SUPREME COURT, STATE OF COLORADO

Case No. 90 SC 568

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BRIEF OF AMICUS CURIAE COLORADO MUNICIPAL LEAGUE, COLORADO COUNTIES, INC., SPECIAL DISTRICTS ASSOCIATION OF COLORADO, COLORADO ASSOCIATION OF SCHOOL BOARDS AND COLORADO ASSOCIATION OF SCHOOL EXECUTIVES IN SUPPORT OF PETITION FOR REHEARING

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MONTEZUMA-CORTEZ SCHOOL DISTRICT RE-1,

Petitioner/Cross-Respondent,

v.

MONTEZUMA-CORTEZ EDUCATION ASSOCIATION, SAN JUAN BASIN UNISERV, a Colorado corporation, COLORADO EDUCATION ASSOCIATION, a Colorado Corporation, ROSE M. MARTIN, ROBERTA J. KECK, JUDITH GONZALES, ROBERTA KEELER, KIM "SLIM" MCWILLIAMS, JOHN DAHM, JAMES V. LANG, and JAMES E.MILLS,

Respondents/Cross-Petitioners.

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On Certiorari to the Colorado Court of Appeals
Case No. 85-CA-1583

EN BANC JUDGMENT AFFIRMED IN PART, REVERSED IN PART AND CASE REMANDED FOR FURTHER PROCEEDINGS

JUSTICE MULLARKEY delivered the Opinion of the Court

CHIEF JUSTICE ROVIRA dissents, and JUSTICE LOHR joins the dissent.
JUSTICE ERICKSON dissents, and JUSTICE LOHR joins the dissent

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## INTRODUCTION

In a sweeping decision with staggering implications for all Coloradans, the majority has created a right to strike in Colorado for law enforcement officers, firefighters, emergency medical service personnel, water and sewage treatment plant operators, court personnel and all other classes of public employees, without limitation. In so doing, this Court creates law that the legislative branch of Colorado government has declined to enact. The majority accomplishes this by inferring from the seventy-seven year old Industrial Relations Act (codified at Article 1 of Title 8, 3B, C.R.S. (1986); hereafter the "Act") a right to strike that is in derogation of the common law and is not provided for in that statute. Amici respectfully submit that, absent clear statutory direction to the contrary, creation of a public employee's right to strike should remain the province of the General Assembly, where the appropriate extent and important policy consequences of this new right could be fully discussed. Amici urge this Court on rehearing to modify its opinion and decline to find a public employee's right to strike in the 1915 Act.

## AMICI PETITION

At common law public employee strikes are prohibited. See Anchorage Educ. Ass'n v. Anchorage Sch. Dist., 648 P.2d 993, 995-96 (Alaska 1982) (cataloguing decisions prohibiting public employees

from striking under the common law absent explicit statutory consent); Annotation, Labor Law: Right of Public Employees to Strike or Engage in Work Stoppage, 37 A.L.R. 3d 1147, 1156 (1971) (recognizing common-law rule denying public employees the right to strike). Thus, any statute said to create such a right is in derogation to the common law and must be strictly construed, according to well-established rules of statutory construction that have been embraced by this Court. See 3 Singer, Statutes and Statutory Construction, § 61.01 (5th ed. 1992); Pigford v. People, 197 Colo. 358, 593 P.2d 354 (1979); Board of County Commissioners of Pitkin County v. Pfeifer, 190 Colo. 275, 546 P.2d 946 (1976).

In finding for the first time in the seventy-seven year old Industrial Relations Act a public sector employees' right to strike, the majority abandons this rule of strict construction. The Act addressed a wide array of subjects relevant to public and private employers and employees in addition to providing the Director of the Division of Labor (the Director) with authority to investigate various types of labor disturbances (a "cooling off" period) before strikes and lockouts may occur. See 1915 Colo. Sess. Laws 562, 568-570.

The majority could have, and, Amici respectfully submit, should have narrowly construed the Act as imposing certain obligations on those employees who otherwise possess a right to strike. Instead, the majority discovers a right to strike for

public employees in the definitions of "employer" and "employee," which include public, as well as private entities, and the fact that the few sections of the Act that mention "strikes" use the terms "employer" and "employee."

The plain fact is that the Act does not create a right to strike for anyone; the Act merely provides that nothing therein shall be held to "restrain" an employee from going on strike once the jurisdiction of the Director is concluded, § 8-1-126, C.R.S.

