IN THE SUPREME COURT OF MISSOURI

No. SC87980

INDEPENDENCE-NATIONAL EDUCATION ASSOCIATION, INDEPENDENCE-TRANSPORTATION EMPLOYEES ASSOCIATION, INDEPENDENCE-EDUCATIONAL SUPPORT PERSONNEL, RANDI LOUISE MALLETT, and RON COCHRAN,

Plaintiffs/Appellants,

v.

INDEPENDENCE SCHOOL DISTRICT,

Defendant/Respondent.

APPELLANTS' REPLY BRIEF

SCHUCHAT, COOK & WERNER

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INTRODUCTION

The District's Brief presents one side of an irrelevant political debate about the wisdom of public sector collective bargaining. The appropriate forum for this debate was the 1945 Constitutional Convention that adopted Article I, Section 29. The issue here is whether the framers intended this provision to apply to public employees. Both its express language and the debates uniformly support the conclusion that Article I, Section 29 guarantees to all employees, including public employees, "the right of collective bargaining." (*See* Appellant's Brief, at 10-14).

Compounding its irrelevancy, the District's polemic cites alleged facts and opinions not introduced at trial. The District presented no expert testimony about the alleged harms it discusses at length in Section I of its Brief. The record contains no evidence that the District repudiated the ITEA and IESP Memoranda of Understanding (MOUs) because they harmed education or permitted strikes. The record demonstrates, instead, that these MOUs defined basic terms and conditions of employment of custodians and bus drivers and expressly prohibited strikes.

The District's "parade of horrors" also ignores that the recognition of a Constitutional right to bargain for public employees would not compel any public

employer to agree to any collective bargaining agreement,[1] much less a harmful one. Nor would it require any group of public employees to select a collective bargaining representative.

Stripped of its ideology, the District's Brief offers scant legal argument pertinent to the questions of law before the Court: (1) Did *City of Springfield v. Clouse*, 206 S.W.2d 539 (Mo. banc 1947), correctly exclude public employees from the protection of Article I, Section 29 of the Missouri Constitution, which guarantees "employees. . . the right to organize and to bargain collectively. . ."?; and (2) Did *Sumpter v. City of Moberly*, 645 S.W.2d 359 (Mo. 1983), correctly extend dicta in *Clouse* to permit a public employer to rescind a collective bargaining agreement that has been approved by the governing legislative body pursuant to Missouri's Public Sector Labor Law, MO. REV. STAT. §105.500? The District's primary response to these questions is to declare the obvious - that *Sumpter* and *Clouse* are existing law. The "doctrine of *stare decisis* . . . is not, however, an inexorable command." *Lawrence v. Texas*, 539 U.S. 558, 577 (2003). The District offers no persuasive reason why this Court should not re-examine and reverse these erroneous precedents.

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[1] *See, e.g., Pac. Legal Found. v. Brown*, 29 Cal. 3d 168 (Cal. 1981) (In upholding the constitutionality of a collective bargaining statute, the court observed that, "nothing in the act purports to compel the Governor to agree to conditions that he would feel obligated to 'blue pencil' or veto).

POINT ONE: RECONSIDERATION OF *CITY IF SPRINGFIELD v. CLOUSE*

A. The District makes no response to the Associations' argument about the plain language of Article I, Section 29 of the Missouri Constitution, and the District's interpretation of the Constitutional debates is flawed.

The language of Article I, Section 29 of the Missouri Constitution could not be clearer: "employees shall have the right to organize and to bargain collectively through representatives of their own choosing." The provision is not limited to private sector employees, but is all-inclusive. The District and its Amici have no response to this plain language argument. "'The language of the section just quoted is too plain to need construction.'" *Rathjen v. Reorganized School District R-II of Shelby County*, 284 S.W.2d 516, 524 (Mo. 1955) (construing a 1950 amendment to Article X, Section 11 of the Missouri Constitution) (quoting *Harrington v. Hopkins*, 231 S.W. 263, 265 (Mo. 1921)).

