No. SC99179

In the
Supreme Court of Missouri

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

Respondents,

v.

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

Appellants.

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

APPELLANTS' BRIEF

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JURISDICTIONAL STATEMENT

Under article V, section 3 of the Missouri Constitution, this Court has "exclusive appellate jurisdiction in all cases involving the validity . . . of a statute . . . of this state." *See Alderson v. State*, 273 S.W.3d 533, 535 (Mo. banc 2009). "[W]here any party properly raises and preserves in the trial court a real and substantial (as opposed to merely colorable) claim that a statute is unconstitutional, this Court has exclusive appellate jurisdiction over any appeal in which that claim may need to be resolved." *See Boeving v. Kander*, 496 S.W.3d 498, 503 (Mo. banc 2016).

Here, Plaintiffs-Respondents American Federation of State, County, and Municipal Employees, AFL-CIO, Council 61 ("AFSCME"); Communications Workers of America, AFL-CIO, Local 6355 ("CWA"); and Service Employees International Union, Local 1 ("SEIU") (collectively, "Plaintiffs" or "the Unions") sued the State of Missouri and a number of state agencies and entities (collectively, the "State"), challenging the constitutional validity of Senate Bill 1007 (2018) ("SB 1007") under Missouri Constitution article I, sections 29 and 13. D169, p.1, ¶ 1. These issues were repeatedly addressed by both parties throughout the litigation. D169, D235, D239, D270, DD304-309, D334.

After trial, the Circuit Court of Cole County ("circuit court") issued an order granting permanent injunctive relief but holding that SB 1007, as applied to the employees represented by the Unions, did not violate the Missouri Constitution because SB 1007's provisions did not incidentally impact the State's bargaining positions during labor negotiations. D334 at p.39-42. In so holding, the circuit court ruled that the State's conduct, which was based on its interpretation that the provisions of SB 1007 do impact

collective bargaining, violated article I, section 29. D334 at p.31. The circuit court ordered, among other things, that the State bargain "without any constraint from SB 1007" and in accord with the circuit court's interpretation of several affirmative bargaining requirements imposed by article I, section 29. D334 at p.42. The circuit court alternatively held that if the legislative amendments in SB 1007 *did* impact collective bargaining, SB 1007 would be invalid under article I, section 29 of the Missouri Constitution. D334 at p.31, 36. The State appeals the circuit court's judgment, including the circuit court's statutory construction of SB 1007 and, consequently, the circuit court's alternative holding regarding the constitutional validity of SB 1007. D335. Thus, this Court has exclusive jurisdiction over this appeal because the Unions "raise[d] and preserve[d] in the trial court a real and substantial . . . claim that [SB 1007] is unconstitutional" and this "claim may need to be resolved" in this appeal. *See Boeving*, 496 S.W.3d at 503.

STATEMENT OF FACTS

I. Constitutional and Statutory History through 2017

In 1945, Missouri voters ratified the current Missouri Constitution. That Constitution contained, among other things, article I, section 29 and article I, section 13. Article I, section 29 provides "[t]hat employees shall have the right to organize and bargain collectively through representatives of their own choosing." As relevant here, article I, section 13 provides "[t]hat no ex post facto law, nor law impairing the obligation of contracts . . . can be enacted." The rights in article I, section 13 date back to the first Missouri Constitution, which was ratified in 1820. *See* Mo. Const. art. XIII, § 17 (1820) ("That no *ex post facto* law, nor law impairing the obligation of contracts . . . can be passed . . . ."). Conversely, the rights in article I, section 29 made their first appearance in the 1945 Missouri Constitution.

The 1945 Missouri Constitution also contained a provision providing for the creation of executive-branch departments, Mo. Const. art. IV, § 12 (1945), and a new[1] provision clarifying how those departments would be run. Mo. Const. art. IV, § 19 (1945). It stated that "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

[1] *See* General Assembly of the State of Missouri Committee on Legislative Research, *The Constitution of the State of Missouri with Annotations and Index – 1945* 63 (Lester G. Seacat ed., 1945) (A0236) (showing that article I, section 19 was not contained in the 1875 Missouri Constitution, as amended, in 1945); *see generally id*. at 145-76 (A0237-A0268) (showing all sections of the 1875 Missouri Constitution, as amended, in 1945 and whether those provisions were part of the 1945 Missouri Constitution).

the state eleemosynary and penal institutions, and other state employees as provided by law, shall be selected on the basis of merit . . . ." Mo. Const. art. IV, § 19 (1945).

About a year after voters ratified the Missouri Constitution, the General Assembly passed the State Merit System Act ("1945 Merit Act"). 1945 Mo. Laws 1158, 1182. As permitted by article IV, section 19 of the Missouri Constitution, this legislation "established . . . a system of personnel administration based on merit principles" that "govern[ed] the appointments, promotions, transfers, lay-offs, removal, and discipline of certain employees and other incidents of state employment." *Id*. at 1158. It also created a Personnel Advisory Board (PAB) with enumerated powers, *id*. at 1160, including the power to prescribe rules and regulations consistent with the 1945 Merit Act, *id*. at 1164, and a Personnel Director ("Director") to classify employees and establish pay plans by classification. *Id*. at 1163, 1165. This system has become known as the "Merit System." Originally, the Merit System only applied to employees of the "Department of Public Health and Welfare, the [ ] Department of Corrections, and the Division of Employment Security of the Department of Labor and Industrial [R]elations." *Id*. at 1158.

Over the years, the 1945 Merit Act has been amended a number of times. *See, e.g.,* 1973 Mo. Laws 515; 1979 Mo. Laws 213; 1993 Mo. Laws 468; 1998 Mo. Laws 234; 2010 Mo. Legis. Serv. H.B. 1868 (West). In 1979, the law was renamed "The State Personnel Law." 1979 Mo. Laws 214; § 36.010, RSMo. By 2017, under the State Personnel Law, the Merit System governed the employment of many more State employees than it originally had—that is, the Merit System applied, with a few exceptions, to employees of the Department of Social Services, the Department of Corrections, the Department of

Health and Senior Services, the Department of Natural Resources, the Department of Mental Health, the Office of Administration, the Department of Labor and Industrial Relations, the Division of Tourism, the Division of Workforce Development, the Missouri Housing Development Commission, the Missouri Veterans Commission, and a number of other State employees. *See* § 36.030, RSMo (2014); § 36.030, RSMo (2018).

II. Union CBAs

The Unions AFSCME, CWA, and SEIU have, from time to time, entered into collective bargaining agreements ("CBAs") with the State on behalf of their members.

A. AFSCME CBA

In this case, AFSCME represents two units of Missouri employees in one CBA effective from May 11, 2015 to December 31, 2017 ("AFSCME CBA").[2] Tr. Trans. II at 373:4-10, 374:25-375:2; 379:5-380:6, 381:20-382:10; Jt. Ex. 41 at 49-50 (Art. 37, § 1) (A0743-44). The AFSCME CBA provides that after December 31, 2017, the CBA "shall automatically be renewed from year to year thereafter, unless either party provides written notification of its intent to modify or amend to the other party by July 1 of the calendar year prior to expiration." Jt. Ex. 41 at 49 (Art. 37, § 1) (A0743). "If bargaining is reopened under [Art. 37, § 1], all provisions of the [CBA] shall remain in full force and effect during any such successor negotiations." *Id*. The AFSCME CBA also states that "the provisions of this [CBA] cannot supersede law." *Id*. at 48 (Art. 33) (A0742). In the event that "any

[2]The AFSCME CBA was entered into by AFSCME, the Departments of Agriculture, Health and Senior Services, Mental Health, Natural Resources, Public Safety, Revenue, and Corrections, the Missouri Veterans' Commission, and the Office of Administration.

provisions contained [in the AFSCME CBA] [are] . . . determined to be contrary to state or federal law or regulation, such portions shall not invalidate the remaining portions hereof . . . . Under such circumstances, the Employer and the Union shall seek to develop a mutually satisfactory modification to replace the invalidated provision." *Id.*

Though AFSCME's CBA originally would have expired on December 31, 2017, the State and AFSCME allowed the AFSCME CBA to be automatically renewed for one year—through December 31, 2018. Tr. Trans. II at 382:23-383:1. On June 28, 2018, OA sent a letter to AFSCME notifying AFSCME of the State's intent to modify or amend the CBA, the step it was required to take to avoid another one-year automatic renewal under Article 37, § 1. Jt. Ex. 135 (A0998); Jt. Ex. 41 at 49 (A0743) Tr. Trans. at 433:10-435:12.

B. CWA CBA

CWA represents certain employees of the Missouri Department of Social Services and the Missouri Department of Health and Senior Services in one CBA effective from January 1, 2016 to December 31, 2018 ("CWA CBA"). Tr. Trans. III at 516:3-16; Jt. Ex. 58 at 1, 46 (A0756, A0803), Appendix A1-A2. The CWA CBA states that it "may be extended in increments of up to one year upon the written mutual consent of the parties." Jt. Ex. 58 at 46 (Art. 35.A) (A0803). To extend the CWA CBA, a party must give "written notice of extension or request to meet and confer . . . by certified mail at least thirty (30) days prior to [ ] expiration." *Id.*

The CWA CBA provides that "the provisions of this Agreement cannot supersede law." *Id.* at 45 (Article 33.B.1) (A0802). But "[i]f any portion of this [CWA CBA] is . . . determined to be contrary to state or federal law or regulation, such portions shall not

invalidate the remaining portions" of the CBA. *Id*. The CWA CBA also provides that, "[u]pon request of either party, [the parties] agree to meet regarding provisions invalidated or modified by change in state or federal law or regulation and shall seek to develop a mutually satisfactory modification to replace the invalidated or modified provision." *Id*.

C. SEIU CBAs

SEIU represents two employee units at the Department of Corrections—probation and parole officers ("PPO") and probation and parole assistants ("PPA")—and one unit of patient care professionals who work for the Department of Mental Health, the Department of Veterans Affairs, and the Department of Corrections ("PCP"). Tr. Trans. I at 107:16-108:3.

i. SEIU PPA CBA

SEIU's most recent CBA with the State on behalf of PPA ("PPA CBA") applied from April 15, 2016 to April 14, 2018. Jt. Ex. 73 at 23 (Art. 19) (A0878); Tr. Trans. I at 113:10-20, 115:3-5. The Parties agree that this CBA expired on April 14, 2018. D334, p.3.

It provided that: "[t]he parties recognize that the provisions of this Agreement cannot supersede law." Jt. Ex. 73 at 23 (Art. 18) (A0878). And when a change in state law invalidates a provision of the PPA CBA, "[u]pon request of either party the Employer and the Union agree to meet regarding any provisions invalidated by a change in state . . . law or regulation and shall seek to develop a mutually satisfactory modification to replace the invalidated provision." *Id*. at 23 (Article 19) (A0878).

ii. SEIU PPO CBA

SEIU's most recent CBA with the State on behalf of PPO ("PPO CBA") extended from October 15, 2015 to September 14, 2018. Jt. Ex. 69 at 35 (Art. 24) (A0850); Tr. Trans. I at 114:18-115:2. The Parties agree that this CBA expired on September 14, 2018. D334, p.3. The PPO CBA states that "[t]he parties recognize that the provisions of this Agreement cannot supersede law." Jt. Ex. 69 at 31 (§ 19.1) (A0846). If state laws or regulations invalidate any part of the PPO CBA, "[u]pon the request of either party the Employer and the Union agree to meet regarding any provisions invalidated by change in state . . . law or regulation and shall seek to develop a mutually satisfactory modification to replace the invalidated provision." *Id*. at 32 (§ 19.6) (A0847).

iii. SEIU PCP CBA

SEIU's most recent CBA with the State on behalf of PCP ("PCP CBA") extended from June 15, 2015 to May 31, 2018. Jt. Ex. 75 at 47 (Article 28) (A0931); Tr. Trans. I at 115:20-116:6. The Parties agree that this CBA expired on May 31, 2018. D334, p.3. Like the other two SEIU CBAs, the PCP CBA provides that it "cannot supersede State or Federal law," and if state laws or regulations invalidate a part of the CBA, "[u]pon request of either party the Employer and the Union agree to meet regarding any provisions invalidated by change in state . . . or other applicable law or regulation and shall seek to develop a mutually satisfactory modification to replace the invalidated provision." Jt. Ex. 75 at 40-41 (§§ 22.1, 22.6) (A0924-25).

iv. The collective bargaining process prior to SB 1007's passage in 2018.

Bargaining between the State and the Unions is a collaborative process, in which both sides work to come to an agreement. The Unions typically begin by asking for all the items on their "wish list." Tr. Trans. II at 472:22-25 (AFSCME); *see also* Tr. Trans. I at 165:18-25 (SEIU); Doc. 334 at p.5 (CWA, AFSCME, SEIU). The State then responds, giving its own "wish list." Tr. Trans. II at 472:22-25 (AFSCME); *see also* Tr. Trans. 165:18-25 (SEIU); D334, p.5 (CWA, AFSCME, SEIU). Then the parties begin bargaining over the differences between the two proposals. Tr. Trans II at 472:22-25 (AFSCME); *see also* Tr. Trans. I at 165:18-25 (SEIU); D334, p.5 (CWA, AFSCME, SEIU).

But there were some things that the State could not agree to during bargaining. Namely, the State could not agree to a proposal that conflicted with a state or federal law. For instance, the State Personnel Law established a set of baseline obligations for the State that the State could not bargain away even if the Unions disagreed with those obligations. *See* Jt. Ex. 35, Tab 2 at 42:6-12 (A0548); § 36.010 *et seq.*; Mo. Const. art. IV, § 19.

III. Senate Bill 1007 (2018)

In 2018, the General Assembly passed Senate Bill 1007 ("SB 1007"), which amended the State Personnel Law. 2018 Mo. Legis. Serv. S.B. 1007 (eff. Aug. 28, 2018); Jt. Ex. 1 (A0269). The Governor signed SB 1007 into law on June 1, 2018. It became effective August 28, 2018.[3] Jt. Ex. 2 at 1 (A0316). SB 1007 added a new section to the State Personnel Law—§ 36.025, RSMo—which provides:

[3]Missouri Senate, SB 1007, https://www.senate.mo.gov/18info/bts_web/Bill.aspx?SessionType=R&BillID=75604865 (viewed Nov. 1, 2021) (showing effective date).

> Except as otherwise provided in section 36.030,[4] 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.

Jt. Ex. 1 at 4 (A0272). Once passed, this provision caused many state employees once subject to the Merit System to become at-will employees no longer subject to the Merit System. *Compare* § 36.030, RSMo (2014) *with* § 36.030, RSMo (2018); *see* Tr. Trans. IV at 721:19-24, 722:20-727:17, 728:5-23.

SB 1007 also modified sections 36.150.1, 36.240.1, and 36.320 to reflect the limited application of merit-selection principles to the positions in section 36.030.1 and to simplify the application of merit-system principles to other employees. Jt. Ex. 1 at 17, 22, 26 (A0285, A0290, A0294). Similarly, SB 1007 modified section 36.380 to reflect that dismissal standards (other than at-will dismissal standards) will only apply to merit employees and modified section 36.390 to limit appeal rights to those employees specified in section 36.030.1. Jt. Ex. 1 at 27-28 (A0295-96).

IV. PAB regulations issued after SB 1007's passage

For decades, the PAB has been authorized to "prescribe such rules and regulations *not inconsistent* with the provisions of [Chapter 36] as it deems suitable and necessary to carry out the provisions of this chapter." § 36.070.1, RSMo (emphasis added). The PAB must also "prescribe by rule the procedures for merit selection, uniform classification and

[4]Section 36.030.1(1)-(2) provides that employees in eleemosynary or penal institutions will be selected on the basis of merit. It also provides that some agency personnel will remain merit personnel if federal law or regulations require them to be for the agency to qualify for grant-in-aid programs.

pay, and covered appeals in accordance with the provisions of this chapter." § 36.070.2, RSMo. When SB 1007 passed, the PAB reacted by enacting new regulations, as section 36.070 requires. *See* § 36.070.1-.2; Tr. Trans. IV at 728:24-732:11. On August 17, 2018, the PAB filed emergency amendments to the Code of State Regulations ("CSR") to implement SB 1007's changes. The emergency rules became effective on August 28, 2018. Jt. Ex. 7 at 2735-65 (A0326-56). The PAB indicated that it amended the CSR because "[p]rovisions of the existing rule[s] are inconsistent with the provisions of Chapter 36, RSMo, effective August 28, 2018, and must be amended to avoid confusion or improper application, avoid potential liabilities, and ensure consistent implementation of Senate Bill 1007 (2018)."[5] Among other changes, the emergency rules amended 1 CSR 20-3.070 and 20-4.020. Jt. Ex. 7 at 2759-62, 2764-65 (A0350-53, A0355-56). On August 31, 2018, the PAB filed proposed Final Rules that amended the CSR to implement SB 1007's changes. Jt. Ex. 8 at 2782-2812 (A0373-0403). The proposed Final Rules similarly included amendments to 1 CSR 20-3.070 and 20-4.020. Jt. Ex. 8 at 2806-09, 2811-13 (A0397-0400, A0402-04). The proposed Final Rules were adopted and became effective on February 28, 2018. Jt. Ex. 10 (A0407).

A. Changes to 1 CSR 20-3.070(1)–(5)

Prior to the passage of SB 1007, 1 CSR 20-3.070(1)–(5) contained many provisions regulating how employees could be laid off (3.070(1)); what constituted "cause" for suspension, demotion, or dismissal of merit-system employees (3.070(2)); the conditions

[5]Jt. Ex. 7 at 2735-36, 2740-44, 2747, 2750, 2753, 2755, 2757, 2759, 2763-64 (A0326-27, A0331-35, A0338, A0341, A0344, A0346, A0348, A0350, A0354-55).

of suspension (3.070(3)); the conditions of demotion (3.070(4)); and the conditions of dismissals (3.070(5)). Jt. Ex. 8 at 2806-09 (A0397-0400) (showing changes between the Rules before and after SB 1007).

