. Instead, it could become largely about making sure members of the bargaining unit know that if they wish to keep their union representation, they have to remember to vote.

It is inconceivable that those who wished to establish a state constitutional right to bargain collectively in Article 1, Section 29 would have envisioned or approved of a voting, certification, and decertification scheme that was entirely foreign to "collective bargaining" as it was understood then (and has been

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generally understood since), especially given that the scheme HB 1413 requires for the unions it covers makes collective bargaining significantly more difficult to achieve.

II. HB 1413 Does Not Satisfy Heightened Scrutiny Because the State Has Not Demonstrated a Sufficiently Important Actual Interest Justifying HB 1413, or That the Statute is Tailored to Achieve Such an Interest

The State argues that HB 1413 meets "any . . . level of scrutiny" because "the State provided a compelling factual justification for every provision." Br. at 23. This statement is incorrect. HB 1413 is not supported by a sufficiently important actual purpose,[4] and that alone is sufficient reason to affirm the lower

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[4] The State's assertion that rational-basis review applies in this case is mostly beyond the scope of this brief. However, *amici* note that, in general, some level of heightened scrutiny applies to infringements of enumerated rights. The fact that the "right to organize and bargain collectively" is enumerated in the Missouri Constitution, Art. I, § 29, should lead this Court to apply heightened scrutiny. *See Manoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503, 512 (Mo. Banc 1991) (stating that a law that "clearly contravenes some constitutional provision" is "presumptively invalid because it impinges upon a substantive right or liberty conferred by the constitution"). Among other reasons, applying rational basis review would render the text of Art. I § 29 superfluous.

In addition, HB 1413's discriminatory infringement of other constitutional rights – such as the rights of free speech, assembly, petition, and association protected by the First Amendment of the federal Constitution and Art. I § 8-9 of the Missouri Constitution – provides a separate reason to review HB 1413 under heightened scrutiny.

court. However, the State also could not demonstrate that HB 1413 is adequately tailored to meet a qualifying purpose under heightened scrutiny.

Under either intermediate or strict scrutiny, the state must justify its actual reasons for HB 1413. *See US v. Virginia*, 518 U.S. 515, 533 (1996) (under intermediate scrutiny, the "burden of justification is demanding and it rests entirely on the state . . . the justification must be genuine, not hypothesized or invented *post hoc* in response to litigation"). But the State's brief offers no citations to statutory language, legislative history, or any other source for the proposition that "HB 1413 was enacted in 2018 to address the well-documented problems with public-sector union representation" that were discussed in pages 25-42 of its brief. Appellant Br. at 43. Likewise, HB 1413 itself says nothing about the State's reasons for limiting collective bargaining for workers represented by non-public safety labor organizations. Instead, the State argues that "the purpose of the bill is evident from the bill itself." *Id*. at 127. But while it is evident that HB 1413 is aimed at weakening collective bargaining protections for Missouri employees who choose to affiliate with covered unions, it is not evident what purpose this is to serve. For example, HB 1413's distinction between public-safety and other unions could be aimed at undercutting disfavored groups, which is not even a legitimate purpose, much less an important or compelling one. *See Romer v. Evans*, 517 U.S. 620 (1996).

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A. *HB 1413 is not Tailored to Achieve Effective Workforce Management*

Even if the State's post hoc say-so was enough to carry its burden to establish a sufficient legislative purpose, HB 1413 is not tailored to achieve the goals identified by the State's experts, such as an efficient workforce or effective union democracy. It is the State's burden to meet heightened scrutiny, and even if the State could establish sufficiently important actual purposes for enacting HB 1413, its evidence does not demonstrate that HB 1413 is adequately tailored to achieve those purposes. Heightened scrutiny requires the government to show a challenged law "will in fact alleviate" any harms they identify "in a direct and material way." *US v. Nat'l Treasury Employees Union*, 513 U.S. 454, 475 (1995). The materials on which the State relies to satisfy this requirement contain, at best, conjecture about possible policy outcomes.

The state argues that HB1413 is justified in part because "common union-negotiated rules relating to seniority, job tenure, discipline, and stringent work descriptions create major problems for the entire workplace," citing three affidavits. MO Br. at 32 (citing affidavits of Daniel Stangler, Robert Maranto, and Aaron Hedlund). At most, the State's experts present policy arguments against the wisdom of collective bargaining over certain working conditions. But their conclusions are not uncontroverted, and Missouri voters chose to resolve the policy

question in favor of collective bargaining when they voted to enshrine Art. I § 29 in the Missouri Constitution.

