

SC98412

IN THE SUPREME COURT STATE OF MISSOURI

MISSOURI NATIONAL EDUCATION ASSOCIATION, et. al.,

Respondents,

V.

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

Appellants.

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

**BRIEF OF *AMICUS CURIAE* MISSOURI FRATERNAL ORDER OF POLICE
IN OPPOSITION TO SEVERANCE OF HB 1413**

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INTERESTS OF AMICUS CURIAE

Amicus Curiae Missouri Fraternal Order of Police (“FOP”) is a statewide organization that is comprised primarily of full-time rank-and-file law enforcement officers employed in Missouri. FOP has over twenty-seven local lodges and nearly eight thousand (8,000) members. The single most important aspect of this organization and its Lodges is that it provides collective bargaining for its membership and member lodges as well as support and fraternalism.

FOP has opposed HB 1413 from its inception. Although HB 1413 in its final form created an exception (referred to as the “carve-out”) for first responders i.e. police, paramedics, and firefighters, the purpose and provisions of HB 1413 make a nullity of the right to collectively bargain. The trial court has determined that HB 1413 is unconstitutional. Further, the trial court has determined that the provisions of this legislation are not severable. Now, the State of Missouri seeks to overturn the decision of the trial court in finding it unconstitutional and in an attempt to revive fatally flawed legislation seeks to remove the exception that allows FOP and first responders to continue to operate free of the impermissible restrictions laid out in HB 1413.

Though the purpose of this Amicus Curiae brief is to highlight issues applicable to this organization, FOP stands with all issues raised by Respondent. Because of the current statutory exception, FOP does not have standing to challenge the legislation it has always opposed and its voice has not been heard; however, should the courts rule in favor of the State, the outcome would certainly affect thousands of members of FOP and all other first responders.

The Missouri Constitution provides in Article I, § 29 that “[e]mployees shall have the right to organize and to bargain collectively through representatives of their own choosing”. HB 1413 adversely effects the rights of the public sector employees and FOP membership to collectively bargain. The ruling of the trial should be upheld.

CONSENT OF THE PARTIES

FOP has received consent from consent from counsels for Appellant and Respondent to file this Amicus Curiae brief.

JURISDICTIONAL STATEMENT

FOP hereby adopts the Jurisdictional Statement of Respondent.

STATEMENT OF FACTS

FOP hereby adopts the Statement of Facts of Respondent.

ARGUMENT

- I. The Trial Court Should Be Affirmed in That HB1413 Cannot Be Severed Because the “Carve-out” Provision of HB1413 Is So Essential and Inseparably Connected with the Other Provisions of HB1413 that the Legislature Would Not Have Enacted HB1413 without the “Carve-out” Provision**

The FOP contends that under RSMo. 1.140, both exceptions for severability can be applied here, i.e., (1) that most of HB 1413’s substantive provisions are unconstitutional and cannot be separated from the rest of the legislation; and (2) severing just the first

responder “carve-out” would not be in accord with the legislative intent because the legislative history of HB 1413 demonstrates that it would not have been passed without the “carve-out.”

The legislative intent here was clear in that the “carve-out” of HB 1413 was a necessary part of approved legislation. Where the legislature added clauses such as this “carve-out” to secure passage, courts have found these clauses are “inseparably connected and dependent upon each other.” *Trout v. State*, 231 S.W.3d 140, 147-148 (Mo. banc 2007). Without the “carve-out,” HB 1413 would have failed to secure the number of votes necessary for passage. Lieb, David A., *Union Seeks to Block New Missouri Labor Group Restrictions*, 2018, <https://apnews.com/article/86570e8442e843a49f20a1640752127d>. In fact, when the original bill was introduced without the “carve-out,” HB 1413 stalled. FOP actively lobbied against HB 1413 before the “carve-out” was added at the end of the session by the bill sponsors to silence the First Responders. 99th General Assembly, 2018. Had the “carve-out” not been included, FOP and other first responders would have challenged HB 1413 in its entirety. Because the passage of HB 1413 relied so integrally upon the “carve-out,” it cannot be severed.

