IN THE SUPREME COURT OF IOWA

NO. 17-1841

AFSCME IOWA COUNCIL 61, Johnathan Good, Ryan De Vries, Terra Kinney, and Susan Baker

Appellants,

v.

STATE OF IOWA AND IOWA PUBLIC EMPLOYMENT RELATIONS BOARD

Appellees.

On Appeal from the Iowa District Court for Polk County

The Honorable Arthur E. Gamble, Judge

APPELLANTS' FINAL BRIEF (AMENDED)

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ROUTING STATEMENT

This case should be retained by the Supreme Court of Iowa as this case presents substantial constitutional questions and fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the Supreme Court. *See* Iowa R. App. P. 6.1101(2)(a)(d).

STATEMENT OF THE CASE

On July 12, 2017, AFSCME Iowa Council 61, Johnathan Good, Ryan De Vries, Terra Kinney, and Susan Baker filed their Petition in Polk County District Court for Injunctive Relief and Declaratory Judgment based on House File 291 ("H.F. 291"), which substantially amended Iowa Code Chapter 20 and ultimately eliminated and restricted the rights of some public employees while preserving such rights for other identically-situated public employees.

Plaintiffs/Appellants are individual employees of the state of Iowa, and their union, Council 61 of the American Federation of State, County and Municipal Employees ("AFSCME"). H.F. 291 violates Art. I, Section 6 of the Iowa Constitution ("Uniform Laws"), which provides

> Laws uniform. All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.

Further, because H.F. 291 has the effect of depriving all AFSCME-represented state public safety employees of the right to meaningful collective bargaining,

and no others, H.F. 291 violates Plaintiffs' freedom of association.

First, prior to H.F. 291's passage, Plaintiffs enjoyed broad collective bargaining rights granted to all of Iowa's public employees. House File 291's arbitrary scheme designates some employees as "Public Safety Employees -- a term narrowly defined by H.F. 291 and referred to herein as "PSEs" – and then confers the full range of bargaining privileges on bargaining units consisting of 30% of more PSEs ("Favored Units"), while depriving such right to all other bargaining units ("Disfavored Units"). Under H.F. 291 Disfavored Units are limited to bargaining over a single topic: "base wage." In the event of a bargaining impasse, a Favored Unit may present and receive any award from the neutral third party, but a Disfavored Unit may only present base wage proposals and may only be awarded the lessor of inflation or 3 percent. Code § 20.22.10.a. H.F. 291 therefore privileges a group of public safety employees and non-safety employees, while depriving identically-situated safety and non-safety employees of the same privilege, in violation of the Uniform Laws clause of the Iowa Constitution.

Second, with respect to employees of the State, H.F. 291 artfully, but capriciously, "red circles" AFSCME-represented bargaining units such that the only state-employed public safety employees deprived of collective bargaining rights are those associated with and represented by AFSCME. This violates the constitutional guarantee of freedom of association, as the

Legislature may not make distinctions based on favoritism nor may it pass laws that intentionally or incidentally infringe on citizens' choices made in the exercise of their fundamental right to freely associate.

Plaintiffs challenged H.F. 291 on these bases, Defendants State of Iowa and the Public Employment Relations Board answered, and the parties filed and respectively resisted cross motions for summary judgment. On October 30, 2017, Chief District Judge Arthur Gamble issued an order and decision ruling in favor of the Defendants and against Plaintiffs ("Ruling"). A Notice of Appeal was timely filed with the District Court on November 20, 2017.

STATEMENT OF THE FACTS

A. The Public Employees Relation Act Prior to House File 291

Nearly fifty years ago, and following a protracted period of labor unrest, a bipartisan effort to address public employee labor relations gained steam and a legislative commission to study the issue was convened to research and fact-find, advise and propose an Iowan system of public employee collective bargaining. Ultimately, in 1974, the Public Employment Relations Act ("PERA") was passed with broad bipartisan support. *Id.*

The system worked, and did so by establishing an orderly system under which public employees could associate into unions and elect their union to be their sole negotiations representative. Employees are grouped for this purpose into collective bargaining units by the state acting through the Public

Employee Relations Board (PERB). The PERA provided that disputes were to be resolved by neutral third parties, either the PERB or arbitrators, and imposed severe and punishing consequences on employees and unions that threatened or engaged in strikes or other disruptive activity.

Under PERA, all Iowa public employees were granted the privilege of negotiating with their employers over a broad array of topics important to their workplace lives, including "wages, hours, vacations, insurance, holidays, leaves of absence, shift differentials, overtime compensation, supplemental pay, seniority, transfer procedures, job classifications, health and safety matters, evaluation procedures, procedures for staff reduction, in-service training and other matters mutually agreed upon." *See* Iowa Code § 20.9 (1975). Both the employees' representative and the employer were duty-bound to meet and confer over each of these subjects at the request of the other. When agreement could not be reached, the PERA provided for appointment of a neutral third-party to resolve the disagreement. *Id*. §§ 20.19-22; 20.22.10.a.

Importantly, PERA outlawed public employee strikes and other concerted disruptions or work stoppages and imposed a process for meting harsh and long-lasting penalties on employees and unions that violate the prohibition. The penalties include judicial injunctions to restrain any actual or threatened strikes, imprisonment and heavy fines, automatic

discharge and disbarment from public employment, and "decertification" of any union involved in a strike (meaning, the union may no longer represent employees). *Id*. § 20.12.3,5.

This system applied equally to all rank-and-file employees of the state, its cities, counties and districts, and proved successful in its goal "to promote harmonious and cooperative relationships." *Id*. § 20.1

Nonetheless, following vigorous debate, on February 9, 2017, H.F. 291 was passed and then signed by Governor Branstad on February 17, 2017. (Ruling, p. 3). The legislation virtually eliminated collective bargaining rights for most – but not all – Iowa public employees. Because of the manner by which the Legislature picked "winners and losers," as described by the District Court (Ruling, p. 10), Plaintiffs charged that H.F. 291 violates the Uniform Laws guarantee of the Iowa Constitution, which explicitly forbids the legislature from granting privileges to some members of a class. More narrowly, Plaintiffs also charged that H.F. 291 violates AFSCME members' right to freely associate, as it was crafted to ensure that all state employed AFSCME members are deprived of the privilege of meaningful collective bargaining.

B. House File 291's Amendments to PERA

House File 291 divides employees into two classes: "Public Safety Employees" – an arbitrary definition referred to herein as "PSEs" as distinct

from public safety employees generally -- and all others. It then confers preferential treatment on employees who have been placed in bargaining units comprised of at least 30% PSEs ("Favored Units").

An employee is not a PSE as a result of her duties, attributes or functions, nor whether she is essential to the public's safety. Rather, PSEs are designated through a seemingly-random list of classifications that consists of: sheriff's deputies, city or township marshals or police officers, peace-officer members of the division of state patrol, narcotics enforcement, state fire marshal, or criminal investigation, including gaming enforcement officers; conservation officers or park rangers; city or township firefighters; department of transportation peace officers. Iowa Code § 20.3(10A)(2017); App. 108.

These selected classifications do not correspond with any objective measures or categorization of public employees under Iowa law, as the list leaves out many peace officers, firefighters and public safety personnel recognized as such under state law. For example, university police, who "have the same powers, duties, privileges, and immunities as conferred on regular peace officers," Iowa Code § 262.13, are not designated as PSEs. This is despite the fact that they are classified as "law enforcement officers" pursuant to Iowa Code § 80B, are trained and certified by the Iowa Law Enforcement Academy (ILEA), and engage in law enforcement, crime prevention, and emergency response alongside other city police under "Section 28E" mutual

assistance agreements. *See* Iowa Attorney General Opinion No. 70-4-28 (opining that the term "law enforcement officer" includes "college and university security police"); App. 202.

Also excluded from the PSE designation are probation/parole officers and Fraud Bureau investigation officers, who are ILEA-certified law enforcement officials with general law enforcement responsibility, work in unpredictable environments, have broad arrest powers and the obligation to respond to emergencies. App. 209, 221.

With respect to fire protection classifications, while H.F. 291 designates many firefighters as PSEs, it inexplicably excludes airport firefighters, who work alongside PSE-designated firefighters and have general firefighting responsibility. App. 213.

In contrast, a number of the classifications included in H.F. 291 as PSEs are less integral to public safety as they have limited duties and functions, including park rangers, gaming enforcement officers, Fire Marshall officers, and Department of Transportation (DOT) motor vehicle officers who are empowered only to enforce commercial automotive laws and lack authority to issue traffic citations.

Also, no corrections officers, jailers, probation officers and emergency medical service providers are designated as PSEs, even though all of those employees work in "protection occupations," *see* Iowa Code § 97B.49B.1.e, and are integral to the public's safety.

To add to H.F. 291's arbitrary doling of privileges, an employee's PSE status is not determinative of whether he receives collective bargaining privileges. Only collective bargaining units comprised of at least 30% PSEs, *i.e.*, Favored Units, may bargain over a broad range of topics, whereas employees assigned to units with fewer than thirty percent PSEs, *i.e.* Disfavored Units, have no such rights.