After SB 1007 passed, a number of changes were made to 1 CSR 20-3.070(1)–(5) due to the new State Personnel Law provision in section 36.025, RSMo. Jt. Ex. 8 at 2810 (A0401) (adding as new "AUTHORITY" § 36.025, RSMo.). As relevant here, the amendments to section (1) removed a very detailed prescription for how layoffs must occur and replaced it with a provision stating that layoffs "shall be administered by each respective appointing authority based on the needs of the service." *Id*. at 2806–07 (A0397-98). The amendments to sections (2)–(5) clarified that the regulations contained in those sections relating to suspension for cause and conditions of suspension, demotion, and dismissal only apply to merit employees. *Id*. at 2807–09 (A0398-0400). For instance, section (2) clarified that the "causes for suspension, demotion [and] dismissal" apply only to "regular employee[s]" (*i.e.*, merit employees).[6] *Id*. at 2807 (A0398). Section (3) clarified that "[e]mployees not covered under section 36.030.1(2)" (*i.e.*, non-merit employees) "do not have the right to notice, opportunity to be heard, or appeal from a suspension." Jt. Ex. 8 at 2808 (A0399); 1 CSR 20-3.070(3)(B) (2019). Similarly, amendments to sections (4) and (5) stated that "[e]mployees not covered under section

[6]A "regular" employee is defined in § 36.020(16) as "a person employed in a position described under subdivision (2) of subsection 1 of section 36.030 who has successfully completed a probationary period as provided in section 36.250." Thus, a regular employee is a merit employee.

36.030.1(2), RSMo do not have the right to notice, opportunity to be heard, or appeal from a" demotion or dismissal "and may be" demoted or dismissed "for no reason or any reason not prohibited by law." Jt. Ex. 8 at 2808–09 (A0399-0400); 1 CSR 20-3.070(4)(A), (5)(B) (2019).

B. Changes to 1 CSR 20-4.020

Prior to the passage of SB 1007, 1 CSR 20-4.020(1)-(3) regulated grievance procedures. Jt. Ex. 8 at 2811-12 (A0402-03). After SB 1007 passed, the PAB added a "new section (1)" to 1 CSR 20-4.020 "and amend[ed] existing sections (1)–(3)." Jt. Ex. 8 at 2811-12 (A0402-03). The PAB made these changes pursuant to section 36.025, RSMo. Jt. Ex. 8 at 2812 (A0403) (adding as new "AUTHORITY" § 36.025, RSMo).

The new section (1) prohibits state agencies from "establish[ing] a grievance procedure" for any non-merit employee "to grieve" discipline, suspension, demotion, "notice of unacceptable conduct or conditional employment," leave denial, transfer, shift change, reprimand, furlough, or "any employment action that could be alleged to have an adverse financial impact" on the employee. Jt. Ex. 8 at 2812 (A0403); 1 CSR 20-4.020(1)(A). It also prohibits state agencies from entering into an agreement with a union providing for a grievance procedure prohibited by section (1)(A).[7] Jt. Ex. 8 at 2812 (A0403); 1 CSR 20-4.020(1)(B). The new section (2) clarifies that the grievance procedure

[7]However, sections (1)(A) and (1)(B) do not prohibit "grievance procedures" for allegations that an adverse employment action "was taken for a reason prohibited by law." 1 CSR 20-4.020(1)(C) (2019).

regulations in new sections (2)–(4) (formerly sections (1)–(3)) now only apply to merit employees. Jt. Ex. 8 at 2812 (A0403).

V. Interactions between the State and the Unions after passage of SB 1007 and before the Unions' Lawsuit

About a month after SB 1007 was signed into law, Sarah Steelman, the Commissioner of the Missouri Office of Administration ("OA") sent an email to state employees stating that, because of changes made in SB 1007, beginning on August 28, 2018, "the majority of the 16 departments' employees will be 'at will' employees." Jt. Ex. 3 (A0320); Tr. Trans. I at 174-77. In the same email, she stated that the Merit System would still apply to two types of employees but did not say that the Merit System still applied to all employees covered by an existing CBA. Jt. Ex. 3 (A0320).

About two months later, on the same date that the PAB filed the emergency rules—August 17, 2018—AFSCME sent correspondence to Steelman at OA, asking her to "correct [her] statements suggesting AFSCME-represented state employees are employed 'at will' as a result of SB 1007" and to "acknowledge [Missouri's] continuing contractual 'for cause' and due process obligations" to AFSCME-represented employees. Jt. Ex. 20 at 2 (A0472); Tr. Trans. II at 394-95. Within a month after AFSCME sent its letter, Danny Homan and Don Zavodny of AFSCME met with Guy Krause (an OA employee and the State's chief negotiator with the Unions) and several other OA employees. D240, p.6, ¶ 22 (stating meeting occurred on September 7, 2018); Tr. Trans. 435:8-12, 436:25-437:11 (stating meeting occurred after August 28, 2018).

Around SB 1007's effective date—August 28, 2018—several state agencies issued policies stating that their employees were "at will." For example, the Department of Mental Health ("DMH") issued a policy stating that all DMH employees are at-will. Jt. Ex. 13 at DMH 099 (A0426), 103; Tr. Trans. I at 178, 181-82. Around the same time, DMH removed policy language that permitted merit employees to appeal adverse employment decisions to the PAB. Jt. Ex. 13 at DMH 105 (A0431). Similarly, on August 28, 2018, OA issued a policy stating that all OA employees were at-will. Jt. Ex. 15 at 0120 (A0454); D173; Tr. Trans. III at 416-18.

A. Interactions between the State and AFSCME after SB 1007 and before the Unions' Lawsuit

AFSCME filed grievances over the new DMH policies, Jt. Exs. 128, 130 (A0992, A0995); D334 at p. 9, ¶ 33; Tr. Trans. III at 412-14. DMH stated in response that the changes were "necessary updates" resulting from SB 1007. D334 at p.9, ¶ 33; Jt. Exs. 129, 131 (A0994, A0997); Tr. Trans. III at 413-15. Also around this time, state departments began rejecting grievances filed by the Unions, in accordance with the departments' views that SB 1007 required all employees to be employed at-will outside of the statutory exceptions described in section 36.025, RSMo. D334, p.9, ¶ 35; Jt. Exs. 104, 106-11 (A0938, A0953, A0964, A0972, A0980, A0985); Tr. Trans. III at 419-27.

B. Interactions between the State and CWA after passage of SB 1007 and before the Unions' lawsuit

On July 19, 2018, Natashia Pickens, the President of CWA, sent an email to Krause at OA requesting to discuss the effects of SB 1007 and House Bill 1413 (another recently

passed bill) on the CWA CBA, which was set to expire at the end of 2018. D240, p.10, ¶ 39. Krause emailed Pickens on September 4, 2018, asking for dates and times that might work. *Id*., p.10, ¶ 40; D247, p.1. Hearing nothing back, Krause sent Pickens emails on September 12 and 20 and October 2, 2018, asking for possible dates for a meeting. D240, p.10-11, ¶¶ 40-43. Pickens responded on October 4, 2018, and proposed a meeting on October 12, 2018, which Krause accepted. *Id*., p.11, ¶ 43.

C. Interactions between the State and SEIU after passage of SB 1007 and before the Unions' lawsuit

SEIU wrote to DMH after SEIU received DMH's August 28, 2018 policy changes, stating that DMH was required to bargain over the changes. D334, p.9, ¶ 34; Pl. Ex. 262. At that time, SEIU's CBA with DMH had expired,[8] and the State and SEIU had started the process of bargaining a successor labor agreement. D334, p.9, ¶ 34; Tr. Trans. at 182:13-184:14. At a meeting with the SEIU on September 24, 2018, Krause told Nancy Cross of SEIU that union employees were "at will" due to SB 1007 and that the new collective bargaining agreement had to be in "congruenc[e]" with SB 1007. D334, p.11, ¶ 41. He also indicated that the grievance process "did not exist" and told Cross that, because the SEIU CBAs had ended, the SEIU would have to bargain for a new agreement. *Id*. Cross disagreed, telling Krause that the State had to bargain for any changes. *Id*.

[8]Jt. Ex. 75 at 1 (A0883) (showing CBA expired May 31, 2018).

VI. Procedural History: AFSCME, CWA, and SEIU file suit against the State

A. Complaint

On October 5, 2018, AFSCME, CWA, and SEIU filed suit against the State. D168, p.1, ¶ 1. On October 17, 2018, the Unions filed a first amended petition, which is the operative pleading in this case. D169. In the first amended petition, the Unions alleged: (1) that SB 1007 and/or its implementation by the State violated article I, section 29 of the Missouri Constitution; (2) that SB 1007 and/or its implementation by the State violated article I, section 13 of the Missouri Constitution; and (3) that, under § 536.050, RSMo., the Unions were entitled to a declaratory judgment stating that the Emergency Rules and the proposed amendments to the PAB's rules were unauthorized by law or unconstitutional under article I, sections 13 and/or 29. D169, pp.26-31. The Unions requested injunctive and declaratory relief.

B. Preliminary Injunction

On November 26, 2018, the Unions moved for a preliminary injunction enjoining the State from implementing and applying SB 1007 to State employees represented by the Unions. D235, pp.1, 6. The Unions argued that the State's interpretation and application of SB 1007 violated article I, sections 29 and 13 and that the Unions were likely to succeed on the merits of those arguments. D235, pp.3-4, ¶¶ 6, 8. Specifically, the Unions challenged the State's alleged positions that SB 1007 "allow[ed] [the State] to abrogate terms of existing [CBAs] with [the Unions] relating to discipline and grievances, to make unilateral changes to terms of employment relating to discipline and seniority without good

faith bargaining in advance, to reject grievances, and to refuse to bargain over standards of discipline, seniority issues, and grievance procedures." *Id.*, p.2, ¶ 5.

The circuit court issued a preliminary injunction with multiple requirements. Because the circuit court found that the Unions were likely to succeed with respect to their article I, section 29 claims, the preliminary injunction required the State to bargain in good faith with the Unions over the terms of successor CBAs without any constraint from SB 1007, the PAB's Rules, or State policies effectuating SB 1007. D270, pp.3-6. Specifically, the Court held that refusal to negotiate about certain issues, "such as just cause, seniority, and grievances not involving adverse employment actions taken for a reason prohibited by law" was likely to violate article I, section 29. *Id.*, p.5. And because the circuit court found that the Unions were likely to succeed with respect to their article I, section 13 claims, *id.*, p.2, it held that the State must continue to process grievances that were filed during the terms of the CBAs without any constraint from SB 1007, the PAB's Emergency or Proposed Rules, or State policies effectuating SB 1007. *Id.*, p.6.

With respect to the CWA and SEIU CBAs, the circuit court did not prevent the State from refusing to process grievances filed after those CBAs' end-dates because those CBAs had expired. *Id.*, p.2, 6-7. But the preliminary injunction subjected the AFSCME CBA to different rules. *Id.* The circuit court found that the AFSCME CBA was still in effect even after its expiration date on December 31, 2018, under its "evergreen clause," because Krause's June 28, 2018 Letter gave AFSCME notice of the State's "intent to modify or amend the Labor Agreement." The circuit court found that this notice triggered the AFSCME CBA's "evergreen" provision, which provided that "[i]f bargaining is reopened

under this paragraph, all provisions of this Labor Contract shall remain in full force and effect during any such successor negotiations." *Id*., p.2 (quoting article 37, section 1 of the AFSCME CBA). Because the AFSCME CBA's terms were still in effect, the circuit court held that the State had an ongoing duty to process AFSCME grievances filed after December 31, 2018—the date which otherwise would have been the AFSCME CBA's expiration date. *Id*., pp.2, 6. For the same reason, the circuit court barred the State from interpreting and applying SB 1007, the PAB's Emergency Rules, the PAB's Proposed Rules, and any policies seeking to effectuate SB 1007 and the PAB's Rules in a manner that impaired the rights of the parties created by the AFSCME CBA. *Id*., p.6.

VII. Interactions between the State and the Unions during litigation, prior to trial

A. Interaction between the State and AFSCME during litigation, prior to trial

On October 19, 2018 (after the Unions sued the State), AFSCME responded to OA's September 27, 2018 letter describing OA's policy changes. In its response, AFSCME requested clarification about whether OA believed its policy changes affected AFSCME's CBA terms and also proposed a meeting. Jt. Ex. 18 (A0467); Tr. Trans. III at 418-19.

On November 15, 2018, Krause met with Homan and Zavodny of AFSCME. D240, p.8, ¶ 31. At that meeting, AFSCME provided a draft ground-rules proposal[9] for bargaining a new CBA. *Id*. On November 29, 2018, OA responded to AFSCME's October 19, 2018 letter, reiterating that its amendment and rescission of policies did not affect the terms and conditions of employment except as required by SB 1007. Jt. Ex. 19 (A0469)

[9]"Ground rules" are the rules the parties agree to use during the bargaining process, and over which the parties negotiate. Tr. Trans. I at 158:12-18.

(referencing Jt. Ex. 17 (A0463)); Tr. Trans. III at 464. In this response, OA also clarified that it disagreed that employees covered by the AFSCME CBA "retain[ed] their rights, including maintenance of the status quo through the life of the current [AFSCME CBA] until its terms are renegotiated." Jt. Ex. 19 (A0469) (referencing OA's disagreement with "the third and fourth sentences of the second paragraph of [AFSCME's] October 22, 2018 letter" (Jt. Ex. 18 (A0467))). Rather, OA indicated that the AFSCME CBA's Article 33 required "that 'the provisions of [the AFSCME CBA] cannot supersede law.'" Jt. Ex. 19 (A0469). OA reiterated that it "remain[ed] available to meet and confer over policy changes that affect[ed] the terms and conditions of employment." *Id*. As of January 7, 2019, OA had not received a response to its November 29, 2018 letter. D240, p.8, ¶ 29.

After the circuit court issued the preliminary injunction ordering the State to abide by the terms of the AFSCME CBA, the State complied with the Court's order. D334, p.38, ¶ 70.

B. Interaction between the State and CWA during litigation, prior to trial

After Krause learned that the Unions, including CWA, had filed a lawsuit on October 5, 2018, he met with Pickens from CWA on October 12, 2018. D240, p.11, ¶ 44. At that meeting, Krause discussed the impact of House Bill 1413 on possible future bargaining and the impact of the SB 1007 lawsuit on the CWA CBA, but based on the advice of his attorneys, he did not discuss SB 1007. *Id*. On December 5, 2018, Krause received a letter dated November 30, 2018, from Pickens, which "request[ed] to postpone a meet and confer and meeting for negotiating a successor contract until after the lawsuit . . . has been settled in the courts." *Id*., p.12, ¶ 45; D251, p.1. On December 8, 2018,

Krause responded with a letter stating that he accepted the CWA's offer to postpone meeting to negotiate a successor contract until after the lawsuit. In the same letter, Krause stated that the CWA CBA would expire on December 31, 2018 "because the Agreement has not been extended by mutual consent of the parties and no 'request to meet and confer' was sent by certified mail by either party 'at least thirty (30) days prior to the expiration' of the Agreement." D240, p.12, ¶ 46; D252, p.1. Pickens never responded to this letter. Tr. Trans. III at 581:18-582:4. As of January 7, 2019, the State and CWA had not begun collective bargaining on a new CWA CBA. *Id.*, p.12, ¶ 47.

VIII. Procedural History: Trial and Judgment

On January 31, 2020, the State filed its pretrial brief. D305. On February 10, 11, 13, and 14, 2020, the case was tried at a four-day bench trial. Tr. Trans. I at 3-4. On May 4, 2020, the State filed a post-trial brief and proposed findings of fact and conclusions of law. D308, D309. On May 10, 2021, the circuit court issued its findings of fact and conclusions of law, ruling in favor of the Unions on Counts I and III and dismissing Count II as moot. D310, pp.42-43. The State moved to amend the judgment and to stay a portion of the judgment pending appeal, which the circuit court denied. D323; D333. The circuit court reissued its findings of fact and conclusions of law on September 3, 2021, and denominated the same as a judgment. D334. In the judgment, the circuit court made the following factual findings and conclusions of law:

CBA Contracts

1. After SB 1007 went into effect, certain state agencies, such as the Department of Social Services, the Department of Mental Health, and the Department of

Corrections either did not process pending grievances or processed them in a different manner than normal. D334, pp.9-10, ¶¶ 35-38.

2. After SB 1007 went into effect, OA took the position that it was unable to bargain with the Unions for provisions that conflicted with SB 1007. *Id*., pp.10-12, ¶¶ 40-44.

3. Both the CWA CBA and the AFSCME CBAs contained evergreen clauses that were properly invoked, meaning that both CBAs remained in effect after their expiration dates of December 31, 2018. *Id*., pp. 2, 13, ¶¶ 10, 53 (CWA), pp.20-21, ¶¶ 16-17 (CWA), pp. 2, 12-13, ¶¶ 7-8, 48, 51 (AFSCME), p.20, ¶ 15 (AFSCME).

4. Natashia Pickens invoked the CWA CBA's evergreen clause on November 30, 2018, when she sent a letter to OA asking to postpone collective bargaining between CWA and the State while the lawsuits were pending. *Id*., pp.20-21, ¶ 17.

5. The State invoked the AFSCME CBA's evergreen clause on June 18, 2018, when it sent a letter notifying AFSCME of its intent to modify or amend the AFSCME CBA. *Id*., p.2, ¶¶ 7-8, p.20, ¶ 15.

6. The SEIU CBAs did not contain evergreen clauses, meaning that they did not remain in effect after their expiration dates in April, May, and September 2018. *Id.*, p.3, ¶ 13.

Effect of SB 1007

7. SB 1007's removal of merit protections does not affect collective bargaining. *Id.*, pp.17-19, 31, ¶¶ 5, 12, 53. Specifically, § 36.025, RSMo, should not be read to prohibit collective bargaining for "for cause" job protections, seniority requirements, or grievance arbitration because it is a default, or a floor, not a ceiling. *Id.*, pp.17-18, ¶ 5.