To the extent any construction of a constitutional provision is needed, the Court is to apply a "broader and more liberal construction" than it does to statutes, because "a constitution is expected to be effective over a longer period of time and its method of revision or amendment is more cumbersome than the legislative process." *Rathjen*, 284 S.W.2d at 524. The Court in *Rathjen*, decided only eight years after *Clouse*, rejected an attempt by plaintiffs to "imply an exception where none exist[ed] under the express terms or plain intendments of [a] constitutional provision." *Id.* at 522. "The law is well settled

that it is the duty of the court, in construing the constitution, to give effect to an express provision rather than an implication." *Id. See also City of Wellston v. SBC Communications, Inc.*, No. SC87207, 2006 Mo. LEXIS 98, at *8, n.5 (Mo., August 8, 2006) ("This Court must enforce statutes as written, not as they might have been written.") (quoting *State v. Rowe*, 63 S.W.3d 647, 650 (Mo. 2002) and *Kearney Special Rd. Dist. v. County of Clay*, 863 S.W.2d 841, 842 (Mo. 1993)). The Court in *Clouse* did exactly what *Rathjen* warned against: it implied an exception where none exists under the plain terms of Article I, Section 29.

Nonetheless, since the District cannot rely on the plain language to defend *Clouse*, it offers one response to the Plaintiffs' arguments regarding the Constitutional debates. The District quotes Reuben Wood, the President of the State Federation of Labor and the sponsor of Article I, Section 29, as saying, "I don't believe there is anyone in the organization that would insist upon having a collective bargaining agreement with a municipality setting forth wages, hours and working conditions." *Clouse*, 206 S.W.2d at 543. Based on this statement, the District argues, it is hard to believe that the framers intended to include public employees within the scope of Article I, Section 29. (Respondent's Brief at 20).

Yet, Reuben Wood also urged the adoption of Article I, Section 29, to assist public school teachers in organizing their profession. II Debates of the Mo. Const. Conv. of 1943-44, at 1953 (hereinafter "Debates") (Appendix at A-28). Mr. Wood also

acknowledged a long-established practice of many cities to engage in collective bargaining with organized employees. Debates, at 1962-63 (Appendix at A-34 to A-35). Finally, he fought hard and successfully against two proposed amendments that would have excluded public employees from Article I, Section 29. Debates, at 1962, 1969 (Appendix at A-34, A-36).

Mr. Wood's seemingly contradictory comments can be reconciled by recognizing that collective bargaining in the public sector does not mean exactly the same thing as collective bargaining in the private sector. Public employee strikes were and continue to be forbidden in Missouri. *St. Louis Teachers' Association v. Board of Education*, 544 S.W.2d 573, 575 (Mo. 1976); *State ex inf., John C. Ashcroft v. Kansas City Firefighters Local No. 42*, 672 S.W.2d 99, 105 (Mo. Ct. App. 1984). Moreover, statutes that govern the operation of state and local governments (like the statutes that dictated wages and hiring practices in the City of Springfield) often limit the scope of bargaining in the public sector. *Clouse*, 206 S.W.2d at 542. However, Wood would not have made the comments he did about public employees or urged the rejection of the two proposed amendments excluding public employees if he believed that Article I, Section 29 covered only private sector employees.

Evidently the judges of the Missouri Supreme Court at the time of the *Clouse* decision did not approve of the concept of public sector collective bargaining. However, "[u]nless the meaning of the terms employed is not clear, questions as to the wisdom,

expediency or justice of the constitutional provision should play no part in the construction thereof." *Rathjen*, 284 S.W.2d at 527. This Court should apply the logic of the *Rathjen* case and overrule the *Clouse* Court's twisted and result-oriented reasoning.