The Stangler, Maranto, and Hedlund affidavits each attach an expert report authored in connection with a different case. That case concerned MO Senate Bill 1007, which implemented "at-will" employment for many Missouri public employees. *See AFSCME Council 61 v. Missouri*, Case No. 18AC-CC00407 (Cole County Circuit Court). The expert reports argue that "at-will" employment is desirable because it provides managerial flexibility. The State then extrapolates that these reports support HB 1413's provision requiring that "[e]very labor agreement shall also include a provision reserving to the public body the right to hire, promote, assign, direct, transfer, schedule, discipline, and discharge public employees," as well as a provision "reserving to management the right to make, amend, and rescind reasonable work rules and standard operating procedures." §105.585(1), RSMo.

This extrapolation is itself unreasonable, because the choice between "at-will" employment and an existing merit protection system is different than the choice whether or not to allow meaningful collective bargaining over working conditions. Collective bargaining is a flexible process that results in different contract provisions depending on the needs and desires of the parties involved, as well as relevant labor law. For example, a collective bargaining agreement that

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contains a provision concerning scheduling might be relatively determinate or relatively flexible—it might use a seniority system in order to avoid conflict over which employees are more "deserving" of a particular schedule, or it might impose only general limits on the employer's discretion.[5]

In any event, the State's affidavits offer at best an incomplete picture of the topics they do address. The State frequently suggests or implies that replacing collectively bargained workforce protections with the management-rights clause required by HB 1413, § 105.585(1) RSMo, could lead to the adoption of "high quality" workforce management. MO Br. at 36. But employers who are unchecked by a collective bargaining agreement can use good or bad management practices. There is nothing in HB 1413 that requires or even promotes use of the former.

For example, quoting an expert report, the State implies that reserving the right to discipline employees will allow it to spend more "resources to provide greater training, professional development, and strategic investments to enhance

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[5] The State suggests, based on the expert reports, that management flexibility is desirable because employers can "design contracts that fit their needs." Appellants' Br. at 32 (quoting Hedlund report.) The implication is that flexibility is desirable so that an employer can offer individualized terms and conditions of employment. This might be true of some working conditions, but divvying up scarce workplace benefits requires more than a series of individual negotiations. For example, if all workers want to drive a school bus during the morning shift, some will win their preference and some will not, in zero-sum fashion. The employer will need a system to allocate the desired shifts, even if that system is as simple as "first-come/first-served." Collective bargaining is a way for workers to have voice in how the system is designed and what criteria it uses.

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worker productivity." Appellant Br. at 33. This result is conceivable, but there is nothing in HB 1413 that compels it. First, reserving employer discretion over discipline and discharge will not prevent workers from filing lawsuits in court if they believe that they have been illegally punished or discharged, and these lawsuits may be more expensive and time-consuming than resolving worker discipline through a union-negotiated process or in consultation with a union. Moreover, HB 1413 does not direct that any savings that do result from eliminating grievance procedures will be spent on workforce development.

Similarly, the State argues that seniority rules disadvantage younger workers, Appellant Br. at 34, presumably in support of HB 1413's requirement that collective bargaining agreements reserve to management the authority to "promote . . . public employees." But the inverse will also be true: seniority rules deter employers from disfavoring more senior workers, either because they earn a higher salary, or because of age discrimination, which "remains pervasive" in US workplaces. David Neumark & Joanne Song, *Do Stronger Age Discrimination Laws Make Social Security Reforms More Effective?* 108 J. Pub. Econ. 1, 1-2 (2013) (citing studies finding persistent workplace age discrimination); *see also* Scott J. Adams & David Neumark, *Age Discrimination in U.S. Labor Markets: A Review of the Evidence*, in *Handbook on the Economics of Discrimination* 203 (William M. Rogers III, ed., 2006). Perhaps Missouri's public employers do not

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discriminate against older workers, but it is not self-evidently true either that Missouri's younger workers need greater protection, or that greater management discretion over promotion criteria will provide that protection.

B. *Collective Bargaining Has Proven Benefits for Employers and Employees*

Finally—although it is the State's burden to justify its restrictions on collective bargaining and not the plaintiffs' burden to defend collective bargaining—research and experience reflects the benefits of effective public sector collective bargaining for both employers and employees more generally.