Count I – article I, section 29

8. Certain of the State's actions that reflected the State's belief that SB 1007 prohibited "for cause" job protections, seniority requirements, and grievance arbitration violated article I, section 29 of the Missouri Constitution. That is:

    a. The State unilaterally rescinded portions of the AFSCME and CWA labor agreements while they were in force, which violated article I, section 29. *Id.*, pp.24-25, ¶¶ 28, 30, p. 42(1).

    b. The State refused to bargain with the Unions over "for cause" job protections, seniority requirements, and grievance arbitration that the State believed to be prohibited by SB 1007, which violated article I,

section 29's requirement that parties bargain in good faith. *Id*., pp.30-31, ¶¶ 48-52.

c. After the SEIU CBAs expired, the State made unilateral changes to the status quo before bargaining with SEIU, which violated article I, section 29's requirement that the State bargain in good faith. *Id*., p.41, ¶ 84.

9. In the alternative, even if SB 1007 did affect what the State could agree to in collective bargaining (as the State believed it did), SB 1007 would violate article I, section 29 because it would prohibit the State from bargaining over core subjects of bargaining without satisfying strict scrutiny. *Id*., pp.32-34, 36, ¶¶ 56, 59, 64.

Count II – Article I, section 13

10. The circuit court determined that it did not need to address the Union's article I, section 13 contract-impairment claim because it already determined that SB 1007 did not affect already-agreed-to terms in the CBAs. *Id*., p.36, ¶ 65.

11. In the alternative, if SB 1007 did affect already-agreed-to terms in the CBAs (as the State believed), SB 1007 would violate article I, section 13 because the changes made by SB 1007 substantially impaired the CBAs and because the State presented no evidence that this was justified as reasonable and necessary to serve an important public purpose. *Id*., pp.37-38, ¶¶ 69, 72-73.

Count III – Unauthorized or Unconstitutional Rules

12. The Regulations promulgated pursuant to SB 1007 are unlawful because they improperly expand upon SB 1007. That is, SB 1007 does not prohibit "for cause" job protections, seniority requirements, or grievance arbitration, but the Regulations prohibit the State from bargaining over these topics. *Id*., p.38-39, ¶¶ 74-76.

13. In the alternative, even if SB 1007 did prohibit the State from agreeing to collective bargaining terms that provided for "for cause" job protections, seniority requirements, and grievance arbitration, the Regulations still would be unlawful because they would violate article I, sections 13 and 29. *Id*., p.39, ¶ 77.

After making these findings of fact and conclusions of law, the circuit court issued a permanent injunction, ordering the State to:

a. bargain in good faith with the Unions over the terms of successor CBAs without constraint from SB 1007, the PAB's Rules, or the State's policies effectuating SB 1007;

b. bargain with the Unions without modifying unilaterally the status quo that existed under the CBAs when they were in effect, until the parties agree on the terms of a successor agreement or reach impasse;

c. under the AFSCME and CWA CBAs, continue to process grievances that were filed during the terms of those agreements and as long as those agreements continue in effect pursuant to the terms of their evergreen clauses.

Id., p. 42. The State timely appealed on September 10, 2021. D335.

POINTS RELIED ON

I. The circuit court erred in holding that SB 1007 does not prohibit the State from agreeing to certain for-cause, grievance, and seniority protections with the Unions, because the circuit court erroneously interpreted SB 1007, in that (a) the term "shall" in section 36.025 indicates a mandate because of its specific legal definition; (b) the term "shall" cannot designate a legal floor here because at-will employment is already the least protection available; (c) reading "shall" in any way other than as a mandate would make it superfluous; and (d) reading "shall" as a mandate does not conflict with HB 1413.

- *Gross v. Parson*, 624 S.W.3d 877 (Mo. banc 2021)
- *Margiotta v. Christian Hosp. Ne. Nw.*, 315 S.W.3d 342, 345-46 (Mo. banc 2010)
- *Kidde Am., Inc. v. Dir. of Rev.*, 242 S.W.3d 709 (Mo. banc 2008)
- *State ex rel. Goldsworthy v Kanatzar*, 543 S.W.3d 582 (Mo. banc 2018)

- § 1.090, RSMo
- § 36.025, RSMo
- 2018 Mo. Legis. Serv. S.B. 1007 (eff. Aug. 28, 2018)
- Black's Law Dictionary 1407 (8th ed. 2004)

II. The circuit court erred by issuing a declaratory judgment with respect to Count I, because neither SB 1007 nor its implementation violated article I, section 29, in that (a) the Missouri Constitution's text and history indicate that SB 1007 is not subject to any scrutiny because it does not burden rights protected by article I, section 29; (b) even if SB 1007 burdens article I, section 29 rights, it is subject to rational-basis scrutiny because article I, section 29 is not a fundamental right and SB 1007 does not substantially burden that right; (c) SB 1007 passes rational basis scrutiny because the at-will employment mandate is rationally related to a legitimate state interest, specifically the State's interests of government effectiveness and efficiency and public confidence in the unelected portion of the executive branch of government; and (d) even if SB 1007 is subject to strict scrutiny, it passes because the at-will employment mandate is narrowly tailored to advance the State's compelling interests of government effectiveness and efficiency and public confidence in the unelected portion of the executive branch of government.

- *Am. Fed. of Teachers v. Ledbetter*, 387 S.W.3d 360 (Mo. banc 2012)
- *Quinn v. Buchanan*, 298 S.W.2d 413 (Mo. banc 1957)
- *Indep.-Nat'l Edu. Ass'n v. Indep. Sch. Dist.*, 223 S.W.3d 131 (Mo. banc 2007)
- *NLRB v. Katz*, 369 U.S. 736 (1962)

- Mo. Const. art. I, § 29
- Mo. Const. art. IV, § 19
- § 34.040, RSMo
- § 36.025, RSMo
- § 105.262, RSMo
- § 610.021, RSMo
- 2018 Mo. Legis. Serv. S.B. 1007 (eff. Aug. 28, 2018)
- WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY 219 (1952)
- WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 176 (2002)
- 1945 Merit Act, 1945 Mo. Laws 1158-82
- Public Sector Labor Law, § 105.500 *et seq*. (1967)
- 29 U.S.C. § 152(2)
- 29 U.S.C. § 158(a)(5), (d)
- 29 U.S.C. § 159(a)

III. The circuit court erred in determining, with respect to Count II, that if SB 1007 affected the CBAs' terms, then it would violate article I, section 13 of the Missouri Constitution, because such a claim does not satisfy the elements of an article I, section 13 violation, in that (a) CWA and the State have no contractual relationship because the CWA CBA expired; (b) the AFSCME and CWA CBAs have not been impaired or substantially impaired because the CBAs expressly recognize that their provisions may be changed by state law and even provide for a remedy when this occurs; and (c) SB 1007 was imposed for a significant and legitimate public purpose—government effectiveness and efficiency and public confidence in the unelected portion of the executive branch of government.

- *General Motors Corp. v. Romein*, 503 U.S. 181 (1992)
- *State ex rel. Kansas City v. Pub. Serv. Comm'n*, 524 S.W.2d 855 (Mo. banc 1975)
- *Univ. of Hawaii Pro. Assembly v. Cayetano*, 125 F. Supp. 2d 1237 (D. Haw. 2000)
- *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983)

- Mo. Const. art. I, § 13
- U.S. Const. art. I, § 10, cl.1

IV. The circuit court erred in issuing a declaratory judgment on Count III, because the Unions have not shown that sections 536.014 and 536.050, RSMo's requirements have been met, in that (a) the PAB's rules are authorized because they are not inconsistent with chapter 36, RSMo, including § 36.025's at-will mandate, since they remove limitations on employer decisionmaking and prohibit grievance procedures inconsistent with at-will employment; (b) the PAB's rules are not contrary to law because they do not violate article I, sections 29 or 13 for the reasons set forth in Points II and III; and (c) the PAB's Rules are not contrary to law because the Contracts Clause does not apply to administrative rules.

- *Massage Therapy Training Inst., LLC v. Mo. State Bd. of Therapeutic Massage*, 65 S.W.3d 601 (Mo. App. S.D. 2002)
- *Foremost-McKesson, Inc. v. Davis*, 488 S.W.2d 193 (Mo. banc 1972)

- 1 CRS 20-3.070(1)-(5)
- 1 CRS 20-4.020(1)-(2)
- § 536.014, RSMo
- § 536.050, RSMo
- § 36.025, RSMo
- § 36.070, RSMo

V. The circuit court erred when it issued a declaratory judgment on Count I, because even if the circuit court correctly interpreted SB 1007, the State's actions did not violate article I, section 29, in that (a) the Unions' claim that the State failed to process grievances is a contract claim, not a constitutional claim; (b) the State did not bargain in bad faith simply because it acted on the basis of a good-faith opinion about SB 1007's meaning; and (c) the State did not bargain in bad faith simply because it decided to no longer abide by the terms of expired CBAs.

- *Indep.-Nat'l Edu. Ass'n v. Indep. Sch. Dist.*, 223 S.W.3d 131 (Mo. banc 2007)
- *Am. Fed. of Teachers v. Ledbetter*, 387 S.W.3d 360, 363 (Mo. banc 2012)
- *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992)
- *NLRB v. Katz*, 369 U.S. 736 (1962)

- 2018 Mo. Legis. Serv. S.B. 1007 (eff. Aug. 28, 2018)
- 29 U.S.C. § 152(2)
- Mo. Const. art. I, § 29

VI. The circuit court erred in issuing a permanent injunction, because the Unions failed to establish the requisite elements for a permanent injunction, in that (a) they succeed on none of their counts; and (b) there is no legal basis for the three types of equitable relief in the injunction.

- *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976)
- *Systematic Bus. Servs., Inc. v. Bratten*, 162 S.W.3d 41 (Mo. App. W.D. 2005)
- *Rebman v. Parson*, 576 S.W.3d 605 (Mo. banc 2019)
- *Minana v. Monroe*, 467 S.W.3d 901 (Mo. App. E.D. 2015)

- § 36.025, RSMo

ARGUMENT

The best way to address this complex case is to use a decision tree. First, this Court should address the meaning of SB 1007, specifically § 36.025, RSMo. Second, this Court should determine whether the Unions or the State should prevail on Counts I, II, and III of the amended petition. Third, this Court should determine whether the circuit court erred by issuing a permanent injunction against the State, including whether the contents of that permanent injunction have a basis in law and fact.

In Points I-IV below, the State describes how the circuit court erred at the first step of the decision tree—statutory construction—and how that erroneous determination affects the subsequent levels of the decision tree. Specifically, the Court erred when it determined that SB 1007 does not affect what the State may agree to during collective bargaining or the terms of the existing CBAs. Then, the circuit court erred in determining that the State violated article I, section 29 and article I, section 13 and likewise erred when it determined that the PAB's Rules were invalid for lack of statutory authority. In Part VI, the State requests that this Court reverse the circuit court's declaratory judgments on Counts I, II, and III of the amended petition and vacate the circuit court's permanent injunction, because each of the Unions' three counts fail and, independently, because every requirement in the permanent injunction has no basis in law and/or fact.

In Part V below, the State argues, in the alternative, that even if the circuit court did not err in its interpretation of SB 1007, it still erred when it determined that the State violated article I, section 29. Further, if the circuit court did not err in its interpretation of SB 1007, then it correctly determined that SB 1007 did not violate article I, section 13.

Finally, this Court should vacate portions of the permanent injunction that have no basis in law and/or fact. *See* Part VI.B.

I. The circuit court erred in holding that SB 1007 does not prohibit the State from agreeing to certain for-cause, grievance, and seniority protections with the Unions, because the circuit court erroneously interpreted SB 1007, in that (a) the term "shall" in section 36.025 indicates a mandate because of its specific legal definition; (b) the term "shall" cannot designate a legal floor here because at-will employment is already the least protection available; (c) reading "shall" in any way other than as a mandate would make it superfluous; and (d) reading "shall" as a mandate does not conflict with HB 1413.

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

Preservation: The State preserved this argument. D308, p.29-34; D309, pp.4, 10, 12-14.

The circuit court held that SB 1007 did not affect collective bargaining because it created a floor, not a ceiling. D334, pp.17-19, 31. This holding is wrong. By its plain terms, SB 1007 *does* restrict the State's ability to agree to certain terms when it engages in collective bargaining with the Unions.

A. The circuit court erred by determining that SB 1007 does not limit the State's ability to agree to certain grievance, for-cause, and seniority protections.

For the purposes of this case, the most important provision in SB 1007 is § 36.025, RSMo. It states:

> Except as otherwise provided in section 36.030, 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. This section's plain language states that all state employees, other than the few identified in § 36.030, RSMo, "shall be employed at-will." The circuit court interpreted this language as implementing a floor, not a ceiling, meaning that the *least* protection a state employee may receive is at-will employment. But the circuit court's interpretation is incorrect for two reasons. SB 1007 clearly mandates at-will selection and removal of employees. The circuit court's incorrect contrary reading stems from an incorrect definition of the word "shall." And even if "shall" can rarely be read more broadly than its plain meaning suggests, as in the case cited by the circuit court, *Cooperative Home Care, Inc. v. City of St. Louis*, this reading makes no sense here. 514 S.W.3d 571, 583 (Mo. banc 2017).

"The primary goal of statutory interpretation is to give effect to legislative intent, which is most clearly evinced by the text of the statute." *Id*. "Words and phrases shall be taken in their ordinary and plain sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their practical import." § 1.090, RSMo; *see also Gross*, 624 S.W.3d at 884. "Accordingly, a word not defined in a statute is given its ordinary meaning pursuant to the dictionary." *Gross*, 624 S.W.3d at 884; *see also S.M.H. v. Schmitt*, 618 S.W.3d 531, 534 (Mo. banc 2021). Statutory interpretations that render portions of a statute superfluous are disfavored. *See State ex rel. Goldsworthy v Kanatzar*, 543 S.W.3d 582, 586 (Mo. banc 2018).

The dictionary definition of "shall" is "[h]as a duty to; more broadly, is required to." *Shall*, Black's Law Dictionary 1407 (8th ed. 2004) (A0228). "This is the mandatory sense

that drafters typically intend and that courts typically uphold." *Id*. Though "shall" sometimes is used in other ways, "[o]nly [the mandatory sense] is acceptable under strict standards of drafting." *Id*. Because "shall" has a "peculiar and appropriate meaning in law," this Court should interpret the statute in accordance with that meaning. Thus, the proper reading of the statute is "[e]xcept as otherwise provided in section 36.030, all employees of the state [*are required to*] be employed at-will."

The circuit court did not use this legal definition of "shall." Instead, it determined that "shall" in § 36.025 means "shall at least," relying on this Court's decision in *Cooperative Home Care*, 514 S.W.3d at 583. D334, p.18. But while such a definition made sense in *Cooperative Home Care*, it does not make sense here. In *Cooperative Home Care*, this Court considered whether to invalidate a municipal ordinance on the grounds that it established a local minimum wage that was higher than the State minimum wage. 514 S.W.3d at 575. In *Cooperative Home Care*, one party argued that the text of the State minimum-wage statute prohibited local minimum wages higher than the State minimum wage because of the State statute's use of the term "shall." *Id*. at 583-84. The State minimum-wage statute provided that

> every employer *shall* pay to each employee wages at the rate of $6.50 per hour, or wages at the same rate or rates set under the provisions of federal law as the prevailing federal minimum wage applicable to those covered jobs in interstate commerce, whichever rate per hour is higher.

Id. at 583 (quoting part of § 290.502.1, RSMo (2007)). This Court determined that the term "shall" in § 290.502 must be interpreted to "set[ ] a floor for minimum wages" because the purpose of the statute was to "ameliorate the unequal bargaining power

between employer and employee and to protect the rights of those who toil," and "nothing in the law suggest[ed] the state also wanted to protect employers by setting a maximum minimum wage." *Cooperative Home Care*, 514 S.W.3d at 583-84.

This case is not like *Cooperative Home Care* because, unlike a $6.50 minimum wage, at-will employment cannot serve as a legal floor. A wage of $6.50 can serve as a legal floor because an employer could pay an employee less than $6.50 without the minimum-wage law, but an employer could not give an employee fewer protections than at-will employment without section 36.025. At-will employment is the least employment protection available under Missouri law. *See Margiotta v. Christian Hosp. Ne. Nw.*, 315 S.W.3d 342, 345-46 (Mo. banc 2010) (describing Missouri's "at-will employment doctrine" and its nuances). For this reason, reading section 36.025 as simply establishing a default also would make the entire provision superfluous, which this Court should avoid when there is a non-superfluous way to interpret it. *Kanatzar*, 543 S.W.3d at 586.

This Court should hold that § 36.025 prohibits for-cause protections because these are inconsistent with § 36.025's provision that "all employees of the state **shall** be employed at will." Grievance procedures are incompatible with mandatory at-will employment because when employees "may be discharged for no reason or any reason not prohibited by law," there is no basis on which a tribunal could review an employee's grievance.[10] And seniority protections are inconsistent with § 36.025's provision that "all

[10]Neither SB 1007 nor the PAB's Rules implementing it prohibit grievance procedures for employees who allege they suffered an adverse employment decision on the basis of a reason prohibited by law. § 36.025, RSMo; 1 CSR 20-4.020(1)(C). In fact, 1 CSR 20-4.020(1)(C) expressly states that the limitations on grievance procedures do not

employees of the state . . . shall serve at the pleasure of their respective appointing authorities, and may be discharged for no reason or any reason not prohibited by law." For instance, if an employer is required to lay off less senior employees before it lays off more senior employees, that is inconsistent with § 36.025's provision that employees "shall" serve at their "respective appointing authorit[y's]" pleasure, as the appointing authority may be unable to discharge the employee it wanted to and could be forced to discharge an employee it did not want to because of the seniority protections. Thus, because the plain language of § 36.025 unambiguously requires at-will employment in selection and removal, this Court should enforce its plain language.