While safety and non-safety employees in Favored Units are granted the right to bargain over the broad array of subjects listed above, the statute also permits them to bargain over any other matters "mutually agreed upon," *i.e.*, permissive subjects. But employees in Disfavored Units are specifically prohibited from bargaining over certain subjects including "insurance, leaves of absence for political activities, supplemental pay, transfer procedures, evaluation procedures, procedures for staff reduction, and subcontracting public services." Code § 20.9.

Peace officers employed by the State of Iowa and its subdivisions who are defined as PSEs, such as Plaintiff Terra Kinney, are deprived of greater rights because the state has placed them in a unit with non-PSE members.

App. 278. Likewise, many state non-safety employees are given bargaining rights whereas others are not like plaintiff Susan Baker) as a result of their placement in a Favored or Disfavored Unit. *Id*. P. 20.

This is also true for local police officers, deputy sheriffs and firefighters serving a number of Iowa communities, such as Humboldt County and the cities of Gutenberg and Decorah. Because of H.F. 291's arbitrary scheme these first responders are denied collective bargaining privileges. App. 623-624. Simply put, the highly arbitrary designation of who is, and who is not a PSE, combined with the 30% PSE Favored Unit threshold, results in a random application and arbitrary results, granting privileges to some identically-situated personnel while depriving others.

C. The Legislature's Stated Purpose For Preferencing "PSEs" and Those Associated With Them in Favored Units

In order to evaluate whether the law complies with the Uniform Laws clause and its prohibition on granting privileges, it is necessary to ask why the Legislature enacted a law with such arbitrary application. The bill itself does not contain policy or related findings, however the legislative debate makes clear the ostensible purpose of its discriminatory treatment.

In a pending case raising similar but not identical claims, *ISEA v. Iowa*, the parties submitted a full transcript of the legislative debate. *See ISEA v. State of Iowa*, Supreme Court No. 17-1834, Polk County Case No.

CVCV053887 (currently pending). As the transcript indicates, all eighteen legislators who addressed H.F. 291's unequal treatment understood their purpose was to confer greater privileges on employees that, in their view, faced elevated health and safety hazards and thereby owed greater consideration with respect to health and safety protections.[1] This goal was attributed to the Legislature by Defendants before the District Court.

Senators who voted for conferring privileges on certain PSEs were explicit, noting that although many workers face elevated risks, such risks are not "comparable" to the risks faced by "public safety" employees such as firefighters. *Id.* and that police and firefighters are unique as they "put their life on the line on an hourly basis." *Id.* Likewise, as to police and firefighters, a senator stated it "comes down to that uncontrolled environment and the training for it" and they should "have more flexibility in determining what is … going to impact, for instance, their healthcare, or the dangerous situation." Other senators wished to preference the "brave men and women who do put their selves in line, who have been trained, who are willing to make those sacrifices…." *Id*. House members expressed identical reasoning, stating that "dangerous, unexpected, unpredictable, uncertain environments" justified privileging some employees under H.F. 291. *Id.*

[1] Although not directly in the record, incorporated herein are legislative facts on which the Court should take judicial notice. The entire legislative record is also incorporated in the record of the *ISEA* case which is pending before the Iowa Supreme Court.

In short, every legislator who spoke for and voted in favor of privileging "safety employees" did so only in the context of the perceived health and safety risks associated with safety professions, and no other rationale was discussed. These are admirable goals, and Plaintiffs share them, but all safety employees who face such adverse risks should be accorded equal consideration.

D. Iowa's Dedicated Safety, Protective and Security Employees

Under Iowa law, public safety employees are employees who provide critical services necessary to protect and secure the public's health and safety. This includes peace officers and security guards, firefighters, jailers, corrections and probation officers, public healthcare providers, EMS workers, as discussed below. But despite the Legislature's professed concern, H.F. 291 excludes most of these professions from its definition of PSE, including instead only a random assembly of some, but not all, peace officers and firefighters (and not necessarily those that face the highest risks).

Perplexingly, several classifications of peace officers designated as PSEs have very narrow and less critical law enforcement duties. These include, gaming enforcement officers, DOT motor vehicle enforcement officers, park rangers and fire marshal officers. On the other hand, like plaintiff Ryan De Vries, a large number of peace officers excluded as PSEs have broad law enforcement authority and are integral to maintaining public

safety, and put their life on the line daily, such as university police, probation and parole officers, department of corrections officers, and airport firefighters. (*Compare* HF 291, § 1, App. 271-81, 301-309, 316-18; *with* App. 202, 209, 221, 280, 283-295, 325).

It is notable that H.F. 291's arbitrary treatment is contrary to Iowa's many laws that address the unique circumstances safety employees face for purposes of training, occupational health and safety, due process, and medical and retirement benefits.

For example, all Iowa peace officers undergo training and certification through the legislatively-mandated Iowa Law Enforcement Academy (ILEA) which is "imperative to upgrading law enforcement to professional status." *See* Iowa Code § 80B; *see also* § 80B.3(3); Iowa Attorney General Opinion No. 70-4-28 ("law enforcement officers" includes "Parole Board Agents; College and University Security Police; and Constables"). Yet H.F. 291 excludes many of these ILEA-certified peace officers who have broad law enforcement and arrest responsibilities, either by excluding them from the PSE definition or because they are placed in Disfavored Units.

H.F. 291's exclusion of university (Regents) police is truly perplexing, as these officers are full-fledged "law enforcement officers" under Iowa Code section 80B, and have the responsibility of policing some of Iowa's largest population centers. See Iowa Code section 262.13 (university police "shall

have the same powers, duties, privileges, and immunities as conferred on regular peace officers.") Indeed, university police work with local police forces -- whose peace officer members are defined as PSEs -- and must respond to emergencies both on and off campus as a result of inter-agency "28E Agreements" with local departments. (App. 202, 209, 248). University police are in every way public safety employees, yet they are excluded from the PSE definition. Their exclusion makes even less sense in light of the dangerous environment in which they work, which gave rise to a decision to arm them years ago. As noted in the report to the Regents recommending arming university police:

> "The campuses of the Regents' institutions are larger than many of Iowa's communities. They include the work place for many faculty and staff, the learning environment for thousands of students on each campus, the residential living spaces for thousands as well as visitors and thousands of spectators at events. *Today's university communities experience all of the problems that exist in society at large. Firearms are present on all of the campuses daily as well as when city, county, state and private law enforcement and security services are on the campuses conducting their day-to-day responsibilities.*"

(emphasis added, App. 361-439). As established to the District Court, university police conduct operations off campus, including traffic stops and searches, and are regularly called upon to assist neighboring police departments in situations involving armed offenders. (App. 376). Neighboring sheriffs and police departments submitted letters supporting the arming of university police, including the Iowa City Chief of Police who

stated:

> "If one of my officers is attacked by an armed suspect and the closest police officer that can render assistance is a UIPD officer I want that officer armed. *Our officers need to be able to back each other up routinely for the safety of your officers and mine.* The fact that UI officers are making proactive traffic stops, answering alarm calls along with every other routine police duty and gamble that the violator doesn't have a firearm sends shivers down my spine."

(App. 379-80; App. 381-94).

Other examples of ILEA-certified peace officers excluded from PSE status include probation/parole officers and Fraud Bureau investigation officers, who have broad law enforcement functions and work in and serve the community under elevated risk. *See* HF 291, § 1; App. 209, 221, 21-22, 296-300, 265-73. Yet H.F. 291 designates Fire Marshall officers, whose duties are limited to fire code and fire-related laws, limited-responsibility gaming enforcement officers, park rangers who work solely in unpopulated areas, and DOT motor vehicle officers who also have limited law enforcement responsibility, are included in the PSE definition.

With respect to fire protection, H.F. 291 also narrowly defines the firefighters included as PSEs. For example, Airport Firefighters are excluded even though they perform dangerous firefighting functions and are often called to respond to emergencies alongside firefighters who are included as PSEs. (App. 213, 321-324).

Generally Iowa has recognized that a broader array of "public safety employees" should receive elevated consideration than is conveyed under H.F. 291, as the examples of pensions, death benefits and the Iowa Peace Officer, Public Safety, and Emergency Personnel Bill of Rights, each indicate.

With respect to pensions, two Iowa statutes create pension systems for public safety occupations. The Peace Officers' Accident, Disability and Retirement System (PORS) covers peace officers employed by the state's Department of Public Safety. Although HF 291's definition of PSE includes *some* – but not all -- officers enrolled in PORS, *compare* HF 291, § 1, *with* Iowa Code § 97A.3, H.F. 291 includes as PSEs some – but not all - peace officers enrolled in the protective services pension plan under Iowa Public Employees Retirement System (IPERS). Because of the greater risk of occupational injury or death, like PORS, IPERS provides a higher benefit at an earlier age to "protection occupations," which includes peace officers employed by the Departments of Natural Resources and Transportation, correctional officers, police and fire fighters, probation officers, county jailers, and emergency medical service providers, s*ee* Iowa Code §§ 97B.1A(22), 97B.49B(3); App. 187-231). Nevertheless H.F. 291 defines only a select few of those protective occupations as PSEs, and does so without regard to the extent of their law enforcement or safety-related duties.