B. The District's argument that Missouri courts still follow the non-delegation doctrine is simply wrong.

The District is blatantly wrong when it states that, "Missouri's government follows the nondelegation doctrine to ensure that important decisions are made by the governing legislative body, which is the political body most accountable to the people." (Respondent's Brief at 13). In support of this proposition, the District cites a single source: the ***dissenting*** opinion in *Menorah Medical Center v. Health and Educational Facilities Authority*, 584 S.W.2d 73 (Mo. 1979) (Donnelly, J., dissenting). The ***majority*** opinion in *Menorah*, cited by the Plaintiffs, holds just the opposite: "The liberalizing trend in interpreting statutes which are faced with nondelegation challenges has been recognized and adopted by Missouri courts." 584 S.W.2d at 84. The District simply ignores the majority opinion in *Menorah* and the four other decisions cited by Plaintiffs in which the Missouri Supreme Court has rejected non-delegation challenges to statutes. *Murray v. Mo. Highway and Transp. Comm'n*, 37 S.W.3d 228 (Mo. 2001); *ABC Sec. Serv., Inc. v. Miller*, 514 S.W.2d 521 (Mo. 1974); *Milgram Food Stores, Inc. v. Ketchum*, 384 S.W.2d 510 (Mo. 1964), *cert. dismissed*, 382 U.S. 801 (1965); *Bd. of Pub. Bldg. v. Crowe*, 363 S.W.2d 598 (Mo. 1962).

C. The District's reliance on the number of times *Clouse* has been followed is misplaced, when this Court did not critically reexamine *Clouse* in those cases.

The only other ***legal*** argument the District makes for reaffirming *Clouse* is that this Court has "revisited *Clouse* in virtually every decade since it was decided and on each occasion has refused to change its ruling." (Respondent's Brief at 22). However, this Court was not asked to reexamine *Clouse* in these cases. They merely required the application of *Clouse* to different facts. *Glidewell v. Hughey*, 314 S.W.2d 749, 756 (Mo. 1958) (public utilities board too enmeshed with city operations to be considered a proprietary entity exempt from *Clouse's* prohibition against public sector bargaining); *State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35, 41 (Mo. 1969) (Public Sector Labor Law "does no violence to *Clouse*," because legislative body may "adopt, modify or reject outright the results of the discussions"); *Curators of Univ. of Missouri v. Public Service Employees Local No. 45*, 520 S.W.2d 54, 57-58 (Mo. 1975) (Public Sector Labor Law does not unconstitutionally infringe on the sovereign right of the board of curators to govern its affairs); *Sumpter*, 645 S.W.2d at 361-364 (under *Clouse*, governing body may not bind itself to follow an agreement adopted pursuant to the Public Sector Labor Law); *Akin v. Director of Revenue*, 934 S.W.2d 295, 299 (Mo. 1996) (under *Clouse,* legislature could not delegate to voters the power to enact or repeal a general tax for education).[2]

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[2] *Morrow v. City of Kansas City*, 788 S.W.2d 278, 280-281 (Mo. 1990), cited by the District, does not even cite *Clouse*, much less critically reexamine it.

The plaintiffs in *Thruston v. Jefferson City Sch. Dist.*, No. SC84624, *on remand*, 95 S.W.3d 131 (Mo. Ct. App. 2003), requested reexamination of *Clouse*, but the Court concluded that the case was moot and declined to reach the merits.[3] Plaintiffs in the

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[3] Amici Missouri State Teachers Association (MSTA) and Missouri Council of School Administrators (MCSA) argue that this case is not justiciable, because the ITEA and IESP Memoranda of Understanding (MOUs) have expired. This argument is meritless. First, issues not raised by a party may not be raised by amici. *Hemeyer v. KRCG-TV*, 6 S.W.3d 880, 882 (Mo. 1999). Second, Plaintiffs claim that the District's actions were void ab initio, and such claims are not mooted by intervening events. *R.E.J., Inc. v. City of Sikeston*, 142 S.W.3d 744 (Mo. 2004). Third, Plaintiffs seek an injunction requiring the District to comply with portions of the MOUs for one year following the judgment – a remedy which precludes a finding of mootness. *See Furniture Mfg. Corp. v. Joseph*, 900 S.W.2d 642, 649 (Mo. Ct. App. 1995) (rejecting mootness challenge to enforcement of one-year restrictive covenant after year passed, since relief could run prospectively). Fourth, Counts I and II present issues of public importance that fall within an exception to the mootness doctrine because they are "capable of repetition, yet evading review," in that the District could rescind other MOUs with Plaintiffs in the future. *In re 1983 Budget for Circuit Court*, 665 S.W.2d 943 (Mo. 1984). Finally, the expiration of the ITEA and IESP MOUs has no effect on Count IV, which asserts that Plaintiffs have a Constitutional right to bargain apart from any MOU.