B. The provisions of HB 1413 do not require a different interpretation of "shall" in § 36.025.

The circuit court determined that "shall" means "shall at least" for one additional reason—the text of House Bill 1413 (2018) (HB 1413). D334, p.18, ¶¶ 6-9. The circuit court stated that HB 1413 was passed on the same day as SB 1007. D334, p.18, ¶ 6. Among other things, HB 1413 added a new section, § 105.585, RSMo, to the Public Sector Labor Law, § 105.500 *et seq.*, RSMo. Section 105.585 provided that "[e]very labor agreement shall include a provision reserving to the public body the right to hire, promote, assign, direct, transfer, schedule, discipline, and discharge state employees." HB 1413 also included a provision that clarified who would be affected by the Public Sector Labor Law. § 105.503, RSMo. It provided that "sections 105.500 to 105.598 shall apply to all

apply to claims that an adverse employment action was taken for a reason prohibited by law.

employees of a public body, all labor organizations, and all labor agreements between such a labor organization and a public body" except (as relevant here) "[p]ublic safety labor organizations," "employees of a public body who are members of a public safety labor organization," "[t]he department of corrections," and "employees of the department of corrections." § 105.503, RSMo.

The circuit court determined that reading § 36.025 to require at-will employment for State employees (except those listed in § 36.030) would violate the principle that "statutes should be construed harmoniously when they relate to the same subject matter [which] is all the more compelling when the statutes are passed in the same legislative session." D334, p.18 (quoting *State v. Knapp*, 843 S.W.2d 345, 347 (Mo. banc 1992)). The circuit court reasoned that

> [i]t 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 exempt[ ] employees of the Department of Corrections*, and then, on the same day, pass a provision in SB 1007 that precludes agreement on for 'cause' protections, [that] *includes employees of the Department of Corrections*. Read this way, HB 1413 and SB 1007 hopelessly conflict.

D334, pp.18-19 (emphasis in original).

This reasoning is flawed, as there is no conflict between the correct readings of sections 36.025, 105.503, and 105.585, and the resulting correct readings are neither absurd nor unreasonable. This Court finds no conflict between two statutes if they "can both be given effect." *Kidde Am., Inc. v. Dir. of Rev.*, 242 S.W.3d 709, 712 (Mo. banc 2008). Here, both statutes can be given effect. Section 105.503 provides that "sections 105.500 to 105.598" do not apply to Department of Corrections ("DOC") employees. This means that

DOC employees are not affected by section 105.585's requirement that any labor agreements they enter into "reserv[e] to the public body the right to hire, promote, assign, direct, transfer, schedule, discipline, and discharge public employees" or by anything else in sections 105.500 to 105.598. But nothing in sections 105.503 and 105.585 *prohibit* DOC employees from being required to be at-will, as section 36.025 mandates (unless those DOC employees are covered by section 36.030). And the fact that DOC employees are also exempted from provisions in sections 105.500 through 105.598 suggests that the General Assembly may have had reasons to exclude them from the Public Sector Labor Law other than the provisions in section 105.585. Thus, both HB 1413's and SB 1007's provisions can be given effect while giving section 36.025's word "shall" its plain and ordinary meaning. And because nothing in sections 105.503 or 105.585 prohibits DOC employees from being required to be at-will, reading section 36.025's term "shall" as having its proper legal meaning is sensible and reasonable.

This reading of section 36.025 is also reasonable when read in conjunction with HB 1413 because SB 1007 exempts some DOC employees from certain "at-will" requirements in section 36.025. SB 1007 expressly exempts employees referenced in section 36.030 from certain of section 36.025's "at-will" requirements. Section 36.030 states that "[e]mployees in eleemosynary or penal institutions shall be selected on the basis of merit." Section 36.020 defines an "[e]leemosynary or penal institution[ ]" as "an institution within state government holding, housing, or caring for inmates, patients, veterans, juveniles, or other individuals entrusted to or assigned to the state where it is anticipated that such individuals will be in residence for longer than one day" but do not include "elementary,

secondary, or higher education institutions operated separately or independently from the foregoing institutions." Thus, because DOC employees may be employees in eleemosynary or penal institutions, such as those caring for inmates, section 36.025's at-will mandate does not apply to their selection, which lessens any perceived conflict between sections 105.585 and 36.025.

Thus, the circuit court erred by determining that section 36.025's language does not require at-will employment.

II. The circuit court erred by issuing a declaratory judgment with respect to Count I, because neither SB 1007 nor its implementation violated article I, section 29, in that (a) the Missouri Constitution's text and history indicate that SB 1007 is not subject to any scrutiny because it does not burden rights protected by article I, section 29; (b) even if SB 1007 burdens article I, section 29 rights, it is subject to rational-basis scrutiny because article I, section 29 is not a fundamental right and SB 1007 does not substantially burden that right; (c) SB 1007 passes rational basis scrutiny because the at-will employment mandate is rationally related to a legitimate state interest, specifically the State's interests of government effectiveness and efficiency and public confidence in the unelected portion of the executive branch of government; and (d) even if SB 1007 is subject to strict scrutiny, it passes because the at-will employment mandate is narrowly tailored to advance the State's compelling interests of government effectiveness and efficiency and public confidence in the unelected portion of the executive branch of government.

Standard of Review: This Court reviews a circuit court's interpretation of the Missouri constitution *de novo*. *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 204 (Mo. banc 2008) (constitution). "Review of a constitutional challenge to a statute is *de novo*." *State v. Harris*, 414 S.W.3d 447, 449 (Mo. banc 2013).

Preservation: The State preserved this argument. D308, pp.29-41; D309, p.13.

The circuit court held that the State violated article I, section 29 of the Missouri Constitution. D334, pp.24-25, 30-31, 41-42. In doing so, it determined that SB 1007 did not affect collective bargaining because it created a floor, not a ceiling. *Id*., pp.17-19, 31. The circuit court held that the State violated article I, section 29 by acting as if SB 1007 did affect collective bargaining. *Id*., pp.24-25, 30-31, 42. That is, the circuit court held that, after SB 1007's effective date, the State refused to process grievances under the CBAs, refused to bargain about grievance procedures, for-cause protections, and seniority benefits and protections that the State determined were prohibited by SB 1007. *Id*. The circuit court held that the State's refusal to process grievances in accordance with the terms of the CBAs violated the Union employees' "right to organize and bargain collectively through representatives of their own choosing" under article I, section 29. *Id*., pp.24-25, 42. Separately, the circuit court held that the State's refusal to bargain for grievance procedures, for-cause protections, and seniority benefits and protections violated article I, section 29 because these were mandatory subjects of bargaining under article I, section 29. *Id*., pp. 30-31.[11]

These holdings are wrong—both in their interpretation of SB 1007 (*see* Point I, *supra*) and in their interpretation of article I, section 29. SB 1007 *does* restrict the State's ability to agree to certain terms when it engages in collective bargaining with the Unions, but this does not violate article I, section 29—which contains no mandatory collective

[11]The circuit court held that the State's decision not to abide by expired SEIU CBAs constituted bad faith bargaining and therefore also violated article I, section 29. D334, p.41. This is incorrect for the reasons set forth in Part V.C.

bargaining subjects, which must be read in conjunction with article IV, section 19 of the Missouri Constitution, and which has long coexisted with statutes that limit the terms to which the State can agree.

A. Interpreting SB 1007 as preventing the State from agreeing to certain CBA provisions does not violate article I, section 29 of the Missouri Constitution.

The circuit court found, in the alternative, that if SB 1007 does affect collective bargaining, then, as applied to the Union's members, it violates article I, section 29 of the Missouri Constitution. D334, pp.24, 32-33 (as-applied challenge); *id*., p.31 (in the alternative); *id*., p.36 (violates art. I, § 29). The circuit court reasoned that SB 1007 violates article I, section 29 because it prohibits the State from bargaining over core, or mandatory, bargaining subjects. *Id*., p.36. The circuit court's conclusion is incorrect, as article I, section 29 does not include any mandatory bargaining subjects.

Article I, section 29 states that "employees shall have the right to organize and to bargain collectively through representatives of their own choosing." Article I, section 29 applies to public sector employees, such as those represented by the Unions in this case. *Indep.-Nat'l Educ. Ass'n v. Indep. Sch. Dist.*, 223 S.W.3d 131, 139 (Mo. banc 2007). Additionally, this Court has determined that a public employer can violate an employee's right to bargain collectively if the employer fails to bargain in good faith. *Am. Fed'n of Teachers v. Ledbetter*, 387 S.W.3d 360, 367 (Mo. banc 2012). But this Court has never held that a statute limiting the State's ability to agree to a few terms during collective

bargaining violates article I, section 29. Nor has it addressed whether a statute mandating at-will employment violates article I, section 29.

When a party, as here, brings an as-applied challenge to the constitutionality of a statute,[12] the challenging party "must overcome the presumption that statutes are constitutional." *R.W. v. Sanders*, 168 S.W.3d 65, 68 (Mo. banc 2005). "This Court's primary goal in interpreting Missouri's constitution is to ascribe to the words of a constitutional provision the meaning that the people understood them to have when the provision was adopted." *State v. Honeycutt*, 421 S.W.3d 410, 414-15 (Mo. banc 2013) (internal quotation marks omitted). "When words do not have a technical or legal meaning, they must be given their plain and ordinary meaning unless such construction will defeat the manifest intent of the constitutional provision." *Id*. at 415. "Weight should be given to cases interpreting constitutional provisions at or near the time the constitution was adopted because contemporaries of the drafters had the greatest opportunity to fully understand the meaning and intent of the language used." *Id*. Constitutional provisions must be interpreted harmoniously with other constitutional provisions. *State ex rel. Upchurch v. Blunt*, 810 S.W.2d 515, 516 (Mo. banc 1991). Likewise, "a constitutional provision should never be construed to work confusion and mischief unless no other reasonable construction is possible." *Ledbetter*, 387 S.W.3d at 363-64.

In determining whether certain practices violate the Missouri Constitution, this Court also considers statutes that historically have coexisted with the constitutional right

[12]*See* D334, pp.24, 32-33 (determining that the Unions' article I, section 29 challenge is as-applied). The Unions do not appeal this holding.

without violating it. *See, e.g., Dortch v. State*, 531 S.W.3d 126, 129 (Mo. banc 2019) (citing favorably *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008), for the proposition that the Second Amendment's right to bear arms does not invalidate "longstanding prohibitions on the possession of firearms by felons and the mentally ill" or regulations of concealed weapons). In doing so, this Court's practices are in line with United States Supreme Court practice. *See, e.g., Roth v. United States*, 354 U.S. 476, 482-83 (1957) (finding libel unprotected by the First Amendment based on laws prohibiting libel in place at the time the First Amendment was ratified); *id*. at 483-85 (finding obscenity unprotected by the First Amendment based on laws passed from 1789 to 1843).

1. Article I, section 29 must be read in harmony with article IV, section 19.

Article IV, section 19 provides that

> 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; provided that any honorably discharged member of the armed services of the United States who is a citizen of this state shall have preference in examination and appointment as prescribed by law.

(Emphasis added.) This provision has remained materially the same since it was adopted in the 1945 Missouri Constitution, along with article I, section 29.[13] Thus, the Missouri Constitution gives the head of each executive department the power to "select and remove"

[13]The only difference was, in 1945, the veteran preference did not apply unless the veteran was a citizen of Missouri before entering the armed services. Mo. Const. art. IV, § 19 (1945).

all employees unless the Missouri Constitution or *a law passed by the General Assembly* regulates that ability in some way. Mo. Const. art. IV, § 19. The same constitutional provision regulates the department heads' ability to "select" employees of eleemosynary and penal institutions on any basis but on the basis of merit, ascertained by competitive examinations, but it does not limit the department heads' ability to remove such employees. *Id*. And even that selection shall apply to other state employees "as provided by law," *i.e.*, based on statutes passed by the General Assembly. This provision, therefore, directly contradicts the notion that the 1945 Constitution (in article I, section 29) ossified the merit-system protections as constitutional rights. Instead, it expressly holds that the department heads have discretion to "select and remove employees all appointees in the department" except as provided by law, and it plainly contemplates that the General Assembly may impose statutory regulations ("provide[] by law") on that employment relationship. *Id.*

Here, the Defendant-employers are executive-branch departments,[14] parts of executive-branch departments,[15] or other executive-branch organizations created by the Missouri Constitution. Mo. Const. art. IV, § 12. The Unions argue that this Court should read article I, section 29 as requiring the State to bargain for (and potentially ultimately agree to) for-cause, seniority, and grievance protections. But if this was the case, current

[14]The Department of Health and Senior Services and Department of Corrections are executive-branch departments not expressly mentioned in article IV, section 12 but created by the legislature in accordance with article IV, section 12. *See* § 192.002 *et seq*., RSMo (DHSS); § 217.010 *et seq*., RSMo (DOC).

[15] The Missouri Veterans Commission and Missouri State Highway Patrol are part of the Department of Public Safety. D169, p.9, ¶¶ 36-37; D180, pp.7, 11, ¶¶ 11, 25.

department heads could bind future department heads so that those future department heads would have no discretion to "select and remove" employees. *See Independence*, 223 S.W.3d at 140-41 (holding that a public entity is bound by the agreement it signs with a union and cannot unilaterally change its terms during the effective period of the agreement). This would, in turn, make article IV, section 19's provision of department-head discretion meaningless.

The Unions may argue that this is not problematic because article IV, section 19 expressly states that department-head discretion may be removed by constitution or law, and article I, section 29 is part of the Missouri Constitution. But the structure and history of article IV, section 19 does not favor such an interpretation. First, article IV, section 19 contains its own, express limitations on department-head discretion for employee selection and removal: (1) employees in eleemosynary and penal institutions must be selected on the basis of merit, ascertained by competitive exams, and (2) certain veterans receive preferences in selection. This Court should not read article I, section 29 to limit department-head discretion because it does not *expressly* do so, unlike the limitations in article IV, section 19. There is no reason to presume that the citizens ratifying the Missouri Constitution believed or even could have known that article I, section 29—a provision in a wholly different article that does not say anything about the selection or removal of employees—could affect department-heads' abilities in another section of the Missouri Constitution. Thus, this Court should not read article I, section 29 to allow one department head to remove the discretion of a later department head with respect to employee "removal." Mo. Const. art. IV, § 19. And therefore, this Court should reject the

interpretation that article I, section 29 requires executive-branch departments to bargain about for-cause, seniority, and grievance protections.

Second, both article IV, section 19 and article I, section 29 were new constitutional provisions in the 1945 Missouri Constitution.[16] Neither provision was contained in the 1875 Missouri Constitution, as amended, just prior to the 1945 Missouri Constitution's ratification. Thus, it would be odd, and contrary to the intent of the citizens ratifying the 1945 Missouri Constitution, 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. *See Independence*, 223 S.W.3d at 140-41 (holding that a public entity is bound by the agreement it signs with a union and cannot unilaterally change its terms during the effective period of the agreement). Because article I, section 29 must be read in harmony with article IV, section 19, this Court should determine that article I, section 29 does not require the State to bargain about for-cause, seniority, and grievance protections.

2. The plain language of article I, section 29 provides only the right to negotiate and this Court's decision in *Ledbetter* requires that the State do so in good faith—it does not require the State to be able to agree to certain provisions deemed "mandatory."

SB 1007's limitations on the State's ability to agree to three types of provisions in a CBA does not violate article I, section 29. SB 1007 prohibits the State from agreeing to for-cause protections, grievance procedures for adverse employment decisions, and

[16]*See* General Assembly of the State of Missouri Committee on Legislative Research, *The Constitution of the State of Missouri with Annotations and Index – 1945* 33, 63 (Lester G. Seacat ed., 1945).

seniority protections, all of which conflict with the mandatory at-will provisions of section 36.025. The plain language of article I, section 29 only guarantees the right to "bargain collectively." That is, it guarantees that employees may participate in a particular *process*, but it does not guarantee that collective bargaining will reach any particular *outcome* and does not prescribe any additional requirements for the bargaining process. Under its ordinary and usual meaning, both in 1945 and today, the verb "bargain" denotes the process of negotiating, not an outcome. *See* WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY 219 (1952) (defining "bargain" as "to negotiate over the terms of an agreement or contract") (A0222); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 176 (2002) (defining "bargain" as "to negotiate over the terms of an agreement or contract") (A0225). Thus, to guarantee that someone may "bargain" indicates that they will be allowed to *negotiate*—it does not guarantee an agreement, a substantive outcome, or even a range of outcomes.

This Court agreed with this definition of "bargain collectively" in its *Ledbetter* case. It wrote: "By 1945, when article I, section 29 was adopted as part of Missouri's current constitution, the words 'bargain collectively' were common usage for **negotiations conducted in good faith and looking toward a collective agreement**." 387 S.W.3d 360, 366 (Mo. banc 2012). And as this Court noted in *Quinn v. Buchanan*—an early case addressing this constitutional right—article I, section 29 "is not a labor relations act, specifying rights, duties, practices and obligations of employers and labor organizations." 298 S.W.2d 413, 418 (Mo. banc 1957) (*overruled on other grounds by E. Mo. Coal. of Police v. City of Chesterfield*, 386 S.W.3d 755, 761-62 (Mo. banc 2012)). Thus, contrary

to the circuit court's holdings, the right to "bargain collectively" and to have the State bargain in good faith does not require that the State be able to agree to every conceivable CBA provision, or even agree to any provision regarding so-called "core" or "mandatory" topics.

3. The circuit court incorrectly relied on Missouri case law, federal case law, and other states' case law to support its holding that the State's interpretation of SB 1007 violates article I, section 29.

In support of its holding that SB 1007, as interpreted by the State, violates article I, section 29, the circuit court relied on this Court's cases, *Ledbetter* and *Independence NEA*, federal-court interpretations of the phrase "bargain collectively" in the National Labor Relations Act (NLRA),[17] and other states' interpretations of other states' constitutional provisions. D334, p.30 (*Ledbetter*, *Independence*), p.31 (NLRA), p.34-36 (other states). But none of these sources supports the Unions' position that, in order to bargain in "good faith," the State must be able to agree to any CBA provision relating to certain topics. Such a position contravenes the General Assembly's long history of limiting the State's ability to agree to certain CBA provisions, which article IV, section 19 of the Missouri Constitution expressly permits.

i. Neither *Ledbetter* nor *Independence* compels the circuit court's conclusion that SB 1007 violates article I, section 29.

