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**In re: Eastern Missouri Coalition of Police, Fraternal Order of Police, Lodge 15  
vs. City of Chesterfield  
Supreme Court No. SC91736**

Dear Counsel:

This will advise that the American Civil Liberties Union Foundation of Kansas and Western Missouri and of the American Civil Liberties Union of Eastern Missouri's amicus curiae brief with consent of the parties was filed with service on July 5, 2011. This will further advise that American Civil Liberties Union Foundation of Kansas and Western Missouri and of the American Civil Liberties Union of Eastern Missouri's motion for leave to file suggestions was received on July 5, 2011.

Yours very truly,

BILL L. THOMPSON

**SCANNED**

Kathy K. Fletchall  
Deputy Clerk, Court en Banc

cc: Mr. Gregory C. Kloeppel and Ms. Danielle M. S. Thompson  
Mr. Robert M. Heggie, Mr. Mark D. Mittleman, and Mr. Harold V. O'Rourke  
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July 1, 2011

The Honorable Bill L. Thompson  
Interim Clerk  
Supreme Court of Missouri  
207 West High Street  
Jefferson City, MO 65101

**Re: Eastern Mo. Coalition of Police v. City of Chesterfield, Case No. SC91736**  
**Our File No.:11-0004311**

Dear Mr. Thompson:

Enclosed for filing is a motion for leave to file a brief as *amici* on behalf of the ACLU Foundation of Kansas and Western Missouri and the ACLU of Eastern Missouri in the above-captioned case. Also enclosed are the original and nine copies of the proposed brief and a disk containing a copy of the brief in Word format.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Doug Bonney  
Chief Counsel & Legal Director  
Direct Dial: (816) 994-3311

cc: Anthony E. Rotherth (w/ enclosures)  
Robert M. Heggie (w/ enclosures)  
Gregory C. Kloeppel & Danielle Thompson (w/ enclosures)

**SCANNED**

IN THE SUPREME COURT OF MISSOURI  
No. SC91736

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EASTERN MISSOURI COALITION OF POLICE,  
FRATERNAL ORDER OF POLICE, LODGE 15, **F I L E D**  
*Plaintiff/Respondent,*

JUL 5 2011

v.

CITY OF CHESTERFIELD,  
*Defendant/Appellant.*

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CLERK, SUPREME COURT

On Appeal From the Circuit Court of St. Louis County, Missouri  
Case No. 09SL-CC00023

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF KANSAS &  
WESTERN MISSOURI AND OF AMERICAN CIVIL LIBERTIES UNION OF EASTERN  
MISSOURI IN SUPPORT OF RESPONDENT AS *AMICI CURIAE*

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IN THE SUPREME COURT OF MISSOURI  
No. SC91736

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EASTERN MISSOURI COALITION OF POLICE,  
FRATERNAL ORDER OF POLICE, LODGE 15,  
*Plaintiff/Respondent,*

v.

CITY OF CHESTERFIELD,  
*Defendant/Appellant.*

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF KANSAS &  
WESTERN MISSOURI AND OF AMERICAN CIVIL LIBERTIES UNION OF EASTERN  
MISSOURI IN SUPPORT OF RESPONDENT AS *AMICI CURIAE*

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## **STATEMENT OF JURISDICTION AND STATEMENT OF FACTS**

Amicus adopts the jurisdictional statement and statement of facts as set forth in Respondent's brief filed with the Court in this case.

## **STATEMENT OF INTEREST OF AMICUS CURIAE**

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of more than 500,000 members dedicated to defending the principles embodied in the Bill of Rights. The ACLU Foundation of Kansas and Western Missouri is an affiliate of the ACLU based in Kansas City, Missouri, with approximately 1500 members in Western Missouri. The ACLU of Eastern Missouri is an affiliate of the ACLU based in St. Louis with over 2500 members in Eastern Missouri. In furtherance of its mission, the ACLU engages in litigation, by direct representation and as *amicus curiae*, to encourage the protection of rights guaranteed by the federal and state constitutions. From its beginnings in the 1920s, the ACLU has supported the constitutional rights of workers. On behalf of their members, the ACLU Foundation of Kansas and Western Missouri and the ACLU of Eastern Missouri file this brief to highlight the significant constitutional issues implicated by the remedy provisions of the court order at issue in this case.