Furthermore, the proper action for this court would be to affirm the trial court’s determination that the entire law is unconstitutional. If only certain sections of the law were struck down, it would broaden the scope of the legislation while denying FOP due process to challenge the legislation. In fact, the United States Supreme Court has recently provided that, where constitutional violations of unequal treatment exist, “a court theoretically can cure that unequal treatment either by extending the benefits or burdens to the exempted

class, or by nullifying the benefits or burdens for all.” *Barr v. Am. Ass’n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2354 (2020). The Court added to the analysis: “[t]o be sure, some equal-treatment cases can raise complex questions about whether it is appropriate to extend benefits or burdens, rather than nullifying the benefits or burdens.” *Id.*, at 2354-55, citing *Morales-Santana*, 582 U. S. ___, 137 S. Ct. 1678, 198 L. Ed. 2d 150 (2020). “For example, there can be due process, fair notice, or other independent constitutional barriers.” *Id.*, citing *Miller v. Albright*, 523 U.S. 420, 458-59, 118 S.Ct. 1428, 140 L.Ed.2d 575 (1978) (Scalia, J., concurring in judgment); *see generally* Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 Clev. St. L. Rev. 301 (1979). Due process and fair notice for the extension of HB 1413 have not been extended to FOP or other public safety organizations.

The consideration to extend or nullify those burdens or benefits are particularly salient here where the burdens presented by HB 1413 would be extended to first responders. One of the most obvious burdens is that HB 1413 would effectively invalidate dozens of existing first responder Collective Bargaining Agreements. HB 1413 requires that all unions go through an initial certification process regardless of previous recognition or whether a collective bargaining agreement contains an initial recognition clause. Those agreements bargained by a first responder union that has not been certified through HB 1413’s new procedures would become invalid. First responders would no longer be able to rely upon important provisions of their contract like grievance processes, equipment use committees, and legal representation. Such a burden would be exceptionally disruptive to FOP members and other first responders. This would represent unconstitutional

impairment under Art. I, § 13 of the Missouri Constitution. See, e.g., *Michigan State AFL-CIO Council v. Pizza*, 154 F.3d 307 (6th Cir. 2017).

In the event that FOP and its members are immediately subjected to HB 1413's restriction on speech and association, FOP would suddenly become disabled from engaging in political speech or support of candidates, unless and until they obtained permission to engage in such conduct as required by HB 1413. The administrative burdens of disclosure requirements required by HB 1413 would be almost impossible to meet for FOP members. Finally, FOP lodges and members would be subject to potential criminal penalties because they have yet to file disclosure reports or may not have been retaining records as HB 1413 requires.

In a faithful analysis of the concepts of *Barr*, this Court must find that it is appropriate to extend the benefit provided in the first responder "carve-out" rather than nullifying that benefit. Extending the burdens created in HB 1413 (i.e., removing the "carve-out") is clearly contrary to the legislative intent and as such would necessitate this Court find severability is inappropriate. Beyond issues with severability and clear legislative intent, there exist potent due process issues whereby severing the "carve-out" provision would bypass FOP's ability to challenge its unconstitutionality from its inception. Therefore, it is not feasible to sever this clause, causing undue burden to approximately 8000 FOP members and thousands of other first responders named in the "carve-out."

II. The Trial Court Should Be Affirmed in That Severance of the “Carve-Out” in HB 1413 Would Be Fundamentally Unfair and Constitutionally Infirm

Severance of the provisions which have excluded FOP and its various members from HB 1413 would create legislation that imposes unprecedented burdens on public sector collective bargaining which is violative of the Missouri Constitution. Moreover, severance of the “carve-out” provisions would impose upon FOP and represented first responders the many unconstitutional restrictions the trial court found relating to certification and recertification of a collective bargaining unit, unilateral modification of collective bargaining agreements, and limitation of bargaining subjects. Because the “carve-out” excluded FOP from coverage, it had no standing to challenge these provisions. Therefore, it would be contrary to impose these unconstitutional provisions on first responders by severing the “carve-out.”