present case, unlike the plaintiffs in the laundry list of cases cited by the District, urge this Court to reexamine and overrule *Clouse*. Although a decision of the Missouri Supreme Court "'should not be lightly overruled,'" especially where it has been applied for many years, "'where it appears that an opinion is clearly erroneous and manifestly wrong, the rule [of] *stare decisis* is never applied to prevent the repudiation of such a decision.'" *Southwestern Bell Yellow Pages, Inc. v. Director of Revenue*, 94 S.W.3d 388, 390-391 (Mo. 2002) (overruling a 36 year old Supreme Court decision where statutory language was plain and legislative intent supported plain language interpretation) (quoting *Novak v. Kansas City Transit, Inc.*, 365 S.W.2d 539, 546 (Mo. banc 1963) (overruling 45 year old case and recognizing wife's claim for loss of consortium of husband)).

POINT TWO: RECONSIDERATION OF *SUMPTER v. CITY OF MOBERLY*

A. The District confuses the holding of *Clouse* with dicta in *Clouse* that was erroneously relied on by *Sumpter*.

The District has no response to the Plaintiffs' distinction between the ***holding*** of *Clouse* and the unnecessary and erroneous ***dicta*** in *Clouse* that became the basis for *Sumpter*. (See pages 20-22 of Appellants' Brief). The holding of *Clouse* was that the statutes governing the City of Springfield precluded the union's wage scale and hiring hall proposals, and that Article I, §29 of the Missouri Constitution did not override the governing statutes because it was not intended to apply to public employees. 206 S.W.2d

at 542. The City of Springfield did not approve any collective bargaining agreement, so *Clouse* did not present the question whether the City could repudiate such an agreement. Nonetheless *Clouse* gratuitously announced that, "no legislature could bind itself or its successor to make or continue any legislative act." 206 S.W.2d at 545. The Court in *Sumpter* latched on to this dicta to justify its conclusion that the City of Moberly could rescind a legislatively-approved collective bargaining agreement during its two-year term.

B. The District mischaracterizes MO. REV. STAT. §105.500 and *State ex rel. Missey v. City of Cabool* as prohibiting public bodies from entering into binding contracts.

The District also errs in its contention that the General Assembly's enactment of the Public Sector Labor Law, MO. REV. STAT. §§105.500-105.530, and this Court's decision in *State ex rel Missey v. City of Cabool,* 441 S.W.2d 35 (Mo. 1969), "strengthened Missouri's ban on collective bargaining contracts. . . ." (Respondent's Brief at 17). Neither the statute nor the decision prohibits binding collective bargaining agreements either expressly or impliedly. The District leaps from the recognition in *Missey* and Section 105.520 that a "public employer is not required to agree," 441 S.W.2d at 41, to an unfounded conclusion that if a public employer does agree to the results of bargaining, the approved agreement may be unilaterally repudiated by the employer at any time and for any reason.