First, neither *Ledbetter* nor *Independence* in any way requires that, in order to bargain in good faith, an employer must be empowered by the legislature to agree to any

[17] 29 U.S.C. § 151 *et seq*.

provision in a CBA. *Ledbetter* merely states that employers must bargain in "good faith," which requires "that both parties sincerely undert[ake] to reach an agreement" and "bargain with a serious attempt to resolve differences." 387 S.W.3d at 367. *Independence* holds that a public entity is bound by the agreement it signs with a union and cannot unilaterally change the agreements' terms during the agreements' effective period (though it expressly permits "clauses excusing contractual obligations" under certain circumstances). 223 S.W.3d at 140-41. *Independence* describes "collective bargaining" as "negotiations between an employer and the representative of organized employees to determine the conditions of employment, such as wages, hours, discipline, and fringe benefits," but it does not in any way suggest that the employer must be able to agree to any specific set of protections, such as those at issue in this case. *Id*. at 138 n. 6.

Restricting the State's ability to agree to for-cause protections and certain seniority and grievance procedures does not make the right to bargain collectively meaningless. *See* D334, p.30. Even without the ability to agree to for-cause protections and some seniority and grievance procedures, there are innumerable other provisions to which the State may agree. Thus, the inability to agree to three provisions does not make the right to bargain collectively meaningless.

In fact, it is the circuit court's contrary interpretation of article I, section 29, in light of this Court's holding in *Independence*, that makes article IV, section 19 meaningless. *Independence* holds that a public entity is bound by the agreement it signs with a union and cannot unilaterally change its terms during the effective period of the agreement. 223 S.W.3d at 140-41. Assuming that there were no State laws requiring department heads to

remove appointees only for-cause and that article I, section 29 means that a department must be able to agree to for-cause protections, then one department head could agree to protections with the Unions that would bind subsequent department heads, violating article IV, section 19's provision that gives discretion to the head of each department to select and remove department employees. Such a reading of article I, section 29 violates the fundamental rule of constitutional interpretation that requires constitutional provisions be read harmoniously with one another. *Blunt*, 810 S.W.2d at 516.

ii. The history of article I, section 29 and legislation with which it has long coexisted weighs against reading article I, section 29 to require the State to be able to agree to all CBA provisions, or even the select few at issue here.

Reading article I, section 29 the way the circuit court and the Unions do conflicts with article I, section 29's history, during which State law has always been able to restrict the department head's ability to agree to certain terms. Some of these terms are favorable to unions, and some are not. For instance, the law establishing the Merit System itself (the 1945 Merit Act, 1945 Mo. Laws 1158),[18] which became law only a year after voters ratified article I, section 29, *id*. at 1182, contained a number of requirements that the State would not have been able to bargain away:

- **§ 24(a): Mandatory promotional preferences for veterans, disabled veterans, and wives of disabled veterans**. 1945 Mo. Laws 1170 (awarding

[18]Missouri Secretary of State, 1945 Missouri Session Laws, Part II, https://mdh.contentdm.oclc.org/digital/collection/molaws/id/32019/rec/73 (last visited Dec. 9, 2021).

extra points in all examinations to veterans, disabled veterans, and wives of disabled veterans); *see also id*. at 1168 (charging the Director to conduct "promotional examinations"); *id*. at 1160 (defining "Promotional examination" as "a test for positions in a particular class, admission to which is limited to employees who are already in positions subject to this act").[19]

- **§ 26(a): Mandatory two-month minimum probationary period during which a new employee may be terminated without cause.** *Id*. at 1172.

- **§ 32: Charging the PAB to issue regulations governing annual leave, sick leave, and special leaves of absence for various classes of positions under the Merit System.** *Id*. at 1175; *see also id*. at 1164 (permitting the PAB to "prescribe such rules and regulations not inconsistent with the provisions of this act as it deems suitable and necessary to carry out the provisions of this act").

- **§ 38(e): Mandating that any appeal to the PAB by an employee challenging dismissal, demotion, or suspension occur within 30 days.** *Id*. at 1178.

These provisions demonstrate that, within about a year after article I, section 29 was adopted, the 1945 Merit Act *itself* materially and substantially limited what the State could agree to in its collective bargaining agreements with unions. In 1946, the State could not

[19]Article IV, § 19 of the 1945 Missouri Constitution required preference in "examination and appointment" for Missouri veterans who were Missouri citizens when they entered the service, but Merit Act § 24(a)'s veteran preference extended beyond what was constitutionally required, to all veterans and wives of disabled veterans.

agree to less than the mandatory two-month probationary period for employees, could not agree to treat veterans and wives of disabled veterans equally with every other applicant in promotions, could not agree to allow someone other than the PAB to determine the amount of annual, sick, and special leave, and could not agree to allow a dismissed, demoted, or suspended merit employee more than thirty days to appeal—even if the unions had wanted to. And this Court has never held that these restrictions cause the State to bargain in bad faith. Holding that the State must be able to agree to certain CBA provisions would not only impermissibly "work confusion and mischief," *see Ledbetter*, 387 S.W.3d at 363-64, it would have made parts of the 1945 Merit Act itself unconstitutional.

But that is not the only "confusion and mischief" that such a reading would cause. The Public Sector Labor Law, § 105.500 *et seq*. (1967), which was passed in 1967 and remained in effect until 2018,[20] also contained longstanding provisions that limited what the State could agree to in CBAs:

- **§ 105.525: Requirement that "[i]ssues with respect to appropriateness of bargaining units and majority representative status . . . shall be resolved by the board."**

- **§ 105.530: Employees have no right to strike.** This provision codifies Missouri's longstanding public policy that government employees have no right

[20]*See* 2018 Mo. Legis. Serv. H.B. 1413 (West's No. 6); *Mo. Nat'l Edu. Assoc. v. Mo. Dep't of Labor & Indus. Rels.*, 623 S.W.3d 585, 587-89 (Mo. banc 2021).

to strike against their employer. *See St. Louis Teachers Assoc. v. Bd. of Edu.*, 544 S.W.2d 573, 575 (Mo. banc 1967).

Thus, for more than half of a century, the State has been unable to bargain for any CBA provision that would violate this statute, and no one even has contended that this violates article I, section 29's right to bargain collectively.

Since 1967, the General Assembly has continued to pass laws that limit what the State can agree to in CBAs with the Unions. For instance, section 105.262.1-.3, RSMo, requires that state employees who fail to pay state income taxes and fail to appropriately remedy the issue be dismissed. The State could not agree to allow such employees to continue employment if the Union made that proposal. Section 610.021(13), RSMo, requires that the names, positions, salaries, and lengths of service of state employees be public record, and the State could not agree with the Unions to the contrary. Section 34.040.1-.3, RSMo, describes requirements for State procurement, such as competitive bidding, that the State could not agree with the Unions to ignore or to circumvent, such as by agreeing to buy only from unionized companies. Put simply, these restrictions do not violate article I, section 29 even though they prevent the State from agreeing to certain CBA provisions, nor does SB 1007. The circuit court's holding to the contrary places in jeopardy longstanding statutes and any number of other laws that limit what the State may agree to in collective bargaining or restrict State operations in any way.

Further, these historical statutory limitations suggest that article I, section 29's right to bargain collectively does not limit the ability of State laws to limit department-head

discretion in selection and removal of employees, as discussed in article IV, section 19. As discussed previously, absent some employment protection "otherwise provided . . . by law," such as the merit-system protections in chapter 36 that were narrowed by SB 1007, article IV, section 19 should not permit a department head to limit his or her own ability to remove an employee at-will or select an employee on any basis but his or her own best judgment. *See* Parts II.A.1, II.A.3.i, *supra*. But even assuming that article IV, section 19 would permit a department head to agree to limit his or her own discretion by agreeing only to remove employees for-cause and/or promote employees based on seniority (without being *required* to do so by law), the General Assembly has the power to circumscribe this discretion. *See* Mo. Const. art. IV, § 19. It has done so before. For instance, the General Assembly mandated promotional preferences for veterans, disabled veterans, and wives of disabled veterans. 1945 Mo. Laws 1170. It also prevented the departments from agreeing to for-cause protections for employees before the employee has been employed for two months. *Id*. at 1172. And it mandated that state employees who fail to pay state income taxes and fail to appropriately remedy the issue be dismissed. § 105.262.1-.3, RSMo. Each of these provisions demonstrates that, even if article IV, section 19 grants department heads discretion to agree to for-cause and seniority protections (absent a law requiring them to), the General Assembly still has the ability (without violating article I, section 29) to limit that discretion, as it did in SB 1007 when it mandated at-will employment.

iii. The phrase "bargain collectively" does not require an employer to be able to agree to any and all CBA terms, or even the ones at issue in this suit.

In determining that the right to "bargain collectively" requires an employer to be able to agree to certain "core," or mandatory terms in a CBA, the circuit court relied on federal court cases interpreting the NLRA and state-court cases from other states. But the NLRA expressly provides that it does not apply to state government employers and employees. 29 U.S.C. § 152(2). Further, none of the cases cited by the circuit court provide logical support for its holding.

a. NLRA

The United States Supreme Court has held that it is an unfair labor practice under the NLRA for employers not to bargain with respect to "wages, hours, and other terms and conditions of employment," but "[a]s to other matters . . . each party is free to bargain or not to bargain." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 209-10 (1964). However, this NLRA requirement does not stem from the phrase "bargain collectively," but from the interplay between two NLRA provisions. First, "[s]ection 8(a)(5)[21] of the [NLRA] provides that it shall be an unfair labor practice for an employer 'to refuse to bargain collectively with the representatives of his employees.'" *Id*. at 209. Second, "[c]ollective bargaining is defined in § 8(d) 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.'" *Id*. at 209-10; *see also Cadillac of Naperville, Inc. v. NLRB*, 14 F.4th 703, 720 (D.C. Cir. 2021); *E.I. DuPont de Nemours & Co. v. Sawyer*, 517 F.3d 785, 793 (5th Cir. 2008); *Retlaw Broadcasting Co. v.*

[21]Section 8 of the NLRA is codified at 29 U.S.C. § 158.

NLRB, 172 F.3d 660, 665 (9th Cir. 1999). Thus, the NLRA expressly provides that "wages, hours, and other terms and conditions of employment" are terms for which an employer and union representative must bargain.[22] *Des Moines Mailers Union, Teamsters Local No. 358 v. NLRB*, 381 F.3d 767, 769 (8th Cir. 2004). In article I, section 29, there is no comparable language from which this Court can divine that the State must be able to agree to CBA provisions granting seniority, grievance, or for-cause protections. As this Court stated in *Quinn*, article I, section 29 of the Missouri Constitution "is not a labor relations act." 298 S.W.2d at 418. The NLRA, by contrast, *is* a labor relations act.

b. Other States

Neither do other state cases provide a basis upon which to find that article I, section 29 requires the State to be able to agree to specific CBA provisions. For instance, Florida's constitutional provision is worded differently and contains requirements that are expressly prohibited under Missouri law. The Florida Constitution's article I, section 6 states: "The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged." In *Hillsborough County Governmental Employees Association v.*

[22]Other federal cases rely on § 9(a) of the NLRA (codified at 29 U.S.C. § 159(a)) as the source of mandatory subjects of bargaining, *see, e.g.*, *14 Penn. Plaza LLC v. Pyett*, 556 U.S. 247, 256 (2009), but the list is substantially the same under both § 8(d) and § 9(a). *See* 29 U.S.C. § 159(a) ("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"**). With respect to the federal cases from 1941 cited by the circuit court, *see* D334, p.31, those cases would have relied on § 9(a) for their determinations that employers must bargain with respect to certain topics, as § 8(d) was added in a later amendment. *See* National Labor Relations Act, Pub. L. 74-198, §§ 8-9, 49 Stat. 449 (1935).

Hillsborough County Aviation Authority, the Florida Supreme Court considered the constitutionality of a state statute that gave the civil service board—an entity charged with making sure that employees were being equally paid for equal work—"the unilateral right to strike down any portion of [a CBA]." 522 So.2d 358, 359, 361 (Fla. 1988). The Florida Supreme Court held that the statute "abridge[d] the right of public employees to bargain collectively" because "[g]iving a local civil service board absolute veto power over the provisions of a [CBA] renders that agreement a nullity." *Id*. at 362. The Florida Supreme Court applied strict scrutiny to the law and determined that while "the goals of uniformity and equal pay for equal work" were "noble" goals, they were "not so compelling an interest as to warrant the abridgement of an express fundamental right." *Id*.

The problem with applying Florida case law here is that Florida's right to bargain collectively is both "quantitative" (can be turned on or off) and "qualitative" (can be expanded or contracted), whereas Missouri's is only quantitative. This is evinced by two considerations—the plain language of article I, section 29 and its history.

For instance, Florida's constitution is phrased in the negative and contemplates not only that the right to bargain collectively can be turned on and off ("denied") but also that it can be expanded or contracted ("abridged"). Fla. Const. art. I, § 6. Thus, Florida's constitution treats the right to bargain collectively as both a quantitative right (on or off) and a qualitative right (expanded or contracted). Conversely, the plain language of Missouri's Constitution treats the right to bargain collectively as only a quantitative right. By phrasing the right to bargain collectively in the affirmative ("employees shall have the right . . . to bargain collectively") and failing to prohibit "abridging" the right, article I,

section 29 contemplates that the right to bargain can be turned on and off, but not that it can be expanded or contracted. Therefore, because SB 1007 does not turn off the right to bargain collectively, it does not violate article I, section 29.

If the plain language of article I, section 29 was insufficient to demonstrate this, article I, section 29's history also makes abundantly clear that the right to bargain collectively is a quantitative, on-or-off kind of right in Missouri. *See supra* Part II.A.3.ii (demonstrating that the State has long faced limitations on the provisions to which it could agree). Further, the Florida-court analysis does not include any mention of a constitutional provision like Missouri Constitution article IV, section 19, which expressly permits State law to limit the discretion of department heads to select and remove appointees. That is all SB 1007 is doing. Thus, even assuming that a department head had the power to limit his or her own discretion to select or remove appointees by agreeing to for-cause, seniority, or grievance protections (it does not, *see supra* I.C.1, I.C.3.i), SB 1007 permissibly limits the department head's power to do so. In short, this is the problem with relying on other states' interpretations of a right to bargain collectively—doing so ignores the textual differences between other states' provisions and article I, section 29, the history of article I, section 29 *in Missouri*, and the history of other constitutional provisions with which article I, section 29 must be harmonized, which are key to understanding its meaning.

B. The circuit court erred by subjecting SB 1007 to strict scrutiny because (1) no scrutiny applies, in that SB 1007 does not burden Union-members' right to bargain collectively; (2) strict scrutiny only applies to fundamental rights, and the right to bargain collectively is not fundamental; and (3) strict scrutiny only applies when regulations impose heavy burdens on or severely restrict fundamental rights, and SB 1007 does neither.

The circuit court determined that "[s]trict scrutiny applies to Plaintiffs' as-applied challenge [under article I, section 29] because Plaintiffs have proven that the application of SB 1007 to them substantially burdens their fundamental right of collective bargaining." D334, p.32. This is incorrect for three reasons. First, this Court does not need to decide whether laws that infringe on article I, section 29 are subject to strict (or any) scrutiny because SB 1007 does not infringe on article I, section 29. Second, strict scrutiny only applies to fundamental rights, and the right to bargain collectively is not fundamental. Third, strict scrutiny only applies when regulations impose heavy burdens on or severely restrict fundamental rights, and SB 1007 does neither.

1. This Court need not subject SB 1007 to any level of constitutional review because article I, section 29 does not require that the State be able to agree to any particular set of CBA provisions.

When a plaintiff claims that a Missouri statute burdens its Missouri constitutional rights, this Court does not always subject the law to some level of scrutiny. For instance, when this Court was asked to determine whether a worker's compensation statute that allowed death benefits for dependents (but not non-dependents) violated the Missouri

Constitution's article I, section 14 open-courts provision,[23] this Court did not subject the statute to any level of scrutiny. *Etling v. Westport Heating & Cooling Servs., Inc.*, 92 S.W.3d 771, 773-74 (Mo. banc 2003). Instead, it determined that the statute did not present "a true procedural hurdle . . . that prevents [the non-dependent plaintiffs] from accessing the courts" and, therefore, held that the statute did not violate article I, section 14. *Id*. This Court did the same thing when determining whether a statute that implemented a cap on non-economic damages for personal injuries violated the Missouri Constitution's article I, section 22 right to a trial by jury.[24] *Ordinola v. Univ. Phys. Assocs.*, 625 S.W.3d 445, 448-49 (Mo. banc 2021). Rather than determining whether the statute survived some level of scrutiny, this Court determined that the article I, section 22 right to a trial by jury does not prevent the General Assembly from statutorily creating a cause of action that includes non-economic-damage caps. *Id*. at 450-51. Essentially, in both of these cases, this Court did not apply any level of scrutiny to the challenged statute because it determined that these procedural constitutional rights were not violated by the statutes' substantive requirements.

So too here. This Court has never subjected a statute or other law that purportedly limits the right to bargain collectively to any type of scrutiny, much less strict scrutiny, and it should not do so now. The right to bargain collectively is a right to participate in a *process*, as it requires "employers [to] engage in the bargaining process in good faith," but

[23]Article I, section 14 provides "[t]hat the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property, or character, and that right and justice shall be administered without sale, denial, or delay."

[24]Article I, section 22 states "[t]hat the right of trial by jury as heretofore enjoyed shall remain inviolate . . . ."

the employer has the "freedom to reject any proposal." *Ledbetter*, 387 S.W.3d at 367. Further, the State's ability to agree to certain substantive proposals has historically been limited by the General Assembly without causing the State to bargain in bad faith. *See supra* Part II.A.3. Thus, SB 1007's prohibition on departments' authority to agree to for-cause, seniority, and (some) grievance protections does not violate article I, section 29, which is a procedural right.

2. This Court should not apply strict scrutiny to article I, section 29 because it is not a fundamental right and because SB 1007 does not heavily burden or severely restrict article I, section 29.