Likewise, the federal government's Public Safety Officers' Benefits

Program, in which the state of Iowa is enrolled covers many Iowa safety employees excluded as PSEs. *See* 42 U.S.C. §§ 3796b (6) and (9) (2016) ("law enforcement officer" includes "individual[s] involved in crime and juvenile delinquency control or reduction, or enforcement of the criminal laws (including juvenile delinquency), including, but not limited to, police, corrections, probation, parole, and judicial officers.")

Further, the provisions of Iowa's Peace Officer, Public Safety, and Emergency Personnel Bill of Rights covers many public safety employees excluded from HF 291's definition of PSE, as it protects any "certified law enforcement officer, fire fighter, emergency medical technician, corrections officer, detention officer, jailer, probation or parole officer, communications officer, or any other law enforcement officer certified by the Iowa law." Iowa Code § 80F.1.1(e).

Clearly, the natural course in Iowa (and federal law) is to view all members of these occupations as equally deserving of additional considerations in light of the dangers and significant risks they face every day in serving and protecting our communities and responding in the first instance to emergencies.

E. The Impact of HF 291 on AFSCME Members

All state-employed bargaining units represented by AFSCME were rendered Disfavored Units by H.F. 291. As noted, it is the state, acting through

PERB, that establishes unit composition, which must follow an "efficient administration of government" mandate under which PERB is to define units in reference to employers' managerial efficiency and employees' common interests. *See Anthon-Oto Community School District v. PERB*, 404 N.W.2d 140, 143 (Iowa 2012).

With respect to AFSCME's state-employed bargaining units, PERB made the rational decision that the state's safety employees share a sufficient interest so as to place them in a statewide unit populated exclusively by safety and protective personnel, see *In matter of State of Iowa and AFSCME Council 61*, PERB Case Nos. 4051, 3507, 942, & 294 (attached to Plaintiffs' Memorandum in Resistance). These employees elected Plaintiff AFSCME to represent them. This statewide "Security Unit" includes various safety and protective occupations PERB has determined should be grouped together due to their protective and safety duties and to ensure maximum managerial efficiency. House File 291's disfavored treatment of the safety employees in this unit undermines each legislative purpose offered by Defendants or considered by the District Court.

Equally problematic – and unconstitutional – is how H.F. 291 confers Favored Unit status to units comprised of 30% PSEs. For example, the AFSCME-represented police officers that serve the City of Guttenberg; and the Deputy Sheriffs of Humboldt County; and the Police *and* fire departments

of the City of Decorah, to name a few, are all Disfavored Units under H.F. 291, due to the 30% PSE threshold requirement. *See ISEA v. State of Iowa*, Supreme Court No. 17-1834, Polk County Case No. CVCV053887 (currently pending).[2] That is irrational under any legislative purpose, its unequal treatment of identically-situated public employees. Indeed, these officers and firefighters serve small communities over a large rural area that are far from other municipal or state public safety personnel. With respect to Guttenberg, the closest other safety personnel are across state lines. As for Humboldt County, the county sheriffs and Humboldt City police officers serve side-by-side and share equipment under a joint facilities agreement.[3] Clearly that disparate treatment is patently discriminatory, and lacks any conceivable rational purpose.

F. The District Court's Order and Ruling Below

The District Court held that H.F. 291 discriminates among similarly-situated employees within a class, but accepted its discriminatory treatment under a policy goal of "labor peace." Although the District Court described the three-step analysis this Court has adapted from federal "Equal Protection"

[2] The pending case of *ISEA v. State of Iowa* currently before the Iowa Supreme Court contains the Andrew Williams declaration in its Appendix. The majority of the appendix in the *ISEA* case is identical to the appendix before the District Court in the matter at hand.

[3] http://www.cityofhumboldt.org/departments/police_department/index.php

jurisprudence under the 14th Amendment, the District Court failed to meaningfully apply the standard when it neglected to engage in a fact-based evaluation of whether all of H.F. 291's particular discriminatory effects are rational in light of the Legislature's purpose.

Further, the District Court failed to apprehend the law applicable to this case, and particularly as to Plaintiffs' claim founded on their freedom of association. This is evidenced by a string of errors beginning with the startling holding that "[p]ublic employees have no constitutionally protected right to unionize…", an incorrect statement of law that impacts the level of scrutiny to be applied to that claim. App. 115. As detailed below, public employees have a constitutionally-protected right to form and join unions without governmental interference under Iowa's constitution as informed by First Amendment jurisprudence, and the legislature may not infringe on that right by disfavoring certain employees for their choice to be associated with a particular union.

Further, although the District Court correctly stated that because the state need not provide for collective bargaining it may rescind that provision *in toto* or in part, that is not the dispositive question presented by a Uniform Laws challenge, which prohibits granting privileges to some but not all members of a class. The District Court failed to apply the Uniform Laws clause's explicit limit on legislative authority, but instead allowed that "the legislature has created classifications of winners and losers among similarly situated unionized

individuals who are employed by public employers." App. 115.

Although the District Court conceded that H.F. 291 was both over- and under-inclusive, it accepted that frailty under a "labor peace" rationale, while saying nothing of the health and safety justification that actually motivated the Legislature. The District Court reasoned, "it is in the public interest that larger collective bargaining units of public safety employees retain greater bargaining rights" as "the legislature could rationally establish PSEs as a priority to reduce the risk of dissatisfaction and instability of larger units of employees who protect the public." App. 115. But H.F. 291 states nothing about bargaining unit size or the actual number of public safety employees who happen to fall into Favored Units. With respect to University Police, which was the only factual example the District Court considered, the District Court offered only surmise regarding the relative likelihood of AFSCME-represented safety personnel refusing to cross a picket line. App. 120. Of course, that concern would apply to any of the several unions that represent both safety and non-safety employees, and there is no factual basis for the suggestion that AFSCME-represented officers are more or less likely to engage in such unlawful conduct. Indeed, as the District Court notes, there has never been a police strike in Iowa. App. 118.

In its final analysis, the District Court concluded H.F. 291 survives scrutiny because "a reasonable legislature could rationally conclude that a

reliable corps of public safety employees is a priority in order to protect the public in the event of a terrorist attack, a natural disaster, or a public health emergency." App. 120. However, the District Court failed to analyze how H.F. 291's discriminatory treatment furthers that laudable goal, choosing to be blind to the misalignment between that goal and how the bill actually treats identically-situated safety and non-safety personnel. Indeed, it makes no sense that favored status is denied to many first responders in public health emergencies or natural disasters, such as EMTs, public nurses, and various firefighters and peace officers, who would be on the front lines in the event of any of these catastrophic circumstances.

ARGUMENT

I. HOUSE FILE 291 VIOLATES ARTICLE I, SECTION 6 OF THE IOWA CONSTITUTION.

Preservation of Error

Plaintiffs raised this issue in their motion for summary judgment, *see* Plf. Motion for Summ. Jdg. and their briefs in support of that motion, *see* Plf. Mem. In Support of Summ. Jdg., Plf. Reply to Def. Resistance to Plf. Motion for Summ. Jdg. The district court ruled on the issue in its Ruling on Motions for Summary Judgment.

Scope and Standard of Review

The Court's review is de novo, as this appeal involves the resolution of a constitutional issue. *See Bierkamp v. Rogers*, 293 N.W.2d 577, 580 (Iowa

1980). In reviewing a grant of summary judgment, the Court "view[s] the entire record in the light most favorable to the nonmoving party, making every legitimate inference that the evidence in the record will support in favor of the nonmoving party." *Bass v. J.C. Penney Co.*, 880 N.W.2d 751, 755 (Iowa 2016).

A. The Iowa Constitution's Uniform Laws Clause, and Its Application

Section 6 of the Iowa Constitution guarantees Iowans that laws "shall have a uniform operation" and the General Assembly "shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." Section 6 was adopted in the 1857 Constitution which "reflected a healthy skepticism of legislative power" and "tended to limit the power of the legislature while it protected the independence of the court." *Godfrey v. State of Iowa*, 898 N.W.2d 844, 864-65 (Iowa 2017) (noting the judiciary's "responsibility" is "to ensure that basic rights and liberties [are] immune from majoritarian impulses.")

Plaintiffs ask the Court whether the guarantee of the Uniform Laws clause has meaning, or is merely surplusage.

Unlike the principle of federalism which animates the federal judiciary's approach and requires exceedingly deferential treatment of state legislative action, Iowa courts are charged with enforcing constitutional

guarantees without such deference and with a "healthy" dose of "skepticism", in light of the 1857 Constitution's purpose. *Godfrey*, 898 N.W. 2d at 865 ; *King v. State*, 818 N.W.2d at 22, citing *Luse v. Wray*, 254 N.W.2d 324, 328 (Iowa 1977) (Court's duty applies "even when the claim pertains to an area where the legislative branch has been vested with considerable authority.").