## **SUMMARY OF ARGUMENT**

As interpreted by this Court, article I, section 29 of the Missouri Constitution imposes a duty on public employers to create a framework for collective bargaining by employees who are excluded from the Missouri Public Sector Labor Law. The circuit court's affirmative injunction ordered the City to perform exactly those duties and nothing more. Thus, the injunction granted plaintiffs the remedy required to protect their right to bargain collectively through representatives of their own choosing. As such, the injunction was the proper and, in fact, constitutionally required remedy.

By enforcing a constitutional right with an appropriate remedy, a court simply performs its constitutional duty to protect the liberties and constitutional rights of the governed. Thus, the injunction at issue here does not violate the separation of powers.

## ARGUMENT

### **I. The trial court acted properly in entering a remedy that effectuated the right to collective bargaining contained in article I, section 29 of the Missouri Constitution.**

The circuit court entered and the court of appeals affirmed an injunction that ordered the City of Chesterfield (hereafter “City”) to “expeditiously establish a framework for collective bargaining.” (L.F. 50). The trial court required that the framework include a mechanism for defining appropriate bargaining units, procedures for holding a certification election, and procedures for the meet and confer process. *Id.*

#### **A. The trial court followed this Court’s well-founded precedent.**

In *Independence-NEA v. Independence School Dist.*, this Court held that article I, section 29 of the Missouri Constitution grants all employees – public and private sector employees alike – “the right to organize and to bargain collectively through representatives of their own choosing.” 223 S.W.3d 131, 136 (Mo. banc 2007). *See also* Mo. Const., art. I, § 29. In so holding, the Court further recognized that, for employees excluded from the Missouri Public Sector Labor Law, Mo. Rev. Stat. §§ 105.500-105.530, the public employer has an affirmative duty “to set the framework for these public employees to bargain collectively through representatives of their own choosing.” *Id.*

There can be no doubt that Missouri's "Courts have power to grant injunctions where a municipal employer engaged in wholesale violation of its employees' rights." *State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35, 45 (Mo. 1969). In *Marbury v. Madison*, 5 U.S. 137, 163 (1803), furthermore, the United States Supreme Court made it clear that "[t]he very essence of civil liberty consists in the right of every individual to claim the protection of the law, whenever he receives an injury." Citing Blackstone's Commentaries, the Court acknowledged "that every right, when withheld, must have a remedy, and every injury its proper redress." *Id.* Chief Justice Marshall concluded on this issue by stating that "[t]he Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right." *Id.*

Moreover, article I, section 14 of the Missouri Constitution guarantees "[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." Mo. Const. art. I, § 14. This provision – shared in one form or another with thirty-nine other states – has its roots in Magna Carta and the explications of Coke and Blackstone. Chief Justice Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. Rev. 1309

(2003). Although this provision creates no rights or duties, it does guarantee that – when a person’s rights have been violated – there will be a remedy.

Because the affirmative injunction entered by the circuit court did nothing more than order the City to stop violating its employees’ rights and to perform its constitutional duty to allow its police officers to exercise their right to engage in collective bargaining, the circuit court’s injunction was valid under *Missey*, and it was required pursuant to article I, section 14 of the Missouri Constitution.

It is too late in the day to claim – as does the City – that article I, section 29 imposes no duties on public employers to effectuate the rights of their police officers to organize and to engage in collective bargaining. This Court settled that issue four years ago in *Independence-NEA*. Although the Court did not specifically overrule *Quinn v. Buchanan*, 298 S.W.2d 413 (Mo. banc 1957), it did so *sub silentio* when it overruled *City of Springfield v. Clouse*, 206 S.W.2d 539 (Mo. banc 1947) and when it clearly enunciated the duty of employers of public employees who are excluded from the scope of the Missouri Public Sector Labor Law – namely teachers and law enforcement officers – to create a framework for collective bargaining. *Independence- NEA*, 223 S.W.3d at 136.