HB 1413’s provisions would destroy public sector collective bargaining as envisioned by two of this Court’s decisions. In *Independence-Nat. Educ. Ass’n v. Independence School Dist.*, 223 S.W.3d 131 (Mo. banc 2007), this Court held that *all* public employees have a constitutional right to engage in collective bargaining over terms and conditions of employment as guaranteed by Art. I, § 29 of the Missouri Constitution. The decision recognized a concept of collective bargaining at odds with the restrictions and burdens of HB 1413 and that once a labor agreement has been negotiated and approved, it is as “enforceable as any other contractual obligation undertaken by the district.” *Id.*, at 141.

In *American Federation of Teachers v. Ledbetter*, 387 S.W.3d 360 (Mo. banc 2012), this Court further interpreted Art. I, § 29 of the Missouri Constitution and expanded the rights guaranteed to require employers to bargain with collective bargaining representatives in good faith. *Id.*, at 367. In short, HB 1413 would “frustrat[e] the very purpose of bargaining,” as described in *Ledbetter* and *Independence* by prohibiting bargaining over any working conditions other than wages and benefits and allowing employers to change an agreement after bargaining has been completed. *Id.*

HB 1413 essentially overturns these decisions. With respect to *Independence*, the law created under HB 1413 would rescind all effective collective bargaining agreements that cover members of FOP statewide in direct parallel to the school district’s unilateral actions. It would further block the ability of those FOP members (and all other public employees) to re-institute such agreements that would still be readily available to private employees. As for *Ledbetter*, HB 1413 stands solely to frustrate the purpose of collective bargaining for FOP and all public labor organizations by adding so many restrictions to the organization process and the bargaining process that it becomes impractical. To allow severance would contradict everything this Court held in *Ledbetter*.

FOP has vigorously and continuously opposed HB 1413 throughout its legislative history because of the massive restrictions that violate the constitutional right for employees (including public sector employees) to organize and bargain collectively. These restrictions include a requirement for a supermajority of employees to vote for union representation rather than the traditional majority required, as well as extreme and costly additional requirements to representative elections and recertification. Specific to FOP, its

members, and all public safety employees statewide, HB 1413's additional restrictions would require previous lawfully recognized labor organizations to recertify through the burdensome procedures required in HB 1413 and invalidate existing contracts. Such restrictions would be an unconstitutional impairment on the collective bargaining agreement contracts under Federal law. See *Toledo Area AFL-CIO v. Pizza*, 154 F.3d 307 (6th Cir. 1998). And, once the restrictions on organization and certification have been hurdled, there are *additional* restrictions to the subjects of a bargaining agreement, which limits topics such as wages and benefits. Even beyond the unconstitutional impairment on contracts, these restrictions very clearly violate *Independence* and *Ledbetter*.

CONCLUSION

For the foregoing reasons, the Court should uphold the trial court's order declaring HB 1413 is unconstitutional and in violation of Art. I, § 29 of the Missouri Constitution and that the provisions of HB 1413 are not severable.

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Dated October 28, 2020

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 October 28, 2020, on all counsel of record.

/s/James P. Towey, Jr.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, pursuant to Supreme Court Rule 84.06(c), that the Brief of Amicus Curiae Fraternity of Police in Opposition to Severance of HB 1413 includes the information required by Rule 55.04, complies with the limitations contained in Rule 84.06(b), and was served in compliance with Rule 103.08 and 43.01(c). The undersigned further certifies that this brief contains 2171 words as determined by Microsoft Word, excluding the title page.

/s/James P. Towey, Jr.