For these reasons, the Court's vital role when evaluating a challenge under the Uniform Laws clause is to scrutinize precisely where the lines establishing a classifications are drawn, and evaluate whether its discriminatory impacts are required to fulfill the legislature's goal. *See*, *e.g.*, *Fed. Land Bank of Omaha v. Arnold*, 426 N.W.2d 153, 157-58 (Iowa 1988) (examining and finding unconstitutional legislative line drawn between those who were granted an extended redemption period for foreclosed property after a sheriff's sale and those who were not); *see also*, *Bierkamp v. Rogers*, 293 N.W.2d 577 (Iowa 1980), 582-85 (scrutinizing and finding unconstitutional the line drawn to establish which conveyance guests were subject to higher standard of care than others). It is in that effort where the District Court's ruling fell short.

In spite of the differences between the 14th Amendment and the Uniform Laws clause, when evaluating claims under the latter, this Court has adapted a standard devised by federal courts under the 14th Amendment. Recognizing the "more protective" sweep of the Uniform Laws clause, this Court has 'added

teeth' to the federal standard. *Varnum v. Brien*, 763 N.W.2d 862, 879 (Iowa 2009) (quoting *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7 (Iowa 2004)("*RACI*"); Iowa rational basis test "is not a toothless one.") Therefore, the Court applies the "rational basis" test "independently in a more rigorous fashion" than do the federal courts. *NextEra Energy Res., LLC*, 815 N.W.2d at 47.

In doing so, the Court has enunciated "a three-part framework" to guide its elevated review. *Residential & Agric. Advisory Comm., LLC v. Dyersville City Council*, 888 N.W.2d 24, 50 (Iowa 2016) ("RAAC").

First, the Court "must determine whether there was a valid, 'realistically conceivable' purpose that served a legitimate government interest." *Id*. (emph added).

Second, the court must "decide whether the identified reason has any basis in fact," *McQuistion v. City of Clinton*, 872 N.W.2d 817, 831 (Iowa 2015), with any offered rationale not accepted "at face value" but only after an examination "to determine whether it [i]s credible as opposed to specious.'" *LSCP, LLLP v. Kay-Decker*, 861 N.W.2d 846, 860 (Iowa 2015) (quoting *Qwest Corp. v. Iowa State Bd. of Tax Review*, 829 N.W.2d 550, 560 (Iowa 2013)). The term "specious" means "*superficially* fair, just or correct but *not so in reality*." *RACI*, 675 N.W.2d at 8, n. 3 (emphases added). Therefore, the Court must look past bromides and *apparent* reasonableness and instead

scrutinize assertions and consider facts and actual application of the aw, which the District Court failed to do.

Third, the Court evaluates "whether the relationship between the classification and the purpose for the classification is so weak that the classification must be viewed as arbitrary." *RAAC*, 888 N.W.2d at 50.

Because the Uniform Laws clause was responsive to legislative over-reach, this Court should not defer to unsupported legislative rationales nor shoulder the Legislature's duty by substituting its own surmised rationales for the purpose of upholding a discriminatory or preferential law. Instead, the Court must be satisfied that "*the Legislature*… reasonably believed that the means chosen would promote the purpose." *Varnum*, 763 N.W.2d at 883 (emphasis added). Indeed, in conducting its analysis, "[t]he purposes of the law must be referenced in order to meaningfully evaluate whether the law equally protects all people similarly situated with respect to those purposes." *Id*. Principles of democratic representative government require the people be informed of why laws have been enacted in their name, and laws should be evaluated in light of the purpose actually offered by the Legislature. Anything less is government by subterfuge.

This Court's Uniform Laws jurisprudence reflects a requirement that laws are to be evaluated with respect to the Legislature's stated purpose. *See, e.g., LSCP*, 861 N.W.2d at 860-61 (emphasizing that "the legislature expressly

identified the interests it sought to advance" and "explained its reasons" for the choices it made); *Qwest Corp.*, 829 N.W.2d at 551-52 (citing a detailed statement by the legislature of its findings and purposes); *id.* at 564 (describing "record … evidence" establishing the basis for the challenged distinction); *RAAC*, 888 N.W.2d at 51 (describing what "the council believed … based on facts presented to and considered by the council"); *Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444, 459 (Iowa 2013) (relying on the testimony of the city engineer explaining how the challenged action served the city's legitimate interests); *State v. Mitchell*, 757 N.W.2d 431, 439 (Iowa 2008) (concluding that the asserted reasons for the statute were "plausible *under this record*") (emphasis added).

An analysis of the actual legislative basis for conferring privileges or unequal treatment among a class is necessary because, as stated in *Varnum*, it is "impossible to pass judgment on the reasonableness of a legislative classification without taking into consideration, or identifying, the purpose of the law," *Varnum*, 763 N.W.2d at 883. The District Court erred by offering its own conjectures as to the rationales that might support H.F. 291.

Once a discriminatory law's legislative purpose is ascertained, the Court analyzes whether, as a factual matter, the purpose is factually aligned with its discriminatory impact. That is, if the discrimination is justified by the legislature's legitimate goal, and whether there is indeed a factual predicate.

Importantly, each discriminatory aspect of the legislation must be analyzed with respect to those who are favored and disfavored by the law. *Id*.

A clear indication that a law fails this test is whether, with respect to its purpose, the law is overinclusive or underinclusive in its discriminatory conferral of privileges. *Chicago & N.W. Ry*., 255 Iowa at 997, 125 N.W.2d at 214 ("[A] reasonable classification is one which includes all who are similarly situated, and none who are not."); *Dunahoo v. Huber*, 171 N.W. 123, 124 (1919) (classification made by legislature was unwarranted "where the evil to be remedied relates to members of one class quite as well as to another"); *Callaway v. City of Edmond*, 791 P.2d 104, 107–08 (Okla.Crim.App.1990) (finding ordinance prohibiting persons under eighteen years of age from entering any pool hall or similar establishment "sweeps too broadly" and "is not rationally related to the ultimate objective of regulating gambling": "Singling out poolhalls or other similar businesses from all other amusement establishments is an act of discrimination, not policy.").

Over-inclusiveness and under-inclusiveness are particularly pertinent here because the District Court conceded that H.F. 291 was both, but neglected to evaluate the extent of that problem because, in its view, the Legislature may pick "winners and losers." App. 115. In this way, the District Court neglected to determine how weak was the link between the H.F. 291's purpose and its discriminatory treatment. Indeed "merely favoring one class over another

(e.g., municipalities over private tortfeasors or riverboats over racetracks) is not in itself a justification for differential treatment. There has to be some independent ground for the different treatment." *Doe v. New London Cmty. Sch. Dist.*, 848 N.W.2d 347, 357 (Iowa 2014) (citing *RACI*, 675 N.W.2d at 13 (cite omitted). Just as in *RACI*, where "nothing in the record, nor is it a matter of common knowledge, that excursion boats are a superior economic development tool as compared to racetracks," here there is nothing to suggests that gaming enforcement officers, park rangers or commercial traffic enforcement officers, who have limited law enforcement duties, are more critical in times of public emergency than are campus police officers, airport firefighters, probation or corrections officers.

If a classification involves extreme overinclusion or underinclusion "in relation to any particular goal, it cannot [reasonably] be said to ... further that goal." *LSCP*, 861 N.W.2d at 861 (finding grandfathering new tax regime supported by Legislature's stated goal of "fairness."). Here the extreme over- and under-inclusion of H.F. 291's scheme, in addition to the weak link between any rational basis and how the law actually favors and disfavors identically-situated individuals, requires a finding that it violates of the Uniform Laws clause.

B. H.F. 291 Offends the Uniform Laws Clause and Fails "Rational Basis" Scrutiny

The uniformity clause ensures that "'[a]ll persons in like situations should stand equal before the law'" and "'[n]o favoritism should be tolerated.'" *See RACI II*, 675 N.W. at 7 (quoting *Chicago & N.W. Ry.*, 125 N.W. 2d at 217.) While a perfect fit between the Legislature's means and ends is not required, *Qwest Corp.*, 829 N.W.2d at 558, "'nothing opens the door to arbitrary action so effectively as to allow [] officials to pick and choose only a few to whom they will apply legislation… .'" *Mitchell*, 757 N.W.2d at 436. Yet the ruling below permits precisely that, as H.F. 291 discriminates among identically-situated public employees, designating some safety employees as PSEs but not others, and conferring bargaining privileges on some PSE and non-safety employees, but not others.

In analyzing the basis and rationale for this discriminatory treatment, the Court must "examine the legitimacy of the end to be achieved" and "scrutinize the means used to achieve that end." *LSCP*, 861 N.W.2d at 860 (quoting *Fed. Land Bank of Omaha*, 426 N.W.2d at 156.) The "end" in question is the legislative goal or policy the statute seeks to accomplish. As stated in *Varnum*, the laws must "treat alike all people who are similarly situated with respect to the *legitimate purpose of the law*." *Varnum*, 763 N.W.2d at 882; *RACI*, 675 N.W.2d at 8 (emphasis added).