Collective bargaining yields affirmative benefits for public employers, including improved workplace efficiency and reduced employee turnover. A large body of evidence shows that collective bargaining benefits employers in two key ways. First, the chance to have a voice at work through collective bargaining is itself highly valued by employees, who report that they view bargaining both as a way to improve their own lives and to make their employers more successful. Richard B. Freeman & Joel Rogers, *What Workers Want* 4-5 (1999). Second, workers who have a say in workplace decisions are "more likely to buy into the firm's processes and objectives," yielding higher "job satisfaction, loyalty, and job tenure" and "reduc[ing] the costs associated with the hiring and training of new employees and provides an incentive for investment in enterprise-specific skills."

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Stephen F. Befort, *A New Voice for the Workplace: A Proposal For An American Works Councils Act*, 69 Mo. L. Rev. 607, 611-12 (2004); *see also* Kenneth G. Dau-Schmidt & Arthur R. Traynor, *Regulating Unions and Collective Bargaining*, in *Labor and Employment Law and Economics* 96, 109 (Kenneth G. Dau-Schmidt et al. eds., 2009) (collective bargaining helps employees to feel more useful and engaged, and has been linked to productivity gains, including lower turnover, search, and retraining costs).

Empirical studies find that where mature collective bargaining relationships develop, "unions can increase firm productivity in certain industries, particularly if management constructively embraces, rather than fights, union contributions." Dau-Schmidt & Traynor at 109-10; *see also* Richard B. Freeman & James L. Medoff, *What Do Unions Do?* 19 (1985) ("unions are associated with greater efficiency in most settings"). Other research suggests that this finding also holds in the public sector. For example, one study linked teachers' unions to stronger statewide performance on standardized college entrance exams. Robert Carini, Brian Powell & Lala Carr Steelman, *Do Teacher Unions Hinder Educational Performance? Lessons Learned From State SAT & ACT Scores*, 70 Harv. Educ. Rev. 437 (2000). Another study found that "compared to less-unionized [school] districts, highly unionized districts dismiss more low-quality teachers and retain more high-quality teachers, raising average teacher quality and educational

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outcomes." Eunice S. Han, *The Myth of Unions' Overprotection of Bad Teachers: Evidence from the District-Teacher Matched Data on Teacher Turnover*, 59 Indus. Relations 316 (2020).

The explanation for these outcomes likely has many causes, but one is straightforward:

> [I]t would be silly to try to plan school policies or curricula without consulting with the teachers who have been trained to educate children and who are actually involved in the day-to-day running of the schools. Discussions with collective representatives in a union setting are more likely to be productive than individual discussions because employees will have less fear of retaliation for reporting administrative failures.

Kenneth G. Dau-Schmidt & Mohammad Khan, *Undermining or Promoting Democratic Government?: An Economic and Empirical Analysis of the Two Views of Public Sector Collective Bargaining in American Labor Law*, 14 Nev. L.J. 414, 429 (2014) (productivity gains can be attributed to facts that "unions help promote the negotiation of efficient contract terms," ensure that those terms are enforced, and facilitate worker voice, which lowers costly employee turnover).

In addition to workforce management benefits, some states and municipalities have worked to achieve other public policy goals through collaborative labor-management relationships. For example, some school districts have successfully partnered with their employees' collective-bargaining representatives to improve student performance and teacher quality. Ken Futernick

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et al., *Labor-Management Collaboration in Education: The Process, The Impact, & The Prospects For Change* 25 (Janice L. Agee ed., 2013) ("[t]he most common practice in high-[labor-management cooperation] districts was a consistent, shared focus on the quality of education provided to the district's students[,]" and citing examples including Green Dot Public Schools in Los Angeles, where "administrators and union representatives explicitly prioritize student interests as they negotiate contracts"); Saul A. Rubinstein & John E. McCarthy, *Collaborating on School Reform: Creating Union-Management Partnerships to Improve Public School Systems* 8-12 (2010) (describing case studies, including union-management collaboration within California's ABC School District on topics including peer mentoring and evaluation, new teacher orientation, and use of data-based decision making on student performance); Bobbi C. Houtchens et al., *Local Labor Management Relationships as a Vehicle to Advance Reform: Findings From the U.S. Department of Education Labor Management Conference* 4 (2011) (describing case studies in which labor-management partnerships have contributed to improved student outcomes in a range of areas by facilitating "teacher leadership," which is "essential to dynamic decision-making").