The circuit court determined that SB 1007 should be subject to strict scrutiny because the right to bargain collectively is a constitutional right and, therefore, fundamental. D334, p.32. This is incorrect for two reasons: (1) not all constitutional rights are "fundamental" for the purposes of determining whether to apply strict scrutiny, and the right to bargain collectively is not a fundamental right; and (2) laws that burden fundamental rights are not subjected to strict scrutiny unless they severely restrict or heavily burden the fundamental right, which SB 1007 does not do.

"'Strict scrutiny' is a legal phrase of art grounded in decisions of the Supreme Court of the United States." *Dotson v. Kander*, 464 S.W.3d 190, 197 (Mo. banc 2015). Missouri courts only apply strict scrutiny if "legislation affects a fundamental right." *Id*. But courts do not apply strict scrutiny—even when legislation affects a fundamental right—unless the legislation severely restricts or heavily burdens the fundamental right. *Weinschenk v. State*, 203 S.W.3d 201, 215-16 (Mo. banc 2006). If legislation does not impose "a heavy burden

on a [fundamental right], [it] will be upheld provided [it is] rationally related to a legitimate state interest." *Id*.

Contrary to the circuit court's contention, not all constitutional rights are fundamental rights subject to strict scrutiny. *State v. Williams*, 729 S.W.2d 197, 200 (Mo. banc 1987) ("The group of rights expressly held to be 'fundamental' is not large."). Fundamental rights are those that are "objectively, deeply rooted in the nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *State ex rel. Nixon v. Powell*, 167 S.W.3d 702, 705 (Mo. banc 2005). In practice, Missouri Courts only apply strict scrutiny in situations in which the United States Supreme Court has recognized a right as fundamental. *See Alpert v. State*, 543 S.W.3d 589, 598 (Mo. banc 2018) (right to bear arms); *Herndon v. Tuhey*, 857 S.W. 203, 209 (Mo. banc 1993) (U.S. First Amendment rights); *Weinschenk v. State*, 203 S.W.3d 201, 211, 215-16 (Mo. banc 2006) (right to vote). As a matter of this Court's practice, the right to bargain collectively does not fall within the mold for a fundamental right because it does not "shadow" any fundamental U.S. Constitutional right, but also because there is no basis for finding this right to be fundamental. That is, the Unions fail to demonstrate how the right to bargain collectively is so implicit in the concept of ordered liberty or that neither liberty nor justice would exist if it were jettisoned. Put simply, ordered liberty would still exist if article I, section 29 was not in the Missouri Constitution. *See Ledbetter*, 387 S.W.3d at 364 (noting that the right to bargain collectively is different from and extends further than the right to petition the government guaranteed by the First Amendment of the U.S. Constitution). Arguing the opposite is difficult, as the

right to bargain collectively did not appear in the Missouri Constitution until 1945, other states prevent state employees from collective bargaining or limit their right to do so, and the U.S. Constitution provides no express right to bargain collectively. *See* N.C. Gen. Stat. Ann. § 95-98; *Branch v. City of Myrtle Beach*, 532 S.E.2d 289, 292 (S.C. 2000); Va. Code Ann. § 40.1-57.2. Because liberty and justice can exist without giving state employees the right to bargain collectively, it is not a fundamental right, and therefore it is not subject to strict scrutiny.

But even if the right to bargain collectively were fundamental, the circuit court still erred by subjecting SB 1007 to strict scrutiny because SB 1007 does not severely restrict or heavily burden that right. *Weinschenk*, 203 S.W.3d at 215-16. Of the hundreds of terms that the Unions have bargained for and agreed to in many CBAs, they take issue with the State's inability to agree to three provisions—for-cause, grievance, and seniority protections. But, as described above in Part II.A.3, article I, section 29 does not contemplate that the State must be able to agree to any specific terms with the Unions—and certainly does not specify these three terms as required. The State has historically been unable to agree to terms with the Unions that would violate State law, even when these terms related to selection and removal of employees. Thus, limiting the State's ability to agree to three provisions does not severely restrict or heavily burden the right to bargain collectively.

3. SB 1007 survives rational basis review.

Because strict scrutiny review is not proper here, the most this Court should apply is rational basis review. *Weinschenk*, 203 S.W.3d at 215-16. Under rational basis review,

this Court only asks whether SB 1007 is "rationally related to a legitimate state interest." *Id.*; *see also Glossip v. Mo. Dep't of Transp. & Hwy. Patrol Emps. Ret. Sys.*, 411 S.W.3d 796, 806 (Mo. banc 2013). "The party challenging the statute's validity has the burden of proving the lack of a rational basis." *Id.* SB 1007 easily survives rational basis review, as it is rationally related to a number of legitimate State interests at play here, such as government effectiveness and efficiency, and public confidence in the unelected portion of the executive branch of government.

At trial, the State presented expert testimony and expert reports describing the widespread benefits of at-will employment on organizational performance. *See* Jt. Ex. 35, Tabs 6-7. 9, 16 (A0621, A0638, A0644, A0662); Tr. Trans. VI at 1041:19-10:43:4; Tr. Trans. V at 901:3-905:2, 907:11-908:7, 913:23-918:23, 963:13-23, 965:24-975:6. For instance, at-will employment benefits employers by decreasing bureaucracy and delays, increasing legal certainty by eliminating the threat of unjust-dismissal suits, streamlining discharge by decreasing documentation requirements, permitting the State to more easily discharge unproductive employees, increasing productivity and decreasing absenteeism, and decreasing resource misallocation across employment units. Jt. Ex. 35 at Tab 16 ¶¶ 13-17 (A0673-76); *see also id.* at Tab 6, pp.5-9 (A0625-29) (explaining how merit systems harm efficiency and effectiveness of public bureaucracies and negatively affect public perception of public servants), p.14 (A0634) (concluding that regulations and constraints on managers in public service undermine the efficiency, effectiveness, and very legitimacy of public bureaucracies); *id.* at Tab 7, p.1 (A0638) (noting lack of respect for public employees); *id.* at Tab 9, pp.1, 13-15 (A0644, A0656-58) (describing how merit-system

protections run counter to effective management practice and how this undermines legitimacy); Tr. Trans. V at 967:9-970:17.

In short, the General Assembly's passage of SB 1007 aimed to bring these benefits to Missouri taxpayers—who ultimately pay for State services and employee salaries. "As is customary in reviewing economic and social regulation, [] courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 22-23 (1977); *see also Cal. Grocers Ass'n v. City of Long Beach*, No. 2:21-cv-00524-ODW (ASx), 2021 WL 3500960, at *5 (D. Cal. 2021). Because SB 1007 is rationally related to multiple legitimate State interests, this Court should determine that it passes rational-basis review.

4. In the alternative, SB 1007 survives strict scrutiny.

Even if strict scrutiny applied, SB 1007 would pass its test. "[S]trict scrutiny is generally satisfied only if the law at issue is 'narrowly tailored to achieve a compelling interest.'" *Dotson*, 464 S.W.3d at 197 (citing *Miller v. Johnson*, 515 U.S. 900, 920 (1995)). SB 1007 is narrowly tailored to the compelling interests of government effectiveness and efficiency, and public confidence in the unelected portion of the executive branch of government. *See* D334, p.34 (noting that the State's experts explained why the at-will employment mandated in SB 1007 will improve government efficiency).

The U.S. Supreme Court has determined that the State has a "vital interest in maintaining governmental effectiveness and efficiency," such that it may trump even State employees' First Amendment rights. *Branti v. Finkel*, 445 U.S. 507, 517 (1980). Public confidence in Missouri government is a related compelling interest. The U.S. Supreme

Court has recognized that public confidence in the workings of the judiciary is a compelling state interest. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 447 (2015). Public confidence in the workings of the unelected portion of the executive branch of state government is just as compelling. The citizens of Missouri pay for, but do not elect, State employees. Those citizens deserve a State government that strives for excellent performance, not just performance that satisfies the bare minimum. Along similar lines, this Court has recognized that Missouri has a compelling interest in "ensuring that election processes are efficient." *Peters v. Johns*, 489 S.W.3d 262, 275 (Mo. banc 2016). If the efficiency of the election process—the method by which citizens *select* government officials—is a compelling interest, then laws promoting the efficiency and effectiveness of the government those officials run are also compelling, especially laws affecting the efficiency and effectiveness of the unelected portion of the executive branch of government, which is directly funded by Missouri citizens' tax dollars.

At-will employment decreases bureaucracy and delays, increases legal certainty by eliminating the threat of unjust-dismissal suits, streamlines discharge by decreasing documentation requirements, permits the State to more easily discharge unproductive employees, increases productivity and decreases absenteeism, and decreases resource misallocation across employment units. Jt. Ex. 35, Tab 16, ¶¶ 13-17 (A0673-76); *see also id*. at Tab 6, pp.5-9 (A0625-29) (explaining how merit systems harm efficiency and effectiveness of public bureaucracies and negatively affect public perception of public servants), p.14 (A0634) (concluding that regulations and constraints on managers in public service undermine the efficiency, effectiveness, and very legitimacy of public

bureaucracies); *id*. at Tab 7, p.1 (A0638) (noting lack of respect for public employees); *id*. at Tab 9, pp.1, 13-15 (A0644, A0656-58) (describing how merit-system protections run counter to effective management practice and how this undermines legitimacy). In short, at-will employment gives leaders in State government the tools and flexibility they need to streamline government and to perform excellently, which is what the citizens of Missouri deserve.

At-will employment is narrowly tailored to achieve the compelling goals of efficiency and public confidence in government. In general, narrow tailoring requires that the government advance the State's compelling interest through the least restrictive means. *Williams-Yulee*, 575 U.S. at 452. Here, "[b]y any measure," SB 1007 "restricts a narrow slice of" bargaining. *See id*. There are three provisions that the State cannot agree to—for-cause protections, grievance procedures, and seniority protections—but they all boil down to one principle, which is that employees be employed, promoted, and demoted at-will. Arguments that at-will restrictions on bargaining collectively are not narrowly tailored "misperceive[ ] the breadth of the compelling interest that underlies" SB 1007. *See id*. at 453. The General Assembly "has reasonably determined that" for-cause protections "inherently create" inefficiencies and "cause the public to lose confidence in" State government. *See id*. Thus, because "most problems arise in greater and lesser gradations," article I, section 29 "does not confine a State to addressing evils in their most acute form." *See id*. at 454. Here, Missouri's General Assembly "has concluded that" for-cause protections are inefficient and "undermine confidence in the integrity of" the unelected portion of the executive branch of government. *Id*. Requiring employees to be employed

at-will "is narrowly tailored to address that concern." *Id*. Thus, SB 1007 satisfies strict scrutiny.

III. The circuit court erred in determining, with respect to Count II, that if SB 1007 affected the CBAs' terms, then it would violate article I, section 13 of the Missouri Constitution, because such a claim does not satisfy the elements of an article I, section 13 violation, in that (a) CWA and the State have no contractual relationship because the CWA CBA expired; (b) the AFSCME and CWA CBAs have not been impaired or substantially impaired because the CBAs expressly recognize that their provisions may be changed by state law and even provide for a remedy when this occurs; and (c) SB 1007 was imposed for a significant and legitimate public purpose—government effectiveness and efficiency and public confidence in the unelected portion of the executive branch of government.

Standard of Review: This Court reviews a circuit court's interpretation of Missouri statutes and the Missouri Constitution *de novo*. *Gross*, 624 S.W.3d at 884 (statutes); *City of Arnold*, 249 S.W.3d at 204 (constitution). "Review of a constitutional challenge to a statute is *de novo*." *Harris*, 414 S.W.3d at 449. Contract interpretation is a question of law, which this Court reviews *de novo*. *Griffitts v. Old Repub. Ins. Co.*, 550 S.W.3d 474, 478 (Mo. banc 2018). Where the essential facts are not in question, the application of contractual terms to those facts is reviewed *de novo* as a matter of law. *Care Ctr. of Kansas City v. Horton*, 173 S.W.3d 353, 355 (Mo. App. W.D. 2005). Whether a party's evidence supports a particular legal conclusion is a question of law reviewed *de novo*. *See Bryant v. Smith Int. Design Grp., Inc.*, 310 S.W.3d 227, 231 (Mo. banc 2010).

Preservation: The State preserved this issue for appellate review. D305, pp.25-30; D308, pp.41-46; D309, pp.14-18, D323, pp.5-6, ¶¶ 12-13, 16.

The circuit court determined that it did not need to reach AFSCME's and CWA's claim that SB 1007 violated article I, section 13 because its determination that the State violated article I, section 29 gave the Unions all relief they requested.[25] D334, p.36, ¶ 65. But in case this Court disagreed with the circuit court's construction of SB 1007, the circuit court ruled in the alternative that SB 1007 violated article I, section 13 because the changes made by SB 1007 substantially impaired the CBAs and because the State allegedly presented no evidence that this was justified as reasonable and necessary to serve an important public purpose. *Id*., pp.37-38, ¶¶ 69, 72-73. For the reasons discussed in Part I, contrary to the circuit court's holding, SB 1007 affects the provisions to which the State can agree during collective bargaining, and, thus, the provisions that can lawfully exist in the CBAs. Thus, this Court must determine whether to reverse the circuit court's alternative conclusion that SB 1007 violates article I, section 13. It should.

Article I, section 13 (the "Missouri Contract Clause") states: "[N]o . . . law impairing the obligation of contracts . . . can be enacted." Missouri courts interpret the Missouri Contract Clause similarly to how the U.S. Supreme Court interprets the Contract Clause in the U.S. Constitution. *See Educ. Emps. Credit Union v. Mut. Guar. Corp.*, 50 F.3d 1432, 1437 n.2 (8th Cir. 1995); U.S. Const. Art. I, § 10, cl. 1 ("No state shall . . . pass any . . . law impairing the obligation of contracts."). To succeed on a claim alleging violation of article I, section 13, a plaintiff must show: (1) "a contractual relationship"; (2) "a change in law [that] impairs that contractual relationship"; and (3) that "the impairment

[25]SEIU did not claim that its article I, section 13 rights were violated. D169, p.28.

is substantial." *General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992). "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." *Koster v. City of Davenport*, 183 F.3d 762, 766 (8th Cir. 1999); *see also State ex rel. Kansas City v. Pub. Serv. Comm'n*, 524 S.W.2d 855, 859 (Mo. banc 1975) ("There is also no question [ ] that abrogation of a contract or rights thereunder as a result of proper exercise of the police power does not violate state or federal provisions against impairment of contracts.").

This Court should reverse the circuit court for at least four independent reasons (three for AFSCME): (A) there is no contractual relationship between CWA and the State because the CWA CBA expired by its own terms; (B) the AFSCME and CWA CBAs have not been impaired because they expressly recognize that their provisions may be changed by state law and even provide for a remedy in case they are; (C) even if the AFSCME and CWA CBAs have been impaired, they have not been substantially impaired because they expressly recognize that their provisions are subject to changes in state law and even provide for a remedy in case they are; and (D) even if the CBAs have been substantially impaired, the impairment resulted from a law imposed for a significant and legitimate public purpose.

A. The CWA CBA cannot be "impaired" in violation of article I, section 13 because there is no contractual relationship—the contract expired.

The circuit court concluded that the State violated article I, section 13 in two ways: first, by violating the just-cause and grievance provisions in the CWA CBA prior to its

expiration date of December 31, 2018, D334, p.37, ¶ 69, and, second, by continuing to violate those provisions after December 31, 2018. *Id*., p.38, ¶¶ 71-72. A plaintiff may only claim that its contract has been impaired if there is, in fact, a contractual relationship. This Court should reverse the circuit court's holding that the State violated article I, section 13 by violating the provisions of the CWA CBA after December 31, 2018.

Earlier in its Judgment, the circuit court addressed the status of the CWA CBA. It held that CWA's CBA expired on December 31, 2018, but that its terms "continued in effect beyond the expiration of the contract." D334, p.2. The circuit court reasoned that the CWA CBA contained an evergreen clause that stated all provisions of the CBA would remain in full force and effect during successor negotiations. *Id*., p.20. It reasoned that successor negotiations had been reopened by a letter sent by CWA on November 30, 2018, in which CWA asked to postpone bargaining pending the lawsuits. *Id*. This conclusion is contrary to the evidence and the plain terms of the November 30, 2018 letter and the CWA CBA.

A contractual relationship did not exist between the State and CWA after December 31, 2018, because the CWA CBA expired and because the Unions' rights under the CBA do not continue after expiration when successor negotiations are not initiated. The CWA CBA states:

> **A. <u>Term of Agreement</u>**
> 1. This agreement shall become effective January 1, 2016 and shall remain in full force and effect for a term of three years through and including December 31, 2018, upon ratification and signature of the parties.
> 2. This Agreement may be extended in increments of up to one year upon written mutual consent of the parties. These extensions shall not exceed three years in

> total. The written notice of extension or request to meet and confer shall be by certified mail at least thirty (30) days prior to the expiration of the Agreement.
>
> **B. <u>Successor Agreement</u>**
> 1. Prior to the first meet and confer session the parties shall work together to develop ground rules . . . .
> 2. All provisions of this Agreement shall remain in full force and effect during any successor negotiations, provided that the parties are negotiating in good faith. . . .

Jt. Ex. 58, Art. 35 (A0803). The problem with the circuit court's conclusion is that the communication relied on by the circuit court—the CWA's November 30, 2018 letter to the State—is neither a notice of extension nor a request to meet and confer. Rather, it requested to *postpone* meeting and conferring, stating:

> CWA is requesting to postpone a meet and confer meeting for negotiating a successor contract until after the lawsuit on the law that has passed under House Bill 1493 has been settled in the courts.