None of the legislative purposes or goals expressed by the Legislature, by the Defendants, or surmised by the District Court are sufficient to justify

on a rational basis H.F. 291's discriminatory treatment of identically-situated person. The articulated purposes fall into two categories (1) health and safety concern for first responders, and (2) two distinct "labor peace" rationales, one offered by Defendants and another developed *sua sponte* by the District Court and adopted as H.F. 291's justifying rationale. Plaintiffs first analyze the Legislature's articulated health and safety concerns, and then proceed to discuss the two distinct "labor peace" rationales.

1. Health and Safety / Preferencing First Responders

Each legislator who spoke regarding H.F. 291's favoring of public safety employees offered only one justification: first responders face risks of unpredictable and unregulated nature and so should be afforded the privilege of meaningful collective bargaining. The District Court did not address that legislative purpose.

By its terms, H.F. 291 is not responsive to health and safety concerns. It provides that Favored Units, which may consist of as little as 30% PSEs, may bargain over seventeen specified subjects only one of which is "health and safety matters." Yet, H.F. 291 prohibits large swaths of public safety and other workers who face elevated occupational health risks from bargaining over that topic. For example, peace officers and firefighters in communities like the Cities of Guttenberg and Decorah, or Humboldt County, as well as university police are denied that privilege. *See ISEA v. State of Iowa*,

Supreme Court No. 17-1834, Polk County Case No. CVCV053887 (currently pending).

On the other hand, H.F. 291 permits Favored Units to negotiate over many topics having nothing to do with health and safety -- such as "leaves of absence for political activities," or "subcontracting public services," and many other seemingly random subjects. Therefore, it must be "viewed as arbitrary.'" *RAAC*, 888 N.W.2d at 50 (quoting *McQuistion*, 872 N.W.2d at 831) (in turn quoting *RACI*, 675 N.W.2d at 8).

To be sure, occupational safety and health issues, and the relative danger of work, can justify conferring privileges, as for example in the case of pensions. But the extension of the privilege cannot be extended to an isolated few or so broadly as to defy rationality. Rather, it must be extended on a basis that is rationally made, realistic, and predicated on fact. *See RACI*, 675 N.W.2d at 7-8. House File 291 fails rational review because it confers privileges on some employees but not others *without regard* to whether they *actually face* heightened safety risks, workplace injuries, or unpredictable work environments.

Undoubtedly, police officers and fire fighters face health and safety risks, and may be accorded privileges. But police and fire personnel placed in Favored Units do not face greater health and safety risk than those placed in

Disfavored Units. A police officer in the three-person police bargaining unit in LaPorte City has far more collective bargaining privileges than a police officer in Decorah's wall-to-wall unit, simply because of their unit placement, not because of their respective health and safety risks. Nor do park rangers, gaming enforcement officers, Fire Marshals officers, or motor vehicle enforcement officers face more risk than university policy, airport fire fighters, or municipal police and firefighters placed in Disfavored Units.

Many security and protective classifications excluded from the PSE definition face greater risk than even police and firefighters, as was established to the District Court. Because of this, the stated health and safety policy goal is not rationally related to how H.F. 291 confers preferential treatment on only some public employees but not others who face greater risks.

a. Corrections Officers

A comparison between police officers and corrections officers indicates that health and safety risk is elevated in corrections environments, rendering the exclusion of Corrections Officers irrational in light of the Legislature's health and safety justification. The U.S. Department of Justice analyzed many such studies, stating:

> While there are natural parallels between the work of correctional officers and police officers, in many ways the daily pressures faced by COs far exceed those experienced by police officers (Armstrong & Griffin, 2004; Lincoln, 2006). For instance, the threat of violence for

> police officers is periodic (e.g., during citizen encounters only; not while on routine vehicle patrol). For COs, the threat is constant during their work shift. COs, of course, are required to work inside a correctional institution while police are not. In many cases, COs may not be armed (Konda, 2012).

App. 238. Statistics confirm this. Corrections officers suffer exceedingly higher levels of stressors and higher rates of depression and Post-Traumatic Stress Disorder. App. 625-84. As compared to police, corrections officers' suicide rates are almost doubled (App. 638, 657), their divorce rates are much greater (App. 516-17), and their health and safety concerns greatly exceed both police and firefighters, as noted below. Nationwide, corrections officers suffer 33,000 inmate-on-staff assaults per year, or 90 assaults per day and 3.7 per hour. *See* U.S. Sourcebook of Criminal Justice Statistics, 31st Edition (2005).[4] Statistically, a corrections officer will be seriously assaulted at least twice in a twenty-year career, *Id.*, and Iowa's experience mirrors these statistics (App. 197). These grim outcomes are unsurprising given the dangers associated with corrections. App. 197. As a factual matter health and safety concerns are graver for corrections officers than for police officers and firefighters, and are exceeded only by attendants of psychiatric facilities, who are also excluded from H.F. 291's preferential treatment.

b. Regents/University Police

[4] Available here: https://www.ncjrs.gov/pdffiles1/Digitization/208756NCJRS.pdf

Iowa's university police forces perform the same job, have the same obligations, and work alongside police that H.F. 291 defines as PSEs. Further, their exclusion is not supported by any health and safety evidence. Indeed in 2016, sixty-one law enforcement officers were killed in the line of duty nationwide, of which two were university police officers. This is statistically significant indicating an elevated risk in light of the fact that nationwide there were only approximately 15,000 sworn campus police officers, compared with over 765,000 local and state sworn police officers. (App. 333-39, 440, 445-46). Since then, incidents of fatal shootings on university campuses have become sadly routine, with news outlets reporting fatal shootings at University of Washington, Wake Forest, Central Michigan University, Colorado State University, Ohio State, Wayne State, Georgia State, University of Cincinnati.[5] The exclusion of university police from the definition of PSE out of a lack of concern for their health and safety is irrational.

c. DOT Road Safety Workers

Working on, maintaining, and providing emergency assistance on roadways is recognized as an extremely dangerous profession in an unpredictable work environment. The number of roadside workers killed while

[5] See, e.g., USA Today Campus Shootings at: http://college.usatoday.com/tag/campus-shootings/; Wikipedia, List of School Shootings in the United States, and sources cited therein: http://college.usatoday.com/tag/campus-shootings/ ; CNN, Ohio State University: Attacker Killed, 11 Hospitalized (https://www.cnn.com/2016/11/28/us/ohio-state-university-active-shooter/index.html); Cincinnati.com (https://www.cincinnati.com/story/news/2017/12/21/police-identify-man-who-shot-security-officer-and-killed-self-uc-medical-center/973121001/).

working, nationally and in Iowa, exceeds the number of police killed in the line of duty. (App. 696-97). As the Sean Passick affidavit submitted to the District Court makes clear, the duties and responsibilities of Iowa DOT workers entail significant safety risks, and it is well known that Iowa's roadside safety workers endure extreme elevated health and safety risks, while also responding to emergencies and, in fact, assisting and ensuring first responders like fire and EMT can navigate to their charges. (App. 684-696). Their exclusion from preferential bargaining rights, accorded by the Legislature on the basis of elevated health and safety concerns, is irrational.

d. Psychiatric Aids and Technicians

The unparalleled health and safety outcomes for psychiatric facility and hospital workers further establishes the irrationality of conferring privileges on a select few. For example, the federal General Accounting Office (GAO) noted in a 2011 report, with respect to workplace violence and injury, that "[t]he most striking rate is that of psychiatric aides in state facilities, at 1,327.2 cases per 10,000 workers. which is significantly higher than patrol officers, security guards," and "other professions characterized as having a higher likelihood of experiencing a violent event." App. 534, 536-37. The GAO noted this safety threat was particularly high in public institutions because "they work with patient populations that are more likely to become violent, such as patients with severe mental illness who are involuntarily committed to state psychiatric

hospitals." App. 536-37.

Susan Rowe, an RN at one of Iowa's state psychiatric facilities and an AFSCME member, submitted an affidavit to the District Court describing the safety threats she and other mental health facility attendants face each workday. (*Id*., pp. 10-14). A 2001 University of Iowa Report also details the incredible safety issues facing such workers, noting: "Of particular concern is the high rate of violent incidents targeting health care workers (Type II violence). On some psychiatric units, for example, assault rates on staff are greater than 100 cases per 100 workers per year." App. 231-40. The exclusion of psychiatric attendants from H.F. 291's collective bargaining privileges also lacks rational basis.

* * * *

The following chart summarizes U.S. Bureau of Labor Statistics data (App. 229, 684-95), illustrating that health and safety concerns do not substantiate H.F. 291's granting of privileges, as it has no "basis in fact."