Among these success stories are school districts such as Toledo, OH, where teachers unions have worked with districts to develop rigorous yet fair teacher evaluation and development systems, thereby improving teacher buy-in to what is

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often a tremendously divisive issue. U.S. Dep't of Educ., *Shared Responsibility: A U.S. Department of Education White Paper on Labor-Management Collaboration* 11-12 (2012) (describing union-management Board of Review in Ohio, which has "provide[d] more rigorous evaluations than those conducted by principals in the past"). Similarly, in Massachusetts, "interest based" rather than adversarial collective bargaining resulted in both school and union leadership becoming more likely to view collective bargaining as a "vehicle[] for improving student performance," and also facilitated a collaborative process that resulted in improved teacher leadership, dual language immersion education, improved professional development, and other improvements at districts serving large numbers of low-income, minority, and special education students. Thomas A. Kochan et al., *Massachusetts Education Partnership: Results & Research From the First Two Years* (2015).

Similar examples abound, and are not limited to education. *See generally* Erin Johansson, *Improving Government Through Labor-Management Collaboration and Employee Ingenuity* (2014), *available at* https://bit.ly/31KbHBF. In Ohio, labor-management cooperation led to "millions of dollars in savings" across state government, with former Governor George Voinovich observing that "[m]y feeling is that labor is key" to successful quality management efforts. U.S. Dep't of Labor, *Report of the U.S. Secretary of Labor's*

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Task Force on Excellence in State & Local Government Through Labor-Management Cooperation (1996), *available at* https://bit.ly/2TpgOCy. In Massachusetts, a joint venture between labor unions and MassHighway resulted in a sixty percent reduction in workers compensation claims, significant reductions in overtime and sick time, and millions in savings. *Id*. Significantly, in each of these examples, as in the public education examples described in the previous paragraph, the collective representative played a key role in marshaling employee support for the joint initiative, on one hand, and channeling employee feedback, on the other. Given the importance of employee buy-in to the success of these new initiatives, each would have been more difficult in an employment setting that lacked meaningful collective representation.

HB 1413 contains a grab-bag of provisions that will undermine the ability of covered unions to carry out their representational duties and to achieve the kinds of results discussed above. For example, by authorizing the State to make post-agreement unilateral changes to a proposed collective bargaining agreement, HB 1413 makes it impossible for a union to reach agreement on a joint labor-management plan to improve some aspect of workplace functioning or take on a tricky problem, such as how to respond to conditions created by the COVID-19 pandemic. Such an agreement would invariably involve give-and-take—and the union would not be able to count on the employer holding up its end of the bargain.

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Similarly, a union that has to win recertification based on a majority of all employees in the bargaining unit is a union that has to be constantly in campaign mode. Such a union would be unlikely to agree to work with an employer on any joint initiative, especially if it feared employees might perceive the partnership as a sign that the union was not fighting on its members' behalf with all its might. And even provisions like HB 1413's ban on "release time," §§105.580.4, 105.585(4), RSMo., will make it difficult for unions to carry out their roles by forcing worker representatives to do union business during evenings and weekends. In short, HB 1413 is likely not only to undermine unions, but also to make it more difficult for them to work with employers towards the common good.

The State has not carried its burden of showing that HB 1413 is tailored to achieve sufficiently important state interests. Rather, collective bargaining itself can be an effective way to achieve many of the State's asserted purposes.

Conclusion

For the foregoing reasons, the Circuit Court's decision should be affirmed.

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Respectfully submitted,

/s/ James P. Faul

James P. Faul
MO Bar Number: 58799
Hartnett Reyes-Jones, LLC
4399 Laclede Avenue
St. Louis, Missouri 63108
Telephone: (314) 531-1054
Facsimile: (314) 531-1131
Email: jfaul@hrjlaw.com

Charlotte Garden
Seattle University School of Law
901 12th Ave.
Seattle, WA 98122
Telephone: (206) 398-4073
Email: GardenC@seattleu.edu

Joseph Slater
University of Toledo
1825 W. Rocket Drive
Toledo, OH 43606
Telephone: (419) 530-2008
Email: Joseph.Slater@utoledo.edu

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Certificate of Compliance

I hereby certify, pursuant to Supreme Court Rule 84.06(c), that this brief includes the information required by Rule 5.03, was served through the Court's electronic filing system, and complies with the limitations contained in Rule 84.06(b). I further certify this brief contains 10,476 words, excluding the cover page, required certificates, and signature block, as determined by Microsoft Word.

James P. Faul

Certificate of Service

I hereby certify that on October 26, 2020, I electronically filed the foregoing brief with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to all counsel of record.

James P. Faul