D251, p.1; Jt. Ex. 146, p.1 (A0999). This is not the same thing as requesting to meet and confer, as even CWA's own witness—Natashia Pickens—and CWA's own responses to the State's Requests for Admissions agreed. Tr. Trans. II at 576:23-577:13 (admitting that the November 30, 2018 letter was a request to postpone a meet and confer and admitting that she had never sent a request for a meet and confer prior to the November 30, 2018 letter); *see also* CWA Resps. to State's RFAs ("No. 30: Admit that the CWA CBA expired on December 31, 2018. Response: Admit."). Because there was no request to meet and confer to negotiate a successor agreement at least thirty days prior to the expiration of the contract, the provisions in Article 35, sections B.1 and B.2 do not apply, and nothing in the CBA causes the CBA's provisions to remain in full force and effect past the CBA's expiration date. *See Univ. of Hawaii Pro. Assembly v. Cayetano*, 125 F. Supp. 2d 1237,

1242-43 (D. Haw. 2000) ("The contracts clause is not implicated by *expired* collective bargaining agreements." (emphasis in original)). The terms of the CWA CBA cannot "*remain* in full force and effect during any successor negotiations" once they have been allowed to expire and lose their force and effect prior to the commencement of subsequent negotiations. Jt. Ex. 58, Art. 35 (A0803) (emphasis added). Thus, the State cannot violate article I, section 13 by failing to comply with expired and ineffectual CBA terms.

B. Even if the CBAs have not expired, they have not been impaired because they expressly recognize that they are subject to changes in state law.

Neither AFSCME nor CWA can succeed on their article I, section 13 claims because neither can show that SB 1007 impairs their contractual relationship with the State. *General Motors*, 503 U.S. at 186. When a contract expressly "provid[es] that any contractual terms are subject to relevant present and future state and federal law," such a "provision c[an] be interpreted to incorporate all future state [ ] regulation, and thus dispose of [a] Contract Clause claim" on the basis that the contract was not impaired. *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 416 (1983) (holding that it is unclear "[t]o [what] extent, if any, the [state law] impairs [a party's] contractual interests" when a contract expressly provided that its terms are subject to future state and federal law). But even if such a provision is not interpreted to incorporate all future state regulation, such a "provision does suggest that [the parties] knew [their] contractual rights were subject to alteration by state [ ] regulation," especially if the "regulation was foreseeable as the type of law that would alter contract obligations," and therefore the

party's "reasonable [contractual] expectations have not been impaired by" the state law. *Id*.

This is exactly what happened here—both the AFSCME and CWA CBAs contained savings clauses indicating that both parties understood and were on notice that their contractual rights could change if state or federal law changed. Specifically, both CBAs (1) provide that "[t]he parties recognize that the provisions of this [CBA] cannot supersede law," Jt. Ex. 41 at 48 (Art. 33) (A0742); Jt. Ex. 58 at 45 (Article 33.B.1) (A0802); and (2) dictate a procedure for the parties to meet, and require the parties to "seek to develop a mutually satisfactory modification" to replace an invalidated CBA provision that is "determined to be contrary to state or federal law or regulation," *see* Jt. Ex. 58 at 45 (Art. 33.B.3) (A0802); *see also* Jt. Ex. 41 at 48 (Art. 33) (A0742). These provisions indicate that the parties anticipated that future changes in state law might impact the CBAs and deliberately incorporated into the CBAs all future state laws, meaning that the contract was not impaired, and the article I, section 13 claim fails. *Kansas Power & Light*, 459 U.S. at 416. It is unclear how the savings-clause provisions could be rewritten to more clearly incorporate future changes in state law.

But even if the CBAs did not incorporate all future state regulations via their savings clauses, these clauses indicate that the Unions knew that their agreements were subject to changes by the General Assembly. The Unions even hedged against that possibility by including contractual provisions that allowed them to call the State back to the bargaining table and bargain for a "mutually satisfactory" replacement provision. *See* Jt. Ex. 58 at 45 (Art. 33.B.3) (A0802); *see also* Jt. Ex. 41 at 48 (Art. 33) (A0742). And finally, the fact

that the General Assembly had long regulated what the State could agree to in a CBA before SB 1007's passage, *see supra* Part II.A.3, bolsters the conclusion that the Unions' contractual rights were not impaired. *Kansas Power & Light*, 459 U.S. at 416.

C. Even if the CBAs were impaired by SB 1007, they were not *substantially* impaired.

Even if the CBAs were impaired by SB 1007's requirement that employees be employed at-will, this impairment was not substantial because the parties not only contemplated that the General Assembly could enact laws that would affect the CBAs, but they offset that risk by allowing, in such an instance, either party to bring the other back to the bargaining table and bargain for replacement provisions. In determining whether an impairment is substantial, courts require some destruction of contractual expectations, but do not require "[t]otal destruction of [those] expectations." *Id*. at 411. However, when a "state regulation [ ] restricts a party to gains it reasonably expected from the contract," this "does not necessarily constitute a substantial impairment." *Id*.

Here, the CBAs were not substantially impaired because the CBAs themselves evince that the parties expressly contemplated that changes in the law could require modification of the CBAs. *See id*. at 416. The CBAs also were not substantially impaired because, if a law required modification of the CBAs, the CBAs required the parties to go back to the bargaining table and bargain for mutually acceptable replacement provisions. Essentially, even if the Unions lost something they bargained for because of SB 1007, the parties foresaw the possibility of similar changes and had already bargained for a way to

mitigate any loss through replacement provisions. Thus, the contractual impairment was not substantial.

D. Even if the CBAs have been substantially impaired, SB 1007 does not violate article I, section 13 because the General Assembly had a significant and legitimate public purpose behind requiring at-will employment for most State employees.

Even if the CBAs were substantially impaired (which they were not, see *supra*), SB 1007 would not violate article I, section 13 because the impairment stemmed from a proper exercise of the police power. "If the state regulation constitutes a substantial impairment," then the State has violated the Contracts Clause unless it has "a significant and legitimate public purpose behind the regulation, such as the remedying of a broad or general social or economic problem." *Kansas Power & Light*, 459 U.S. at 411-12; *see also Pub. Serv. Comm'n*, 524 S.W.2d at 859. "The public purpose need not be addressed to an emergency or temporary situation." *Kansas Power & Light*, 459 U.S. at 412. But "[a]s is customary in reviewing economic and social regulation, [ ] courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 22-23 (1977); *see also Cal. Grocers Ass'n v. City of Long Beach*, No. 2:21-cv-00524-ODW (ASx), 2021 WL 3500960, at *5 (D. Cal. 2021); *Williams-Yulee*, 575 U.S. at 453-54.

Here, the Missouri General Assembly exercised its legislative power for a clear significant and legitimate public purpose—to promote governmental effectiveness and efficiency and promote public confidence in the unelected portion of the executive branch of government by requiring at-will employment in lieu of the Merit System's stifling rules

relating to hiring, firing, and promotions. At trial, the State presented expert testimony and reports describing the widespread benefits of at-will employment on organizational performance. *See* Part II.B.3; Jt. Ex. 35, Tabs 6-7. 9, 16 (A0621, A0638, A0644, A0662); Tr. Trans. VI at 1041:19-1043:4. For instance, at-will employment benefits employers by affording greater flexibility and by facilitating the employer's ability to recruit, retain, and develop talent. Jt. Ex. 35, Tab 16, ¶¶ 10-12 (A0664-73). Contractual requirements that impede at-will employment impose costs on employers by increasing bureaucracy and delays, increasing legal uncertainty, requiring revision of employment handbooks, increasing documentation, causing employers to retain unproductive employees, reducing productivity, increasing absenteeism, and increasing resource misallocation across employment units. *Id*. at Tab 16 ¶¶ 13-17 (A0673-76); *see also id*. at Tab 6, pp.13-14 (A0633-34); Tr. Trans. IV at 967:9-970:17. Contractual requirements that impede at-will employment impose costs on employees by causing them to receive compensation in the form of job security instead of other dimensions (e.g., pay, advancement opportunities, etc.) that employees may find more valuable and hampering employment opportunities, particularly for young, low-skilled, and marginalized workers. Jt. Ex. 35 at Tab 16 ¶¶ 18-20 (A0676-81).

In short, the State's passage of SB 1007 aimed to bring these effectiveness and efficiency benefits to Missouri taxpayers—who ultimately pay for State services and employee salaries—and to State employees themselves. Because this legislation serves a

significant and legitimate public purpose, this Court should determine that it does not violate article I, section 13 of the Missouri Constitution.[26]

IV. The circuit court erred in issuing a declaratory judgment on Count III, because the Unions have not shown that sections 536.014 and 536.050, RSMo's requirements have been met, in that (a) the PAB's rules are authorized because they are not inconsistent with chapter 36, RSMo, including § 36.025's at-will mandate, since they remove limitations on employer decisionmaking and prohibit grievance procedures inconsistent with at-will employment; (b) the PAB's rules are not contrary to law because they do not violate article I, sections 29 or 13 for the reasons set forth in Points II and III; and (c) the PAB's Rules are not contrary to law because the Contracts Clause does not apply to administrative rules.

Standard of Review: In court-tried civil cases, the judgment of the trial court will be affirmed "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." *Pearson v. Koster*, 367 S.W.3d 36, 43 (Mo. banc 2012). Accordingly, this Court "applies *de novo* review to questions of law decided in court-tried cases." *Id*.

Preservation: The State preserved this issue for appellate review. D308, pp. 29-41; D309, pp.9-14.

In Count III, the Unions alleged that the PAB rules adopted (1) were unauthorized because SB 1007 does not supersede the terms of CBAs or limit the State's ability to agree to certain provisions in collective bargaining and/or (2) were unconstitutional because they

[26]In the event that this Court determines that the circuit court correctly interpreted SB 1007 to be a floor rather than a mandate for at-will employment, the circuit court correctly determined that the State should prevail on Count II, as SB 1007 does not change the parties' contractual requirements and so does cannot have impaired, much less substantially impaired, the AFSCME and CWA CBAs. *See General Motors*, 503 U.S. at 186.

violate article I, sections 13 and 29, and therefore the rules should be invalidated under § 536.050, RSMo. D169, pp.30-31, ¶¶ 141-45. The circuit court determined that SB 1007 does not change the terms of the CBAs or limit the State's ability to agree to certain provisions in collective bargaining and, therefore, the PAB rules sought to expand upon SB 1007 in an invalid manner. D334, p.38, ¶ 75. Alternatively, the circuit court held that if this Court disagrees with the circuit court's construction of SB 1007, the PAB's rules violate article I, sections 13 and 29. *Id*., p.39, ¶ 77. Either way, the circuit court was wrong. As discussed in Part I, the circuit court's construction of SB 1007 is incorrect, and as discussed in Parts I, II, and III, the circuit court was incorrect to conclude that changes in the Rules—which mirror the changes in SB 1007—violate article I, sections 13 and/or 29.

As applicable here, rules are invalid if: "(1) There is an absence of statutory authority for the rule or any portion thereof; or (2) the rule is in conflict with state law." § 536.014, RSMo. Circuit courts may issue declaratory injunctions invalidating rules. § 536.050.1, RSMo; *Graves v. Mo. Dep't of Corr., Div. of Prob. & Parole*, 630 S.W.3d 769, 775 (Mo. banc 2021). "Regulations promulgated under an act are to be sustained unless unreasonable and plainly inconsistent with the act and are not to be overturned except for weighty reasons." *Massage Therapy Training Inst., LLC v. Mo. State Bd. of Therapeutic Massage*, 65 S.W.3d 601, 606 (Mo. App. S.D. 2002). "The interpretation and construction of a statute by an agency charged with its administration is entitled to great weight." *Foremost-McKesson, Inc. v. Davis*, 488 S.W.2d 193, 197 (Mo. banc 1972).

A. There is no absence of statutory authority for the PAB's rules.

First, there is no absence of statutory authority for the rules promulgated. The rules at issue here include the amendments to 1 CRS 20-3.070(1)-(5) and 20-4.020(1)-(2). The amendments to 1 CRS 20-3.070(1) removed a very detailed prescription for how layoffs must occur and replaced it with a provision stating that layoffs "shall be administered by each respective appointing authority based on the needs of the service." *See* Jt. Ex. 8 at 2806–07 (A0397-98). Sections 36.070 and 36.025 provide the statutory authority for this rule. Section 36.070 provides that "[t]he [PAB] shall have power to prescribe such rules and regulations not inconsistent with the provisions of this chapter as it deems suitable and necessary to carry out the provisions of this chapter." The provisions of chapter 36 include § 36.025, which states that, with a few exceptions, "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 . . . ." When 1 CRS 20-3.070(1) permits appointing authorities to administer layoffs in the manner that they see fit rather than in a prescribed manner, this is not inconsistent with chapter 36. In fact, such a rule implements the changes to chapter 36 by permitting appointing authorities to discharge their employees at-will rather than, for instance, based on seniority. In this way, 1 CRS 20-3.070(1) prevents the State from violating section 36.025's mandate that employment be at-will, and so is not consistent with chapter 36.

The amendments to 1 CRS 20-3.070(2)–(5) are statutorily authorized for similar reasons. The amendments in these subsections clarify that regulations relating to

suspension for cause and conditions of suspension, demotion, and dismissals only apply to merit employees. *See* Jt. Ex. 8 at 2807–09 (A0398-0400). For instance, subsection (2) clarifies that the "causes for suspension, demotion [and] dismissal" apply only to "regular employee[s]." *Id*. at 2807 (A0398). This rule is consistent with § 36.025's provision that "[e]xcept as provided in [§] 36.030, all employees of the state shall be employed at-will." Subsections (3), (4), and (5) clarify that non-merit employees "do not have the right to notice, opportunity to be heard, or appeal" from a suspension, demotion, dismissal, or discharge, and may be demoted or dismissed "for no reason or any reason not prohibited by law." Jt. Ex. 8 at 2808-09 (A0399-0400); 1 CSR 20-3.070(3)(B), (4)(A), (5)(B) (2019). These rules are consistent with chapter 36 because they reflect section 36.025's provision that all non-merit employees shall be employed at-will. The Rule stating that employees do not have the right to notice, opportunity to be heard, or appeal from a suspension, demotion, or dismissal supports the employer's rights to at-will employment and to have employees "serve at the pleasure of their respective authorities." These rules are not inconsistent with chapter 36.

The PAB's amendments to 1 CRS 20-4.020 also do not exceed statutory authority, for similar reasons. The new 1 CRS 20-4.020(1) prohibits state agencies from "establish[ing] a grievance procedure" for any non-merit employee to grieve discipline, suspension, demotion, notices of unacceptable conduct, notices of conditional employment, leave denial, transfer, shift change, reprimand, furlough, or "any employment action that could be alleged to have an adverse financial impact" on the employee. Jt. Ex. 8 at 2812 (A0403); 1 CSR 20-4.020(1)(A) (2019). It also prohibits state agencies from

entering into an agreement with a union that provides for a grievance procedure prohibited by section (1)(A).[27] Jt. Ex. 8 at 2812 (A0403); 1 CSR 20-4.020(1)(B) (2019). Similarly, the new 1 CRS 20-4.020(2) clarifies that the grievance procedure regulations in new subsections (2)–(4) (formerly sections (1)–(3)) now only apply to merit employees. The rationale behind these new rules is simple. Allowing the creation of a grievance procedure would violate the at-will mandate of section 36.025. Additionally, if the State may dismiss an employee for no reason or any legal reason, what is the purpose of appealing or grieving an adverse employment decision? On what basis would an arbiter determine whether the State's decision was erroneous? This provision is not inconsistent with chapter 36 because it eliminates appeals that violate the at-will employment mandate and are useless to employees without for-cause protections.

The circuit court's rationale in holding the contrary is erroneous. The circuit court determined that the PAB Rules fail because "SB 1007 does not abrogate labor agreements or preclude bargaining over 'just cause' job protections, seniority considerations, or grievance procedures" and "the PAB's attempt through rulemaking to abrogate agreements and preclude bargaining over these subjects is unauthorized by law." This analysis misses the mark. As discussed in Part I, SB 1007 mandates at-will employment. There is no exception in the statute for unionized state employees. Thus, the Rules must be "sustained" because they are not "unreasonable and plainly inconsistent with the act" and the

[27]However, sections (1)(A) and (1)(B) do not prohibit "grievance procedures" for allegations that an adverse employment action "was taken for a reason prohibited by law." 1 CSR 20-4.020(1)(C) (2019).

interpretation and construction of a statute by an agency charged with its administration is entitled to great weight." *Massage Therapy*, 65 S.W.3d at 606. Because the PAB may implement any rules "not inconsistent" with chapter 36, *see* § 36.070, and because the Rules are "not inconsistent" with that chapter, including § 36.025, this Court should determine that the PAB's rules do not exceed SB 1007's statutory authority.

B. The PAB's rules do not conflict with state law.

Likewise, the PAB's rules do not conflict with state law—either statutory or constitutional. The only statute the circuit court identified as a conflicting statute was SB 1007. For the reasons in Part IV.A, *supra*, the rules do not conflict with SB 1007. Thus, the only remaining question is whether the PAB's rules conflict with article I, sections 13 and 29. They do not.

The new rules do not violate article I, section 29 because, as discussed above in Part II, article I, section 29 neither contains mandatory bargaining topics nor requires the State be able to agree to for-cause, seniority, and grievance protections. There is nothing in the text or history of article I, section 29, read in conjunction with article IV, section 19, that requires any such thing. In fact, the text and the history of article I, section 29 suggest the opposite. *See* Part II. Thus, the new Rules instructing the State to deny non-merit employees for-cause, seniority, and grievance protections do not violate article I, section 29.

The new Rules also do not violate article I, section 13. First, Missouri agency rules and regulations cannot violate the article I, section 13 because they are not "laws," as that term is used in article I, section 13, because they are not passed by the legislature. *AGI-*

Bluff Manor, Inc. v. Reagen, 713 F. Supp. 1535, 1552-53 (W.D. Mo. 1989) (stating that promulgation of an emergency amendment by Missouri executive branch agencies cannot violate U.S. Const. Art. I, § 10, cl.1 because it was an administrative, not a legislative, act); *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, 125 U.S. 18, 30 (1888) (stating that U.S. Const. Art. I, § 10, cl. 1 "is aimed at the legislative power of the state, and not at the decisions of its courts, or the acts of administrative or executive boards or officers"); *see also Sveen v. Melin*, 138 S. Ct. 1815, 1823 (2018) ("[T]he Contracts Clause applies only to *legislation*, not to judicial decisions." (emphasis added)).