The majority explains that the rule that statutes in derogation of the common law must be strictly construed:

> . . . cannot be invoked to defeat the plain and manifest language of the Industrial Relations Act. Needless to say, we cannot read out of existence an express definition under the guise of narrow construction. Slip Op. at 34.

Respectfully, "reading out of existence" the definitions in the Act is neither required nor suggested. These definitions of employer and employee make sense, in pari materia, considering the numerous aspects of the Act that apply equally to the public and private sector (such as child labor, employment of females and workplace safety, See: Colo. Sess. Laws [1915] Pgs. 568-70). What is of profound concern to Amici is the Court's inference of a public employees' right to strike from these definitions when such an inference is in derogation of common law and no such right to strike is created by the "plain and manifest language" of the Act.

Surely, if the General Assembly had wished to create a public employees' right to strike in the Act it would have explicitly so provided. Why would the legislature use language of regulation in the Act if its actual intention was to act in derogation of the common law and take the momentous step of creating for the first time a right to strike for public employees? Must such inartful drafting be imputed to our legislative branch?

A far more sensible interpretation would be to simply accept the Act as meaning what it says, and only what it says. The Act provides that before a strike may proceed certain prerogatives of the Director may be exercised. Rights to strike are not created in the Act; any such rights must find their source elsewhere in the law. Reading the Act in this way gives reasonable and meaningful effect to the words used by the General Assembly, while leaving to that body the important policy decision as to whether, and to what extent, public employees in Colorado should enjoy a right to strike.

Amici are greatly concerned by the breadth of the right to strike which the majority's opinion establishes for public employees. The majority's discovery of this right in the Act is accompanied by no limitations on its scope. All classes of public employees are given the right to strike by the Court's decision. Emergency medical service personnel, firefighters, police officers, sewer and drinking water infrastructure operators, jail keepers and

solid waste personnel, as well as school teachers now have equal right to strike pursuant to the majority's decision.

In his dissent, Chief Justice Rovira points out that no state in the union enacted legislation abolishing or amending the common law prohibition on public employees strikes until the 1970's (Rovira, C. J. dissenting, slip op. at 7,n.5). Justice Rovira's review of state legislation highlights the limitations, such as prohibitions on strikes by police, firefighters and paramedics, that legislatures have imposed when permitting public employee strikes. Id. at 8-11.

It is noteworthy that the General Assembly has declined on several occasions since 1915 to enact legislation that would create a right to strike for public employees. See SB 329 (1965); SB 134 (1967); HB 1154 (1973); HB 1699 (1975); HB 1703 (1975). Other legislation would have given public employees collective bargaining rights, but limited dispute resolution to mediation, conciliation or arbitration. See HB 136 (1959); HB 338 (1961). One bill would have enabled public employees to bargain collectively, subject to procedures for negotiation and bargaining established by the responsible governing body. See SB 267 (1963).

As indicated, much of this legislation was proposed in the Colorado General Assembly in the 1970's, when, as the Chief Justice noted, other state legislatures first acted to modify the common

law prohibition (Rovira, C. J. dissenting, slip op. at 7, n.5). Presumably, the General Assembly declined to enact this legislation because they believed that, for a variety of policy reasons, such a right should not be created in Colorado.

This Court's construction of the 1915 Act amounts to a finding that Colorado was the first state in the union (preceding other states by over five decades) to abolish the common law prohibition on public employees' strikes, that this derogation of the common law was done by implication rather than explicitly, and that the General Assembly intended this right to be available to all public employees, including those whose absence due to strike would endanger the public health, safety and welfare.

Amici urge this Court on rehearing to consider the alternative construction suggested above, that is, that the Act means simply what it says. The Act regulates, but does not create a right to strike for anyone. Creation of such a right would be in derogation of the common law. The General Assembly, should it decide to create for public employees in Colorado a right to strike, may do so. While it has in the past considered such legislation, it has thus far chosen not to enact this right. Amici urge this Court on rehearing to decline to infer a public employees right to strike in the 1915 Act.

Respectfully submitted this 20th day of November, 1992.

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**CERTIFICATE OF MAILING**

I hereby certify that a true and correct copy of the foregoing was mailed, first class postage prepaid, this 20th day of November, 1992 to:

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