The discretion "not to agree" is simply not synonymous with the discretion to

repudiate a properly approved agreement. No public or private sector collective bargaining statute requires the employer to agree to any term or condition of employment. *See, e.g., NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 358 (1958) ("It must not be forgotten that the [National Labor Relations] Act requires bargaining, not agreement, for the obligation to bargain '. . . does not compel either party to agree to a proposal or require the making of a concession.' § 8 (d)."); *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970) (NLRA "is without power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement."); *Pac. Legal Found. v. Brown*, 29 Cal. 3d 168 (Cal. 1981) ("nothing in the act purports to compel the Governor to agree to conditions that he would feel obligated to 'blue pencil' or veto"). However, the public employer's discretion to reject a union's proposal does not mean that, once it has approved an agreement, it must also retain unfettered discretion to repudiate it. The District is correct that *Sumpter* made this illogical equation, but it is not one mandated by *Clouse, Missey,* or the Public Sector Labor Law.

C. The District asserts, but fails to explain why collective bargaining agreements are unenforceable when other types of contracts with public bodies are enforceable.

In Sections C-1 and 2 of its Brief, the District fails to adequately distinguish enforceable governmental contracts from Chapter 105 agreements, which *Sumpter* holds are unenforceable. The key distinction, according to the District, is that an enforceable

public contract is legislatively approved. The gaping flaw in this argument is that all Chapter 105 agreements must also be "be presented to the appropriate administrative, legislative or other governing body in the form of an ordinance, resolution, bill or other form required for adoption, modification or rejection." MO. REV. STAT. §105.520.

The District also fails to square its claim about the viability of the non-delegation doctrine with the clear enforceability of individual teacher contracts with school districts.[4] Instead, the District resorts to a misleading discussion of such contracts. It attempts to distinguish teacher contracts from collective bargaining agreements on the grounds that the contents of teacher contracts are wholly dictated by the Tenure Act. (Respondent's Brief at 31). The Act, however, only defines broad parameters for such contracts. *See,* MO. REV. STAT. §168.110; *Dial v. Lathrop R-II School District,* 871 S.W.2d 444, 450 (Mo. 1994). A district may not unilaterally modify a teacher's contractual salary during

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[4] For over one hundred years before enactment of the Teacher Tenure Act in 1969 and since, this Court has recognized the binding nature of teachers' contracts with public school districts. *See, e.g., Dial v. Lathrop R-II Sch. Dist.*, 871 S.W.2d 444, 450 (Mo. 1994) (school board may not unilaterally change terms of teacher's contract except in the limited circumstances defined in Section 168.110 of the Tenure Act); *Dye v. School Dist.*, 195 S.W.2d 874 (Mo. 1946) (school district liable for breach of teacher's contract due to its failure to re-employ him); *Wilson v. Board of Education*, 63 Mo. 137 (Mo. 1876) (teachers' contracts valid and binding).

the school year or arbitrarily repudiate such a contract in the manner that the District abrogated the ITEA and IESP MOUs. *See, Dial,* 871 S.W.2d at 450 ; *Long v. University City School District,* 777 S.W.2d 944 (Mo. Ct. App. 1989) (freezing a teacher's salary is impermissible); MO. REV. STAT. §§ 168.112, 168.114 (indefinite contracts may be terminated only by mutual consent or based upon limited reasons after affording teacher due process). If a District wants to unilaterally modify the salary or length of a school year, it must do so prior to May 15 for the following year. MO. REV. STAT. §168.110.

Most egregiously, the District incorrectly claims that the ITEA and IESP MOUs are different from binding governmental contracts because they are agreements "with unions." (Respondent's Brief at 31, 34). Yet, the District fails to acknowledge this Court's holding in *Peters v. Bd. of Educ.,* 506 S.W.2d 429 (Mo. 1974), ***enforcing*** a school district's contract with a ***teachers union***. Unable to explain why the agreements with unions in *Peters* and *Finley v. Lindbergh School District,*522 S.W.2d 299 (Mo. Ct. App. 1975), did not offend the delegation doctrine, the District simply ignores these pertinent decisions, although they were cited on page 27 of Appellants' Brief and by the Court of Appeals in this case. *Independence Nat'l Education Assoc. v. Independence School*

District, 162 S.W.3d 18, 20 (Mo. Ct. App. 2005).[5]