Additionally, as discussed above in Part III, only CWA and AFSCME brought article I, section 13 claims, but neither succeed on these claims because the PAB's rules do not impair the CBAs, any impairment was not substantial, and the PAB had a significant and legitimate public purpose in enacting the regulations that implemented SB 1007.

V. The circuit court erred when it issued a declaratory judgment on Count I, because even if the circuit court correctly interpreted SB 1007, the State's actions did not violate article I, section 29, in that (a) the Unions' claim that the State failed to process grievances is a contract claim, not a constitutional claim; (b) the State did not bargain in bad faith simply because it acted on the basis of a good-faith opinion about SB 1007's meaning; and (c) the State did not bargain in bad faith simply because it decided to no longer abide by the terms of expired CBAs.

Standard of Review: "An action seeking an injunction is an action in equity. The standard of review in a court-tried action in equity is that of a judge 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, it erroneously declares the law, or [ ] it erroneously applies the law." *Systematic Bus. Servs., Inc. v. Bratten*, 162 S.W.3d 41, 46 (Mo. App.

W.D. 2005) (citing *Murphy*, 536 S.W.2d at 32). This Court "applies *de novo* review to questions of law decided in court-tried cases." *Pearson*, 367 S.W.3d at 43.

Preservation: This issue is preserved. D169, pp.26-28, ¶¶ 122-28; D180, pp.6-7, ¶¶ 7-8, 10; D308, pp.29-38; D309, pp.9-14.

Assuming, for the sake of argument, that the circuit court was correct when it determined that SB 1007 was merely a floor and therefore SB 1007 did not require the State to override CBA terms or take the position that it could not agree to certain CBA terms, the State still did not violate article I, section 29. The circuit court found that the State violated article I, section 29 in three ways: (1) the State unilaterally rescinded portions of the AFSCME and CWA labor agreements while they were in force, D334, pp.24-25, ¶ 30; (2) the State refused to bargain with the Unions over for-cause job protections, seniority requirements, and grievance arbitration that the State believed to be prohibited by SB 1007, *id*., pp.30-31, ¶¶ 48-52; and (3) after the SEIU CBAs expired, the State made unilateral changes to the status quo before bargaining with SEIU, *id*., pp.41-42, ¶ 84. The State will address each of these alleged violations in turn.

A. The circuit court erred in holding that State violated article I, section 29 by unilaterally rescinding portions of the AFSCME and CWA labor agreements while they were in force because this is a breach-of-contract claim, not an article I, section 29 claim, and the Unions' amended complaint does not contain a breach-of-contract claim.

The circuit court determined the State violated article I, section 29 because it did not comply with the grievance procedures in the CBAs because of the State's erroneous understanding of SB 1007. D334, p.24-25, ¶ 30. As discussed above in Part I, the State's

view of SB 1007 was correct—it mandated at-will employment—and the CBAs expressly provided that their terms could not conflict with state law,[28] so the State did not fail to comply with the CBAs' terms. But even if this Court disagrees with the State's construction of SB 1007 or the CBAs, the circuit court's conclusion that the State did not comply with grievance procedures could not result in a violation of article I, section 29 because this is a breach-of-contract claim, not a claim for violation of article I, section 29.[29]

In determining that the State violated article I, section 29, the circuit court relied on *Independence*, stating that, in that case, "the Missouri Supreme Court held that a school district violated Article I, Section 29 by unilaterally rescinding the bargaining procedures in two labor agreements," among other reasons. D334, p. 24, ¶ 30. The circuit court over-read *Independence*. In *Independence*, this Court was asked to determine whether a public employer could unilaterally change the terms of an agreement with its employees, 223 S.W.3d at 133, but it was not charged with deciding whether this was also a refusal to bargain collectively because the public employer "acknowledge[d] that its unilateral adoption of the new policy constituted a refusal to bargain collectively with [the] employee associations." *Id*. at 134. This Court held that a public employer could not unilaterally change the terms of an agreement with its employees because, contrary to prior case law that this Court was overruling, public employees have the right to bargain collectively

[28] *See* Part III.B-C, *supra*; Statement of Facts, Parts II.A-C, *supra* (providing that the CBAs shall not supersede law and providing a remedy in case the CBA is superseded by law).

[29] The Unions' amended complaint, the operative pleading here, does not include a breach-of-contract count.

under article I, section 29, *id*. at 139, and therefore their agreements with public entities are *enforceable contracts*. *Id*. at 141 ("Agreements that the [public employer] made with employee groups . . . are enforceable as any other contractual obligations undertaken by the [public employer].").

But *Independence* did not convert all CBA contract disputes between public employees and their employers into constitutional claims. Article I, section 29 grants the right to "bargain collectively," not the right never to have one's employer misunderstand the terms of a CBA or never to have one's employer perform imperfectly its duties under a CBA. In the event that an employer misunderstands the terms of a CBA or performs imperfectly, the proper claim is for breach of contract, not for violation of the right to bargain collectively.

Here, the State did not violate the right to bargain collectively. Rather, the parties to the CBAs disagreed about whether SB 1007 mandated at-will employment and, if so, whether the CBAs were affected. The State took the position that SB 1007 did mandate at-will employment and that the CBAs' terms required the parties to modify the CBAs accordingly. *See, e.g.*, Statement of Facts, Parts V.A, VII.A. The Unions disagreed. *See, e.g.*, *id*. The State's decision to interpret its contractual duties in light of its understanding of SB 1007 does not constitute a refusal to bargain collectively with the Unions, nor a refusal to bargain in good faith. At most, the Unions' claim sounds in breach of contract, not violation of article I, section 29. Thus, the circuit court erred by determining that the State violated article I, section 29 by failing to process grievances because this is a breach-of-contract claim, not a claim that the State violated the right to bargain collectively.

B. The circuit court erred in holding that the State violated article I, section 29 by determining it could not agree with the Unions on certain CBA provisions that contained for-cause, seniority, and grievance protections that the State honestly believed were prohibited by SB 1007 because being mistaken about what one can legally agree to does not constitute bad-faith bargaining.

The circuit court held that the State violated article I, section 29 when it took the position that it could not agree to certain terms as a matter of law, because this constitutes bad-faith bargaining under *Ledbetter* and because for-cause, seniority, and grievance protections are mandatory subjects of bargaining. D334, p.30, ¶¶ 48-49. This is incorrect. As discussed in Part I, *supra*, article I, section 29 includes no mandatory subjects of bargaining. Further, being mistaken about what one can legally bargain about does not constitute "bad faith" bargaining under this Court's case law, including *Ledbetter*.

In *Ledbetter*, this Court considered whether employers owe a duty to bargain in good faith under article I, section 29. 387 S.W.3d at 363. It held that they do because, without a duty to bargain in good faith, the right to bargain collectively would be "reduced to the right to petition an employer for redress of grievances." *Id*. at 364. This Court went on, in dicta, to describe what constitutes good-faith bargaining:

> Under Missouri law, good faith is not an abstract thing, but [ ] a concrete quality, descriptive of the motivating purpose of one's act or conduct when challenged or called into question. Parties act in good faith when they act without simulation or pretense, innocently and in an attitude of trust and confidence[.] Those parties act honestly, openly, sincerely, without deceit, covin, or any form of fraud. Consequently, the course of a negotiation between parties acting in good faith should reflect that both parties sincerely undertook to reach an agreement. While there is an inherent tension between the duty to bargain with a serious attempt to resolve differences and the employer's freedom to reject any proposal, this tension serves to strike the balance intended by . . . article I, section 29.

Id. at 367 (citations and internal quotation marks omitted).

Here, the circuit court erred by finding that the State failed to bargain in good faith simply because it was supposedly mistaken as to the meaning of SB 1007, without finding that the State was acting dishonestly, insincerely, deceitfully, deceptively, fraudulently, evasively, or that it was not sincerely undertaking to reach an agreement. *See id*. Doing so wrongly converts a simple mistake, which is not bad faith, into a constitutional violation. Instead of claiming an article I, section 29 violation, the Union could have properly responded to the State by (1) seeking a declaratory judgment on SB 1007's meaning, as it relates to the parties' situation or (2) offering to agree with the State on provisions containing for-cause, seniority, and grievance protections that were contingent upon the results of litigation relating to SB 1007's application to the CBA.

C. The circuit court erred in holding that the State violated article I, section 29 by making unilateral changes to the status quo before bargaining with SEIU because article I, section 29 does not contain any requirement that the employer maintain the status quo after a CBA expires.

The circuit court determined that even though the SEIU CBAs expired and contained no evergreen clauses, the State violated article I, section 29 by making "unilateral changes to established conditions of employment" before "the parties bargain[ed] to impasse." D334, pp.41-42, ¶ 84. The circuit court reasoned that article I, section 29 requires the State to make a "sincere effort to reach agreement" and that by making unilateral changes, the State was not making a sincere effort to reach agreement and, in fact, was frustrating the bargaining process and making it harder to reach agreement. *Id*.

Though article I, section 29 requires an employer to bargain in good faith and "sincerely undert[ake] to reach an agreement," the State did not violate that requirement here. As the circuit court noted, the SEIU CBAs have no evergreen clauses, meaning that their terms expired as of their expiration dates—September 14, 2018 (PPO CBA), May 31, 2018 (PCP CBA), and April 14, 2018 (PPA CBA). D334, pp.41-42, ¶ 84; Jt. Ex. 73 at 23 (A0878); Jt. Ex. 69 at 35 (A0850); Jt. Ex. 75 at 47 (A0931). After the SEIU CBAs expired, the State was no longer contractually bound by the terms of those agreements. Further, nothing in article I, section 29, which only provides the right to "bargain collectively," requires the State to continue abiding by the terms of an expired CBA until the union and the State have bargained to impasse. This is an NLRA concept that is inapplicable to the State and is not separately found in Missouri law. 29 U.S.C. § 152(2).

The two cases cited by the circuit court do not support finding that the State violated its duty to bargain in good faith simply because it stopped abiding by terms of an expired CBA. D334, p.41-42, ¶ 84. Those cases are based in the NLRA, which is a large and complex statute that contains mandatory subjects of bargaining that article I, section 29 does not contain, and courts review the NLRB's rulings on the NLRA's meaning deferentially. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992) ("Like other administrative agencies, the NLRB is entitled to judicial deference when it interprets an ambiguous provision of a statute that it administers."); *Cooper Tire & Rubber Co. v. NLRB*, 866 F.3d 885, 890 (8th Cir. 2017) (same).

Additionally, the reasoning in those cases is not persuasive. For instance, in *NLRB v. Katz*, the Court held that "[u]nilateral action by an employer" in the form of merit

increases for employees "without prior discussion with the union [ ] amount[s] to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy." 369 U.S. 736, 747 (1962). This is an unwarranted conclusion. Why would an employer's decision to give some employees merit raises indicate a refusal to negotiate in good faith with the union rather than simple recognition by the employer that it is no longer bound by a contract? The Court in *Katz* agreed: "It follows that the Board may hold such unilateral action to be an unfair labor practice in violation of § 8(a)(5) without finding the employer guilty of over-all subjective bad faith." *Id*. at 747; *see also Allentown Mack Sales and Serv., Inc. v. NLRB*, 522 U.S. 359, 364 (1998) ("Courts must defer to the requirements imposed by the [NLRB] if they are 'rational and consistent with the [NLRA]' and if the [NLRB's] explication is not inadequate, irrational or arbitrary.").

Here, article I, section 29 provides only the right to bargain collectively, which this Court held implies that the State must bargain in good faith. But unlike in the NLRA, there is no comparable provision in article I, section 29 that prohibits "unfair labor practices." Thus, the circuit court was wrong to conclude that when the State stopped abiding by the terms of an expired contract, it violated the right to bargain collectively. This is especially the case because the circuit court failed to make any additional findings that the State's

unilateral changes and/or other actions demonstrated that the State did not make a sincere effort to reach agreement with the Unions.[30]

VI. The circuit court erred in issuing a permanent injunction, because the Unions failed to establish the requisite elements for a permanent injunction, in that (a) they succeed on none of their counts; and (b) there is no legal basis for the three types of equitable relief in the injunction.

***Standard of Review*:** "An action seeking an injunction is an action in equity. The standard of review in a court-tried action in equity is that of a judge 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, it erroneously declares the law, or [ ] erroneously applies the law." *Bratten*, 162 S.W.3d at 46 (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)). Accordingly, this Court "applies *de novo* review to questions of law decided in court-tried cases." *Pearson*, 367 S.W.3d at 43.

Preservation: This argument is preserved. D308, pp.46-47; D309, pp.9, 18.

The circuit court erred by issuing a permanent injunction because none of the Unions' claims should have succeeded as a matter of law and because there is no legal basis for the three types of equitable relief provided in the injunction. The circuit court's permanent injunction ordered the State to: (1) bargain in good faith with the Unions over the terms of successor CBAs without constraint from SB 1007, the PAB's Rules, or the State's policies effectuating SB 1007; (2) bargain without modifying unilaterally the status quo that existed under the CBAs when they were in effect, until the parties agree on the

[30]The argument in this section equally applies to the State's negotiations with CWA because CWA's CBA expired and neither party invoked its evergreen clause. *See supra* Part III.A.

terms of a successor agreement or reach impasse; and (3) continue to process grievances under the AFSCME and CWA CBAs that were filed during the terms of those agreements and as long as those agreements continue in effect pursuant to the terms of their evergreen clauses. D334, p.42-43.

In order to obtain a permanent injunction, "a party . . . must show [ ] irreparable harm and a lack of an adequate remedy at law." *Rebman v. Parson*, 576 S.W.3d 605, 611 (2019). "Irreparable harm is established if monetary remedies cannot provide adequate compensation for improper conduct." *Minana v. Monroe*, 467 S.W.3d 901, 907 (Mo. App. E.D. 2015).

A. Because the Unions succeed on none of their claims, the circuit court erred in granting injunctive relief.

Because the Unions do not succeed on any of their claims, *see* Parts I-IV, they fail to show any improper conduct, and therefore the circuit court erred in determining that the Unions had shown irreparable harm from that conduct. *Minana*, 467 S.W.3d at 907. Because the Unions failed to show irreparable harm, the circuit court erred by issuing a permanent injunction. *Rebman*, 576 S.W.3d at 611.

B. Neither the Unions nor their employees have been harmed in any way that would justify, as a matter of law, the types of relief in the injunction.

The circuit court's permanent injunction ordered the State to: (1) bargain in good faith with the Unions over the terms of successor CBAs without constraint from SB 1007, the PAB's Rules, or the State's policies effectuating SB 1007; (2) bargain without modifying unilaterally the status quo that existed under the CBAs when they were in effect,

until the parties agree on the terms of a successor agreement or reach impasse; and (3) continue to process grievances under the AFSCME and CWA CBAs that were filed during the terms of those agreements and as long as those agreements continue in effect pursuant to the terms of their evergreen clauses. D334, p.42-43. But neither the Unions nor their employees have been harmed in any way that would justify, as a matter of law, the types of relief in the injunction.

First, the State should not be required to bargain in good faith with the Unions over the terms of successor CBAs without constraint from SB 1007, the PAB's Rules, or the State's policies effectuating SB 1007 because SB 1007 affects the terms that the State may agree to in collective bargaining, *see* Part I, which does not violate article I, section 29 of the Missouri Constitution, *see* Part II. The PAB's Rules simply effectuate the terms of SB 1007, particularly § 36.025, and also do not violate the Missouri Constitution. *See* Part IV. Thus, the State must be able to bargain in compliance with SB 1007's limitations, and the circuit court erred as a matter of law by ordering the opposite.

Second, the State should not be required to bargain without modifying unilaterally the status quo that existed when the CBAs were in effect until the parties agree on the terms of a successor agreement or reach impasse. This injunction has no legal basis with respect to the expired SEIU CBAs, D334, p.3, ¶ 13, because article I, section 29's good-faith bargaining requirement does not require that the State continue to abide by expired CBAs until the parties agree on the terms of a successor agreement or reach impasse. *See* Part V.C. This injunction also has no legal basis with respect to the CWA CBA because it too expired before the parties began subsequent negotiations. *See* Part III.A.

Third, the State should not be required to continue to process grievances under the CWA CBA because it has expired and article I, section 29 contains no requirement that the State continue to abide by expired CBAs until the parties agree on the terms of a successor agreement or reach impasse. Further, the State should not be required to continue to process grievances under either the CWA or AFSCME CBAs because section 36.025 prohibits it. *See* Part II.

CONCLUSION

The circuit court made numerous errors. As described in Parts I and II, it erred by holding that the State violated article I, section 29 because it misinterpreted SB 1007 and article I, section 29. SB 1007 mandates at-will employee selection and removal, but this does not violate article I, section 29. As discussed in Part III, the circuit court erred in holding that if SB 1007 affects the terms of the CBAs, then it violates article I, section 13. And as noted in Part IV, the circuit court erred in holding that the PAB Rules are unauthorized or prohibited by law. For these reasons, this Court should reverse the circuit court's holdings on Counts I, II, and III and vacate the permanent injunction. The permanent injunction should also be vacated because it has no legal basis.

In the alternative, even if the circuit court correctly interpreted SB 1007 as not affecting the terms the State may agree to in collective bargaining and not affecting the CBAs terms, the circuit court still erred by holding that the State's actions violated article I, section 29. If the circuit court correctly interpreted SB 1007, then it was correct to dismiss the Unions' article I, section 13 claim. And further, this Court should vacate all parts of the permanent injunction except: (1) the portion requiring the State to process

AFSCME grievances as required by the AFSCME evergreen clause; and (2) the portion requiring the State to bargain in good faith with the Unions over the terms of successor CBAs without constraint from SB 1007, the PAB's Rules, or the State's policies effectuating SB 1007.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 29,730 words, is in compliance with Missouri Supreme Court Rule 84.06(b), includes the information required by Rule 55.03, includes information on how the brief was served on the opposing party.

/s/Maria A. Lanahan

CERTIFICATE OF SERVICE

I hereby certify that, on January 19, 2022, a true and correct copy of the foregoing was filed with the Court's electronic filing system to be served by electronic methods on counsel for all parties entered in the case.

/s/ Maria A. Lanahan