Occupation	Incidence Rates for all Injury and Illness	Rates Attributed to Workplace Violence
Psychiatric Aides	1,371	655
Psychiatric Technicians	849	551
Correctional Officers and Jailers	432	154
Police and Sheriff's Patrol Officers	506	143
Fire fighters	417	4

All Occupations	170	25

Psychiatric Aids and Technicians and corrections officers have dramatically elevated rates of workplace injury and violence as compared to police and sheriff's *patrol* officers and fire fighters, yet HF 291 includes as PSEs non-patrol officers while excluding these riskier professions.

2. The Defendants' and District Court's "Labor Peace" Rationales

Although the District Court did not analyze the Legislature's stated health and safety rationale, it did consider a "labor peace" rationale, but not the one offered by Defendants. Defendants argued that H.F. 291's discriminatory treatment is justified in order to ensure critical services to the public are not disrupted by strikes or other work stoppages, that is, so that strikes do not *cause* public emergencies. The District Court's "labor peace" rationale is the *opposite* concern, as it held that a reliable corps of first responders is necessary to *react* to unforeseen terrorist attacks, public health emergencies or natural disasters. *See* App. 105.

As a matter of Iowa law, both versions of the "labor peace" rationale are the definition of "specious" because they are "belied" by the H.F. 291's legislative history. *Tyler v. Iowa Dep't of Revenue*, 904 N.W.2d 162, 171 (Iowa 2017) (quoting *RACI*, 675 N.W.2d 14-15; "[T]he legislative history indicates otherwise" and so "belies that argument."). The rationale is also

revealed as specious because the "labor peace" concern involves the type of conduct already prohibited by law, and as a result, has never happened in Iowa. Factually, neither version of the "labor peace" rationale is actually advanced by H.F. 291's discriminatory classifications.

a. The District Court's Rationale

The District Court adopted a "labor peace" rationale that, in its view, broadly justified what the court conceded were arbitrary and discriminatory distinctions among identically-situated employees. The District Court permitted H.F. 291's discriminatory treatment by surmising the Legislature may desire a "reliable corps" of public safety personnel in the event of natural disasters, terrorist attacks, or public health threats. App. 118.

However, the District Court neglected to analyze how H.F. 291's classification system furthered that conjectured rationale. If it had the link would have been revealed as so attenuated as to be arbitrary. Instead, the District Court noted that "big" or "larger" units may receive preference in light of this need. App. 120. However, H.F. 291 does not speak to the size of a unit, but only the *percentage* of PSEs, and so the unit size justification has no "basis in fact."

The only "facts" the District Court related that it believed support why some PSEs and non-PSEs are preferenced over others, was to conjecture that University Police, who are represented by AFSCME, may be reticent to cross

a picket line walked by non-safety AFSCME members who strike during a time of public emergency. App. 117. But that rationale would apply to *every single* Favored Unit that contains non-PSE and PSE members, not only University Police represented by AFSCME. It is also specious, having "no basis in fact" and instead consisting of surrealist conjecture. App 737.

Moreover, police are commonly required to enforce laws against union members, and police officers responsibly enforce laws against neighbors, friends, companies with which they do business, and even other police officers. And consider small communities like Decorah, Guttenberg or Humboldt County where the only first responders, both police and fire, are confined to Disfavored Units. These facts alone reveal the District Court's rationale is so attenuated as to be specious.

It is likely that the Legislature did not offer any "labor peace" rationale because Chapter 20 already effectively addresses that concern, *see* code § 20.12.3-.5, and so labor unrest was far from the Legislature's mind. This further establishes that H.F. 291's discriminatory treatment based on labor peace concerns is irrational. *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1209–10 (D. Idaho 2015) ("But the State fails to explain why already existing laws against trespass, conversion, and fraud do not already serve this purpose."); *see, also U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528, 536–37 (1973) ("The existence of these provisions necessarily casts considerable

doubt upon the proposition that the 1971 amendment could rationally have been intended to prevent those very same abuses.")

Accepting *arguendo* that "labor peace" *could* justify discriminatory treatment, because H.F. 291 "features…extreme degrees of overinclusion and underinclusion in relation to" any goal, "it cannot reasonably be said to further that goal." *LSCP*, 861 N.W.2d at 861 (quoting *Bierkamp*, 293 N.W.2d at 584). For example, university police are not PSEs under H.F. 291 even though they do the same job and work alongside other police officers both on and off campus, protect large populations, and involve high-risk interventions. App. 202. The Legislature could not rationally believe that this large corps of law enforcement personnel would be unnecessary in the event of a public emergency, while believing park rangers, DOT motor vehicle enforcement officers, Fire Marshall officers, and gaming enforcement officers would be necessary.

Corrections officers and emergency medical service providers similarly are not PSEs under H.F. 291, even though Iowa makes clear they work in "protection occupations." *See* Iowa Code § 97B.49B.1.e. While a strike by prison guards or emergency medical service providers could have a severe and immediate impact on public health and safety, their presence on the job is also integral to maintaining public safety in the face of a natural disaster, public health emergency or other chaotic event. In such events, DOT roadway

workers serve critical needs, including hauling material to respond to floods and other natural disasters, plow roadways, maintain and rebuild damaged infrastructure, and escort fire and ambulances through difficult-to-navigate terrain. App. 346.

To underscore the point, if the Legislature were "plausibly" concerned about police strikes in the event of an emergency, it would have afforded *all* police (or *all* public safety employees) the same bargaining privileges, and not left the matter up to the placement of such employees in units consisting of more than 30% PSEs. Similarly, Airport Firefighters serve the critical and specialized function of preserving a rapid lifeline for the transportation of materials, personnel, medical supplies and national guard personnel into the state in times of emergency, and so their exclusion is arbitrary.

b. The Defendants' Asserted "Labor Peace" Rationale

Defendants argued to the District Court that H.F. 291's discriminatory scheme was necessary to ensure critical services to the public are maintained, and a public emergency is not *caused* by labor unrest (in addition to the health and safety rationale). This is clearly distinct from ensuring a reliable corps of first responder is available to address terrorist attacks and outbreaks of disease.

Although the basis may appear plausible, it is specious when analyzed with respect to how H.F.291 arbitrarily confers privileges on some public safety employees but not others, and on some non-safety employees but not

others. For example, a strike among health care workers or corrections officers would be catastrophic to the public health and safety, yet they are excluded as PSEs and their bargaining units are Disfavored. Of the ten states that have permitted public workers to strike, all prohibit not only police and firefighters, but also health care facility workers, transit employees, and corrections officers, out of concern for ensuring the public's welfare. *See County Sanitation Dist. No. 2 v. Los Angeles Cty. Employees Assn*., 699 P.2d 835, 846 (Cal. 1985) ("Typically these statutes permit public sector strikes, unless such strikes endanger the public health, safety, or welfare. The statutes generally prohibit strikes by police and fire-protection employees, employees in correctional facilities, and those in health-care institutions.")

In contrast to the rationale of avoiding strikes or sick outs by critical public safety employees, H.F. 291 confers privileges on employees whose strike activity would involve far less repercussions, such as park rangers, conservation officers, and gaming enforcement officers. Nor could the Legislature have plausibly concluded that the risk to public safety resulting from a strike among such employees be more consequential than, for example, a strike by Guttenberg's police and fire departments or all university police. Or that a strike of three police officers in LaPorte City, for example, represents a greater risk than of 180 university police officers. *See RACI*, 675 N.W.2d at 9 (no rational basis if the facts supporting a distinction could not "rationally

[be] considered to be true by the governmental decision maker.")

In light of the purpose, it is irrational to include motor vehicle enforcement officers, although they perform an important public service and are deserving of consideration, are tasked only with enforcing laws regulating the operation of commercial vehicles on Iowa roadways and do not have authority to issue traffic tickets,[6] or officers of the state fire marshal, who enforce fire codes and laws but do not engage in firefighting, while excluding police that perform broad law enforcement functions and firefighters that provide fire protection to remote communities. (App. 333-36, 248-62; 301-11). For their part, campus police are likely have more experience in crowd control as compared to any other Iowa peace officers, and certainly have more general police experience than gaming enforcement officers whose primary function is to "assure compliance with the proper type of licensing by all individuals employed in conjunction with the riverboat assignment," "Tests machines to check the payout's, jackpots, etc. to assure compliance with rules and regulations" and "Monitors table games to assure compliance with the appropriate rules and regulations and internal controls."[7]

[6] Attorney General Opinion No. Opinion No. 90-12-8, 1990 WL 484921; Des Moines Register, "Second Judge Says DOT Can Not Issue Tickets", March 1, 2017. Available here: https://www.desmoinesregister.com/story/news/investigations/2017/03/01/second-judge-says-iowa-dot-cant-issue-tickets/98593988/

[7] *See* Division of Criminal Investigation Special Agent I (Riverboat Gambling) Job Description, http://www.dps.state.ia.us/jobs/geo.shtml

Ultimately, and most fatally to H.F. 291, is that the bill undermines the purported "labor peace" rationale. If, as Defendants argued, non-safety groups are more likely to engage in a strike if excluded from meaningful collective bargaining, then a Disfavored Unit is now *more* likely to strike and, in doing so, would draw out its public safety members who, in sympathy or solidarity, may honor their non-safety bargaining unit members' strike vote. In this way, HF 291's extreme overinclusiveness and underinclusiveness undermines the "labor peace" legislative purpose. *E.g. LSCP,* 861 N.W.2d at 860.