REPLY TO POLICY ARGUMENTS RAISED BY THE DISTRICT AND AMICI

The bulk of Respondent's Brief and the Briefs of its Amici consist of a manifesto against public sector collective bargaining in schools. Such arguments and the evidence that allegedly supports them have no place before this Court, for two reasons. First, the parties presented no expert or other evidence to the trial court about the effect of public sector collective bargaining on the educational system. "Generally, appellate courts will not consider evidence outside of the record on appeal." *8182 Maryland Assocs. v. Sheehan*, 14 S.W.3d 576, 587 (Mo. 2000); *Southwestern Bell Media, Inc. v. Ross*, 794 S.W.2d 706, 708 (Mo. Ct. App. E.D. 1990).

Second, such evidence is irrelevant to the questions of law presented by this case. The answers to these questions turn on Article I, Section 29's plain language and debates leading up to its enactment; the viability of the non-delegation doctrine; the intent of the Public Sector Labor Law; and basic principles of contract law, not on an ideological

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[5] The Court of Appeals chastised the District for failing to acknowledge the significance of *Peters* and *Finley*: "Despite Appellants' reliance upon these cases before the trial court and on appeal, the District has failed to even mention *Finley* or *Peters* in its brief on appeal, let alone attempt to differentiate those cases from the case at bar." 162 S.W.3d at 18.

debate about public sector collective bargaining.

If this Court decides to enter this policy debate, it should recognize that many researchers disagree with the claims of the District and its Amici. A number of studies have identified a positive correlation between public sector bargaining and a quality educational system. *See, e.g.,* ROBERT M. CARINI, *Teacher Unions and Student Achievement, in* SCHOOL REFORM PROPOSALS: THE RESEARCH EVIDENCE (Alex Molnar, ed., Information Age Publishing, 2002); M. KLEINER & D. PETREE, UNIONISM AND LICENSING OF PUBLIC SCHOOL TEACHERS: IMPACT ON WAGES AND EDUCATIONAL OUTPUT, University of Chicago Press (1988); L. Argys & D. Rees, *Unionization and School Productivity: A Reexamination*, 14 RES. IN LAB. ECON. 49-86 (1995); R. Eberts & J. Stone, *Teacher Unions and the Productivity of Public Schools*, 40 INDUS. & LAB. REL. REV. 354-363 (1987); P. Grimes & C. Register, *Teachers' Unions and Student Achievement in High School Economics*, 21 J. ECON. EDUC. 297-306 (1990); P. Grimes & C. Register, *Teacher Unions and Black Students' Scores on College Entrance Exams*, 30 INDUS. REL. 492-500 (1991); M. Milkman, *Teachers' Unions, Productivity, and Minority Student Achievement*, 18 J. LAB. RES. 137-150 (1997); F. Nelson & J. Gould, *Teachers' Unions and Excellence in Education: Comment*, 9 J. LAB. RES. 379-387 (1988); L. Steelman, B. Powell, & R. Carini, *Do Teacher Unions Hinder Educational Performance? Lessons Learned from State SAT and ACT Scores*, 70 HARV. EDUC. REV. 437-466 (2000).

The District's specific claim that public sector bargaining would impair the ability

of Missouri schools to comply with the No Child Left Behind Act, 20 U.S.C. §6301 (2001), lacks any support. (*See* Respondent's Brief at 12-13). A comparison of fourth grade reading scores from the Nation's Report Card[6] in October, 2005 with a state-by-state summary of teacher collective bargaining laws[7] reveals that of the 31 states whose students scored above the national average, 24 of them (or 77 percent) are bargaining states, and 7 (or 23 percent) are non-bargaining states. *Compare* National Assessment of Educational Progress, *State Comparisons: Average Reading Scale Score, Grade 4 Public Schools* (2005), *available at* http://www.nces.ed.gov/nationsreportcard/nde/statecomp/ (Supplemental Appendix