Even if *Independence-NEA* did not overrule *Quinn sub silentio*, the Court should overrule that case now because it is internally inconsistent, is confusing, and was wrongly decided. In *Quinn*, the Court initially noted that “violation of

one's fundamental rights by another would usually be such a wrong" as would justify a remedy. 298 S.W.2d at 417. The Court further found that article I, section 29 "is a declaration of a fundamental right of individuals . . . [and that] [a]ny governmental violation of the declared right is void. As between individuals, because it declares a right the violation of which is a legal wrong, there is available every appropriate remedy to redress or prevent violation of this right." 298 S.W.2d at 418-419. But, at that point, the Court gutted one of the fundamental guarantees of article I, section 29, by holding that "the constitutional provision provides for no required affirmative duties concerning this right and these remedies can only apply to their violation." 298 S.W.2d at 419. Specifically, the Court determined, in *Quinn*, that article I, section 29 obliges private employers to permit their employees to join unions without interference but imposes no duty on those employers to recognize the unions or to bargain with them. 298 S.W.2d at 420.

In its decision below, the court of appeals held that *Quinn* is inapplicable to the current case because it dealt with a private sector labor dispute and because "*Quinn* acknowledged . . . that the constitutional right of collective bargaining could not be denied by the *government*." *Eastern Missouri Coal. of Police, Fraternal Order of Police, Lodge 15 v. City of Chesterfield*, ED95366, 2011 WL 1712262 (Mo. Ct. App. May 3, 2011) (emphasis in original). This reading would mean that article I, section 29 grants more rights to public sector employees than to

private sector employees based on *Quinn*'s language acknowledging that the Missouri Bill of Rights imposes limits on governments but not private parties. That logic is strained. But, more importantly, *Quinn*'s holding that the words of article I, section 29 protect only the right to organize and to choose a representative union fundamentally misreads the clear language of this constitutional provision. In fact, *Quinn* reads out of article I, section 29 "the right . . . to bargain collectively." Thus, *Quinn* violates an elementary principle of constitutional interpretation because "[e]very word in a constitutional provision is presumed to have effect and meaning." *Buechner v. Bond*, 650 S.W.2d 611, 613 (Mo. 1983).

**B. The plain meaning of collective bargaining includes an affirmative duty on the employer.**

While the express language of the constitution will always control the meaning, it is important to recognize that all language is contextual. This Court does not have the authority to use legislative intent to read into a constitutional provision what is not included in the plain language of that provision.

*Independence-NEA* 223 S.W.3d at 137. Instead, the Court must determine the meaning of the words used in the Constitution, here the phrase "to bargain collectively." To do that, the concept of collective bargaining must be understood in its historical context. This Court acknowledged that when it pointed out in *Independence-NEA* that at the time the constitution was ratified, the National

Labor Relations Act already provided protection for many private sector workers. 298 S.W.2d at 139. Looking at the history of labor law, it becomes clear that the trial court correctly interpreted section 29.

The history of industrial-labor conflict in the United States can be traced back well into the nineteenth century. However, the constant failure of the courts to effectively resolve labor conflict eventually compelled the federal government to attempt to solve the problem with legislation. *The Developing Labor Law* 1 (Patrick Hardin et al. eds., 4th ed. 2001). The first attempt at national labor policy came in the form of the Erdman Act, passed in 1898 in response to the 1894 Pullman Strike. *The Developing Labor Law* at 13-14. It applied only to workers on interstate railroads, and protected union activity and provided mediators to resolve disputes. *Id.* However, the provisions preventing the firing of workers attempting to unionize were struck down by the Supreme Court for depriving the railroads of their liberty of contract. *Adair v. United States*, 208 U.S. 274 (1908).

In response to the court's rebuff, Congress passed the Clayton Act. This prevented industry-friendly courts from allowing employers to use the Sherman Act to treat union organizing as illegal anti-trust activity. *The Developing Labor Law* at 16. It limited the courts from enforcing various injunctions against labor activity. *The Developing Labor Law* at 17. During World War I, the National War Labor Board exerted control over much of industry and declared that "the rights of

workers to organize in trade unions and to bargain collectively, though chosen representatives, is recognized and affirmed.” *The Developing Labor Law* at 19 (quoting National War Labor Board, Principals and Rules of Procedure 4, 1919). The board was serious about this policy, going as far as to seize businesses that tried to crack down on labor activity. *The Developing Labor Law* at 19. Thus, some twenty years before ratification of the Missouri Constitution of 1945, the meaning of a right to collective bargaining had begun to take shape.