C. H.F. 291's extreme overinclusion and underinclusion renders it unconstitutional

With respect to each policy rationale offered, H.F. 291's overinclusion and underinclusion is so extreme as to render it's discriminatory treatment irrational and arbitrary. Having determined that certain public safety employees designated as PSEs, but not others, should be exempted from H.F. 291's reduction of bargaining rights, the statute inexplicably preferences only those employees who happen to have been placed in a unit of at least thirty percent PSEs without regard to the functions or duties of the particular employees. Thus, many employees who are *not* PSEs are favored solely because of their placement in a Favored Unit. In that way, many police officers firefighters and other public safety employees, including the entire police forces and fire departments of various towns, have no bargaining

rights.[8] *See* App. pp. 279-80. There is no good reason for this, as nothing in Iowa law requires all employees in a bargaining unit to have the same bargaining rights and, as is often the case, bargaining units consist of many different categories of employees to which different contract provisions may apply.

It is not "credible" that H.F. 291's granting of privileges promotes "labor peace" among critical employees or addresses their specific health and safety needs because "the relationship between the classification" and the "purpose for the classification is so weak" as to be "arbitrary," due to the "extreme degrees of overinclusion and underinclusion" in relation to its goals. *LSCP*, 861 N.W.2d at 861; *RAAC*, 888 N.W.2d at 50; *McQuistion*, 872 N.W.2d at 831; *RACI*, 675 N.W.2d at 8.

D. If H.F. 291 Survives the Current Standard, the Court Should Reconsider its Standard in Order to Properly Enforce the Uniform Laws Clause

If, despite the foregoing, the Court finds H.F. 291 survives the rational review analysis, then Plaintiffs respectfully suggest that the standard fails the constitutional guarantees of the Uniform Laws clause. The root of the problem may be in showing deference, as exhibited by the District Court, to unstated Legislative rationales and permitting judicial officers to surmise rationales of their own in order to justify a discriminatory law.

[8] Which under Defendants' and the District Court's theory may induce them to engage in harmful strikes.

The Iowa Constitution was ratified during an era heavily influenced by the need to curb legislative power and prevent the endowment of special privileges upon select classes of persons, a threat to democracy. *See* Robert F. Williams, *The Law of American State Constitutions* 212 (2d ed. 2009). The Jacksonian thought prevalent in this era was based on an increasing opposition to favoritism and special treatment in enacting laws. *Id*. The State constitutions, including Iowa's, adopted in the nineteenth century reflected the rejection of selective access to power, prosperity, and influence. *Id.* (quoting R. Welter, *The Mind of America: 1820–1860* 77–78 (1975).) Responding to "a series of abuses by the relatively unfettered state legislatures," many states in the nineteenth century amended their constitutions to "curb the granting of 'special' or 'exclusive' privileges." Williams, *supra* at 212. These "uniformity" or "special privileges" provisions are distinct from, and address a different purpose than the federal equal protection guarantee established later by the Fourteenth Amendment. *Id*. at 212-13 (quoting *Hewitt v. State Accident Ins. Fund Corp., 653 P.2d 970*, 975 (Or. 1982) (citations omitted): "There is an historical basis for this distinction. The Reconstruction Congress, which adopted the fourteenth amendment in 1868, was concerned with discrimination against disfavored groups or individuals, specifically, former slaves… in 1859, the concern… was with favoritism and the granting of special privileges for a select few." (alteration in original)). Thus, a clause of this type "does not seek

equal *protection* of the laws at all. Instead, it prohibits legislative discrimination *in favor of* a minority." Williams, *supra* at 213. Put another way, while equal protection permits unequal treatment, it prohibits denying the protection of laws for disfavored groups. But uniformity clauses require equal treatment and guarantee uniform application to all citizens.

Considering this distinction between the federal equal protection doctrine and the uniformity provisions born out of Jacksonian ideals, the judicial deference to the legislature that is present in federal "rational basis" review is wholly inappropriate under state uniformity cases. Judicial deference to the Legislature runs counter to the very purpose of the state uniformity guarantees, as it allows for the legislature to dole out special privileges with little judicial oversight, despite an explicit constitutional guarantee to the contrary. Such deference is the antithesis of the Jacksonian ideals reflected in Iowa's Uniform Laws guarantee.

Justice William Brennan recognized the need to clearly distinguish between rights guaranteed under the federal and state constitutions, stating that federal decisions about federal constitutional rights "are not mechanically applicable to state law issues, and that state court judges and the members of the bar seriously err if they so treat them." *Id.* at 135 (quoting William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev . 489, 502 (1977)); *see also* Mark S. Cady, *The Vanguard of*

Equality: The Iowa Supreme Court's Journey to Stay Ahead of the Curve on an Arc Bending toward Justice, 76 Alb. L. Rev. 1991, 1993-4 (2013) ("it is a well settled precept that states enjoy considerable freedom to depart from federal interpretations of analogous federal constitutional provisions.")

This Court has recognized these principles, recently in *Godfrey*, in which the Court noted "the importance of the [Iowa Constitution's] Bill of Rights in our scheme of government," because "the Iowa Constitution of 1857 tended to limit the power of the legislature while it protected the independence of the court," and otherwise "reflected a healthy skepticism of legislative power." *Godfrey*, 898 N.W.2d at 864-66. To the extent the Court's present "rational basis" standard permits undue deference to the Legislature, thereby permitting such arbitrary rationalizations as those embodied in H.F. 291's otherwise discriminatory treatment among identically-situated citizens, it is in need of adjustment.

Plaintiffs suggest a proper standard is one that holds the Legislature to its articulated rationales in performing the people's business, and that those rationales—and only those rationales – are scrutinized with respect to the impact of the law among similarly-situated individuals. Disparate results should be permitted only if they entail a close relationship to that legislative purpose. Otherwise, Plaintiffs respectfully suggest, the current standard represents a departure from responsibility conferred on the judiciary by the

1857 Constitution, and an untoward willingness by the courts to do the Legislature's work.

II. HOUSE FILE 291 DOES NOT SURVIVE STRICT SCRUTINY FOR ITS VIOLATION OF INDIVIDUALS' RIGHTS OF ASSOCIATION

The District Court failed to apply a strict scrutiny standard, which Iowa courts apply when government action infringes upon group member's fundamental right of association. House File 291 was drafted and adopted for the purpose of burdening State employees who have associated with AFSCME as their labor union, and has the effect of substantially interfering with their guaranteed associational rights.

Preservation of Error

Plaintiffs raised this issue in their motion for summary judgment, *see* Plf. Motion for Summ. Jdg., and their briefs in support of that motion, *see* Plf. Mem. In Support of Summ. Jdg., Plf. Reply to Def. Resistance to Plf. Motion for Summ. Jdg. The district court ruled on the issue in its Ruling on Motions for Summary Judgment.

Scope and Standard of Review

For the same reasons stated above, review of this issue is *de novo*, *see Bierkamp*, 293 N.W.2d at 580, and the Court "view[s] the entire record in the light most favorable to the nonmoving party, making every legitimate inference that the evidence in the record will support in favor of the

nonmoving party." *Bass v. J.C. Penney Co.*, 880 N.W.2d 751, 755 (Iowa 2016).

A. H.F. 291 Infringes on Plaintiffs' Right of Association

In evaluating this claim, the District Court committed error by finding that public employees have no constitutionally protected right to organize into unions. (Ruling, p. 10 ("Public employees have no constitutionally protected right to organize into unions or to bargain collectively").) It is well established law in Iowa that public employees have the right to organize and join labor unions. *State v. Keul*, 855, 5 N.W.2d 849, 852 (Iowa 1942) ("The right to form labor unions and by lawful means to act in furtherance of their legitimate purposes is not open to question"); *State Bd. of Regents v. United Packing House Food & Allied Workers, Local No. 1258*, 175 N.W.2d 110, 112 (Iowa 1970) ("[T]he following propositions are accepted as the law… Public employees have the right to organize and join labor organizations.") Iowa courts "have traditionally followed the U.S. Supreme Court's guidance in determining which rights are deemed fundamental" and like Iowa's high court, the U.S. Supreme Court has found that the right to join a union is a protected associational right. *King v. State*, 818 N.W.2d 1, 26 (Iowa 2012); *AFSCME v. Woodword*, 406 F.2d 137 (8th Cir. 1969) ("Union membership is protected by the right of association under the First and Fourteenth Amendments."); *Brotherhood of R. R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 8

(1964) ("Constitution protects the associational rights of the members of the union precisely as it does those of the NAACP."); *see also Thomas v. Collins*, 323 U.S. 516 (1945); *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968).