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[6] The National Assessment of Educational Progress (NAEP), also known as "the Nation's Report Card," evaluates students' performance in different subject areas. *See* http://nces.ed.gov/nationsreportcard/about/ (Supplemental Appendix hereto, at A-2 to A-4). The U.S. Department of Education is responsible for carrying out the NAEP project. *Id.*

[7] The summary of state collective bargaining laws was prepared by the Education Commission of the States (ECS), which is the operating arm of the interstate Compact for Education established in 1967. The ECS website "features the nation's only comprehensive database of state education policy enactments, searchable by state, by year and by policy issue...." *See* http://www.ecs.org/html/aboutECS/ECShistory.htm (Supp. App. at A-9 to A-14).

hereto, at A-5 to A-6) (hereinafter "Supp. App. at ___") *with* Education Commission of the States, *State Collective Bargaining Policies for Teachers* (2002), *available at* http://www.ecs.org/html/aboutECS/ECShistory.htm (Supp. App. at A-15 to A-35). Of the 19 states scoring below the national average on fourth grade reading scores, 9 (or 47 percent) were bargaining states and 10 (or 53 percent) were non-bargaining states. *Id.* The results are almost identical for fourth grade math scores. *Compare* National Assessment of Educational Progress, *State Comparisons: Average Mathematics Scale Score, Grade 4 Public Schools* (2005), *available at* http://www.nces.ed.gov/nationsreportcard/nde/statecomp/ (Supp. App. at A-7 to A-8) *with State Collective Bargaining Policies for Teachers* (Supp. App. at A-15 to A-35).

The Amicus Brief of MSTA/MCSA makes the additional argument that a reversal of *Clouse* would open the floodgates to strikes.[8] (MSTA/MCSA Brief at 16-17). This scare tactic is not only irrelevant, but baseless. Recognition of a Constitutional right to engage in collective bargaining would not require overruling the long-standing common law prohibition against public employee strikes that was in place at the time Article I, Section 29 of the Missouri Constitution was adopted. Even among the 33 states that have enacted public sector bargaining laws, 24 prohibit strikes. *State Collective Bargaining*

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[8] Of course, unlawful work stoppages can occur even in the absence of a right to bargain collectively. *See St. Louis Teachers Ass'n*, 544 S.W.2d 573; *Kansas City Firefighters Local No. 42*, 672 S.W.2d 99.

Policies for Teachers (Supp. App. at A-15 to A-35). Missouri's General Assembly could define the precise contours of public employees' Constitutional right to bargain collectively. *See Dade County Classroom Teachers' Ass'n v. The Legislature of the State of Florida*, 269 So.2d 684, 686-88 (Fla. 1972) (directing legislature to develop guidelines for enforcing the provision of the Florida Constitution guaranteeing employees the right to bargain collectively).

CONCLUSION

Clouse and *Sumpter* should be overruled based on the plain language of Article I, Section 29, the debates preceding it, the Courts' repudiation of strict non-delegation principles, the enactment of the Missouri Public Sector Labor Law, and ordinary common law rules governing the enforceability of contracts. The District's responses to these legal arguments are without merit, and their polemic against public sector collective bargaining is both irrelevant and unfounded.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned certifies that:

(1) this brief contains the information required by Rule 55.03;

(2) this brief complies with the limitations contained in Rule 84.06(b);

(3) there are 5,552 words in this brief;

(4) the floppy disk containing a copy of this brief filed contemporaneously herewith has been scanned for viruses and is virus free.

Loretta K. Haggard

Loretta K. Haggard

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of December, 2006, two copies of the foregoing were sent by overnight mail to each of the following attorneys for Defendant: Duane Martin, Doster, Mickes, James & Ullom, L.L.C., 4600 Madison, Suite 711, Kansas City, MO 64112, and Thomas A. Mickes, Doster, Mickes, James & Ullom, L.L.C, 17107 Chesterfield Airport Rd., Ste 320, Chesterfield, MO 63005.

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