The Railway Labor Act (RLA) was the first federal statute that provided for a comprehensive system of collective bargaining. 44 Stat 577 (1926). The RLA created mechanisms for dealing both with “major disputes” (issues regarding statutory duties and the formation of labor agreements) and “minor disputes” (issues involving the interpretation and application of the terms of collective bargaining agreements). *The Developing Labor Law* at 20. The RLA also specifically imposed a duty on employers (called “carriers” in the RLA) “to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions.” 45 U.S.C.A. § 152, First (West 2010). By 1926, therefore, the right to collective bargaining had further crystallized to include an affirmative duty on the part of employers to participate in meaningful bargaining sessions with the express goal of “mak[ing] and maintain[ing] agreements.” *Id.*



During the Great Depression, moreover, legislative attention turned toward the on-going interruptions of interstate commerce that accompanied labor strife. *The Developing Labor Law* at 24. Because the imbalance of power between employers and workers was a primary source of labor strife and economic distress, Senator Robert Wagner pushed the National Labor Relations Act (NLRA) through Congress. *The Developing Labor Law* at 26. In the NLRA, Congress declared it “the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.” 29 U.S.C.A. § 151 (West 2010). Ensuring that labor strife did not interrupt interstate commerce required not only that employees be able to form and join unions without interference by employers but also that, once employees designated a bargaining representative, the employer be required to bargain with the union in good faith. *The Developing Labor Law* at 27.

It was in this context that Missouri choose to include a right to bargain collectively into its constitution. It was one of only two sections of the Bill of

Rights that had not appeared in the previous 1875 Constitution. Mo. Const., art. I. Understood in this historical context, “the right . . . to bargain collectively” enunciated in article I, section 29 plainly means that, in Missouri, employees will never be denied the right to meet with their employer for purposes of holding meaningful negotiations over terms and conditions of employment.

**C. The decision of the trial court is the only result possible under the plain meaning of the Missouri Constitution.**

It is clear from the historical context that the Constitution’s reference to “bargain collectively” entails negotiation by two parties. Put another way, collective bargaining is “the process of negotiating the terms and conditions of employment.” Harold S. Roberts, *Robert’s Dictionary of Industrial Relations* 58 (B.N.A. Inc. 1966). However, the City argues that the existence of such a right does not then oblige it to meet with the union representatives. This position goes not only against the weight of logic but against the express meaning of the Missouri Constitution.

Collective bargaining is a right that requires activity by the employer. Unless the employer recognizes the employees’ chosen representative and sits down with that representative to discuss terms and conditions of employment, the employees have no meaningful right to collective bargaining. As interpreted in *Quinn*, the collective bargaining provision would go no farther than the

constitutional guarantees of free speech, assembly, and petition that are enshrined in the First Amendment to the United States Constitution and in article I, sections 8 and 9 of the Missouri Constitution, thus making article I, section 29 duplicative and superfluous. This Court will disfavor an interpretation that renders any part of a law superfluous. *Cf. Schoemehl v. Treasurer*, 217 S.W.3d 900, 902 (Mo. 2007) (interpretation that would render part of a statute invalid is disfavored). In order to avoid that absurd result, the Court should continue to read the language of article I, section 29 literally so that it imposes duties on the employers of employees who choose a representative for purposes of collective bargaining. Doing otherwise would essentially write article I, section 29 out of the Missouri Constitution.

Other states with similar constitutional protections have recognized that a right to collective bargaining imposes a duty on an employer. New Jersey's Constitution ensures that "[p]ersons in private employment shall have the right to organize and bargain collectively." N.J. Const. Art. I, para. 19. Their Supreme Court has found that this language, similar to Missouri's, "imposes an affirmative duty on employers to bargain collectively" because not to do so would "render[] impotent the rights guaranteed to employees under the constitutional provision." *Comite Organizador de Trabajadores Agricolas v. Molinelli*, 552 A.2d 1003, 1008 (N.J. 1989). This reasoning is no less true in Missouri. And while New Jersey's Constitution only grants this protection to private employees, Missouri's

Constitution applies to public employees as well. *Independence-NEA*, 223 S.W.3d at 133.

The claim that article I, section 29 does not impose affirmative duties on public employers also ignores the express language of the Missouri Constitution. “That employees shall have the right to organize and to bargain collectively through representatives of their own choosing” is a sentence that seems to be missing its beginning. The missing introductory clause can be found at the beginning of the Missouri Bill of Rights: “In order to assert our rights, acknowledge our *duties*, and proclaim the principles on which our government is founded, we declare:” Mo. Const., art. I. (emphasis added). Thus, as ratified by the people of Missouri in 1945, the Missouri Constitution confers rights and acknowledges governmental duties that accompany the rights found in the provisions of the Missouri Bill of Rights.