Notably, Plaintiffs never argued that public employees have a protected right to bargain collectively, but asserted – and established -- that House File 291 both intentionally and incidentally infringes upon their fundamental associational rights to be associated with a particular union of their choice. This expression of the freedom of association is a protected fundamental right, the incidental infringement of which is subject to strict scrutiny. *City of Maquoketa v. Russell*, 484 N.W.2d 179, 184 (Iowa 1992) (quoting *City of Panora v. Simmons*, 445 N.W.2d 363, 367 (Iowa 1989): "[i]f a fundamental right is infringed, the level of judicial scrutiny is raised from a rational relationship test to one of strict scrutiny. In that case, the statute will survive a constitutional challenge only if it is shown that the statute is narrowly drawn to serve a compelling state interest.")

The District court wholly overlooked the significant burden that H.F. 291 imposes on Plaintiffs with respect to their fundamental right to associate with AFSCME, their labor union, and failed to apply a strict scrutiny standard in evaluating that claim.

The right of association is an indispensable liberty that is recognized under the First and Fourteenth Amendments, *NAACP v. Alabama*, 357 U.S.

449, 460, 78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488 (1958), as it is under the Iowa Constitution. Importantly, this fundamental right of association is protected against both intentional and *incidental*, yet unintended, infringement. *Id*. at 461, 78 S.Ct. at 1171 ("In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action.")

Incidental burdens on the right to associate are unconstitutional if they are "direct and substantial" or "significant." *Tabbaa v. Chertoff*, 509 F.3d 89, 101–02 (2d Cir. 2007). Government action can constitute a direct and substantial interference with associational rights, even in the absence of prior restraints or any clear chilling effect on future expressive activity. *Id*. Thus, Constitutional protections from infringement of a group's associational rights are not limited to direct interference, but extend to any government action that imposes a substantial burden, or imposes disabilities, on one's freedom of association. *Id.* (citing *Healy v. James*, 408 U.S. 169, 181–84, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972)) ("It did not matter that the plaintiffs… had not demonstrated a chilling effect on their desire or ability to associate in the future, or that they could freely hold their meetings and distribute their materials off campus; rather, there was a substantial burden because of the significant 'disabilities imposed' by the defendant's actions.")

To be clear, Plaintiffs do not contend that their right of association prevents the Iowa legislature from reducing or even eliminating collective bargaining rights. Rather, the nature of Plaintiffs' claim is that with respect to state employees, over whom the governor negotiates and for whom the Legislature appropriates funds,[9] H.F. 291 singles out AFSCME-represented safety employees for disfavored treatment above all other state employees, a fact that has not been disputed.

House File 291, with scalpel-like precision, ensures all AFSCME members, safety and non-safety alike, but particularly safety, end up in Disfavored Units and thereby denies them the privilege of meaningful bargaining. As established to the District Court, all peace officers and fire fighters that have been excluded from the definition of PSE in House File 291 are associated with AFSCME. App. 278. Similarly, all state peace officers and fire fighters excluded from bargaining over anything other than base wage are AFSCME members. (*Id*.) This is despite, or perhaps because, AFSCME is by far the largest collective bargaining representative of state employees (s*ee* 11/13/2014 Legislative Services Agency Issue Legal Brief).

The State Legislature does not have the unfettered authority to draw lines to disadvantage employees due to their choice to associate with a particular

[9] As described in Legislative Services Agency 11/13/2014 Issue Legal Brief (https://www.legis.iowa.gov/docs/publications/IR/17614.pdf)

union. By disadvantaging employees for their choice as to which union, if any, they associate with, H.F. 291 infringes on their right of association. The mere fact that "[n]othing in [House File 291] facially disadvantages AFSCME," as Defendants argued to the District Court, is irrelevant to the analysis. Defendant's Sur-reply, p. 3. Further, Defendants themselves suggest that AFSCME members were intentionally omitted from favored bargaining units for the purported purpose of ensuring availability of PSEs to police strikes, an argument the District Court credited. App. 117. ("The State suggests that should AFSCME decide to go on strike at the University of Iowa, campus police officers might hesitate to cross picket lines while State Troopers would feel free to do so in order to keep peace").) That scenario could apply equally to all unions that represent both safety and non-safety state personnel, but only AFSCME members have been disadvantaged in this way. Thus, Defendants' own justifications for House File 291 include the specific and intentional omission of university police offers from favored treatment for no reason other than their choice to associate with AFSCME.

Suffering a significant penalty or disability solely by virtue of association is a cognizable burden on associational rights. *Tabbaa*, 509 F.3d at 102 (quoting *Lyng v. Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW*, 485 U.S. 360, 367, 108 S. Ct. 1184, 99 L. Ed. 2d 380 (1988)): "[A] burden is merely incidental when it is 'exceedingly unlikely' that

a defendant's actions would prevent someone from exercising his or her associational rights.") There is no doubt that the ability to collectively bargain for more than base wages is a great privilege. Yet this privilege is only granted to state employees who are non-AFSCME represented state peace officers and firefighters, while every single AFSCME-represented state peace officer and firefighter is unable to bargain for more than base wages. That is no coincidence, but even if it is deemed "incidental," it is a substantial burden on those employees' freedom of association and is unconstitutional. Such a significant disability penalizes AFSCME members for no reason other than their choice of association, as the *very purpose* of a labor union is to collectively bargain on behalf of its members. Crippling that right as to one state employee union but not others is a substantial infringement.

B. H.F. 291 Fails Strict Scrutiny

Where a statute distinguishes between individuals, and provides for unfavorable treatment or denial of privileges based on their exercise of associational rights, the classification is subject to strict scrutiny under Iowa law because it implicates a fundamental right, *i.e.*, the treatment burdens individuals based on their association. *Varnum*, 763 N.W.2d at 880 ("Under this approach, classifications... affecting fundamental rights are evaluated according to a standard known as 'strict scrutiny.'"); *RACI*, 675 N.W.2d at 15-16 (quoting *Thompson v. KFB Ins. Co.*, 850 P.2d 773, 782 (Kan. 1993):

"[W]here, as here, the only basis for the classification is to deny a benefit to one group for no purpose other than to discriminate against that group, the statutory classification is not only mathematically imprecise, it is without a rational basis and arbitrary.")

Unlike the rational basis analysis, classifications subject to strict scrutiny are presumptively invalid, and the state carries the burden to establish the statute is narrowly tailored to serve a compelling governmental interest. *Varnum*, 763 N.W.2d at 880. Further, administrative convenience or preference does not overcome an infringement on Plaintiffs' constitutional rights. *See, e.g.*, *Taylor v. Louisiana*, 419 U.S. 522, 535 (1975) ("administrative convenience" cannot justify a practice that impinges upon a fundamental right); *Johnson v. Halifax County*, 594 F. Supp. 161, 171 (E.D.N.C. 1984) (finding "administrative and financial burdens on the defendant are not . . . undue in view of the otherwise irreparable harm to be incurred by plaintiffs"). *See also Schneider v. State*, 308 U.S. 147, 161 (1939) ("Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.").

Defendants cannot satisfy this heavy burden. House File 291 is both underinclusive and overinclusive. Yet, the only rationale that Defendants rely upon to justify such imprecise line drawing is either that they are entitled to

legislative deference or that the Legislature may "pick winners and losers."

The District Court found H.F. 291's line drawing entailed arbitrary distinctions and applications, and there are many other means by which the Legislature could have achieved its goal. For example, the Legislature could have expanded the definition of PSEs to include all traditional public safety employees or could have conferred the broad collective bargaining rights without regard to whether the employees are assigned to a unit that includes non-safety employees. Instead, the Legislature "red-circled" AFSCME members, denying them privileges granted to other similarly situated individuals. House File 291 cannot survive strict scrutiny and Defendants have presented no evidence to satisfy their heavy burden on their motion.

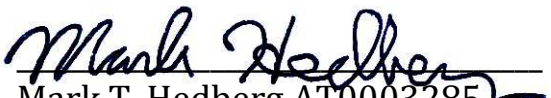
CONCLUSION

For these reasons, Plaintiffs/Appellants respectfully request that the Court reverse the decision of the district court and remand the case with instructions to enter judgment in favor of Plaintiffs/Appellants, tax the costs of this action to the Defendants/Appellees, and for such other relief as is appropriate in the circumstances.

REQUEST FOR ORAL ARGUMENT

Appellants request oral argument on the issues appealed in this case.

Respectfully submitted,



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1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this Brief contains 13,042 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this Brief has been prepared in a proportionally-spaced typeface using Microsoft Word in Times New Roman size 14 font.

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The undersigned certifies that on the 16th day of May, 2018, the undersigned electronically filed this document using the Electronic Document Management System.

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The undersigned certifies that the Appellants' Amended Final Brief was served on the 16th day of May, 2018, upon Matthew C. McDermott, Michael R. Reck, Kelsey J. Knowles, and Espanola F. Cartmill, Belin McCormick, P.C., 666 Walnut Street, Suite 2000, Des Moines, IA 50309, and the Clerk of the Supreme Court by EDMS filing in this matter.

Sarah M. Baumgartner