This Court has previously recognized that the provisions of the Missouri Bill of Rights impose affirmative duties on cities. For instance, the Court has held that sections 1, 2, and 25 of article I impose “upon the city council” of a city whose boundaries are unrepresentative of the population “[t]he duty to conform to constitutional standards.” *Armentrout v. Schooler*, 409 SW 2d 138, 144 (Mo. 1966). Thus, the Appellant City cannot be allowed to justify its lack of action in

this case with the argument that article I, section 29 imposes no affirmative duty to protect and enforce its police officers' rights to collective bargaining.

As interpreted by the Court in *Independence- NEA*, article I, section 29 of the Missouri Constitution imposes the duties that the circuit court's affirmative injunction ordered the City to perform. Thus, the injunction did nothing more than grant the remedy required to protect the right of the plaintiffs to bargain collectively through representatives of their own choosing. As such, the injunction was the proper and, in fact, constitutionally required remedy.

**II. The trial court's injunction does not offend the separation of powers enshrined in article II, section 1 of the Missouri Constitution.**

Article II, section 1 of the Missouri Constitution provides as follows:

The powers of government shall be divided into three distinct departments – the legislative, executive and judicial – each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

Mo. Const., art. II, § 1. This provision – in substantially similar form – has been in the Missouri Constitution since Statehood. *See* Mo. Const. 1820, Art. 2.

“Article II, section 1 of the Missouri Constitution concerns the division of power, including the judicial power, which in turn guarantees certain rights to the public and places obligations on the courts to protect and enforce those rights and to administer justice.” *Alderson v. Missouri*, 273 S.W.3d 533, 539 (Mo. banc 2009). *See also State ex rel. Weinstein v. St. Louis County*, 451 S.W.2d 99, 101 (Mo. banc 1970). “The reason for the separation of powers is to protect the liberty and security of the governed.” *Savannah R-III School Dist. v. Pub. School Ret. Syst. of Mo.*, 950 S.W.2d 854, 859 (Mo. banc 1997).

Here, the circuit court was simply complying with its constitutional obligation to protect and enforce the right to collective bargaining guaranteed by article I, section 29 of the Missouri Constitution. In fact, in this case, the circuit court’s injunction left it to the City’s governing body to fashion the precise contours of the framework for selecting and bargaining with a representative of its police officers. The circuit court did not usurp the City’s legislative functions by imposing a detailed remedy.

If the Court were to accept Appellant’s argument that this injunction violated the separation of powers, it would deprive constitutional rights and liberties of all force and meaning and leave them as sterile abstractions. It would allow governments to run amok violating the rights and liberties of the people without any threat of remedy or enforcement. That would be a setback of profound import

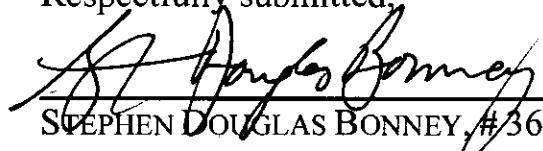
and would undo our social contract's long understanding of the judicial function going back to *Marbury v. Madison* and Magna Carta.

By enforcing a constitutional right with an appropriate remedy, a court performs its constitutional duty "to protect the liberty and security of the governed" and does not violate the separation of powers. Thus, the injunction at issue here does not implicate the separation of powers.

## CONCLUSION

Based on the foregoing and the reasons provided in Appellant's brief, *amici* ACLU of Eastern Missouri and ACLU Foundation of Kansas & Western Missouri urge this Court to rule in Respondent's favor.

Respectfully submitted,



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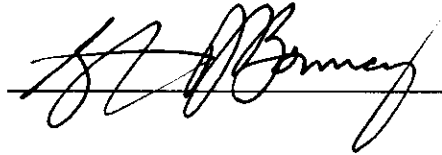
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## CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that pursuant to Rule 84.06(c), this brief:  
(1) contains the information required by Rule 55.03; (2) complies with the  
limitations in Rule 84.06; (3) contains 4278 words, as determined using the word-  
count feature of Microsoft Office Word 2003. The undersigned further certifies  
that the accompanying disk has been scanned and was found to be virus-free.



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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of this brief and a copy of the brief on disk were served upon the counsel identified below by United States Mail, postage prepaid, on July 1, 2011:

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