IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 17-1834
Polk County Case No. CVCV053887

IOWA STATE EDUCATION ASSOCIATION
and
DAVENPORT EDUCATION ASSOCIATION,

Plaintiffs/Appellants

vs.

STATE OF IOWA,
IOWA PUBLIC EMPLOYMENT RELATIONS BOARD,
MIKE CORMACK,
JAMIE VAN FOSSEN, and
MARY GANNON,

Defendants/Appellees

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
The Honorable Michael D. Huppert

FINAL BRIEF FOR PLAINTIFFS/APPELLANTS

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ROUTING STATEMENT

Plaintiffs/Appellants believe this case should properly be retained by the Iowa Supreme Court as it "present[s] substantial constitutional questions as to the validity of a statute, ordinance, or court or administrative rule." *See* Iowa R. App. P. 6.1101(2)(a); *see also Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 4 (Iowa 2004) ("It is this court's constitutional obligation as the highest court of this sovereign state to determine whether the challenged classification violates Iowa's constitutional equality provision.").

STATEMENT OF THE CASE

In February 2017 the Iowa legislature enacted House File 291 ("H.F. 291"), which substantially alters the Public Employment Relations Act ("PERA") contained in Iowa Code Chapter 20. Plaintiffs/Appellants Iowa State Education Association ("ISEA") and Davenport Education Association ("DEA"), as employee organizations representing employees of public schools, challenge two features of H.F. 291 that violate Article I, Section 6 of the Iowa Constitution by denying equal treatment to these organizations and the employees they represent.

First, the broad collective bargaining rights that previously were granted to all of Iowa's public employees are confined by H.F. 291 to employees in bargaining units in which at least thirty percent of the members work in a limited class of "public safety" positions. *Second*, H.F. 291 prohibits public employers from allowing employees to make dues payments to an employee organization by means of payroll deduction, but does not prohibit payroll deduction for any other kind of payment, including payment of dues to any other kind of organization.

The ISEA and DEA filed a Petition for Declaratory and Injunctive Relief on April 4, 2017. (App. 35-56, Petition for Declaratory and Injunctive Relief). The Defendants, collectively, filed their Answer and Affirmative

Defense to Petition on May 9, 2017. (App. 57-65, Answer and Affirmative Defense to Petition). Plaintiffs and defendants both moved for summary judgment. (App. 66-67, 68-71; Defendants' Motion for Summary Judgment, May 9, 2017, and Plaintiff's Motion for Summary Judgment, June 23, 2017). The district court denied plaintiffs' motion and granted defendants' motion, dismissing the case with prejudice. (*See* App. 17-34, Ruling on Motions for Summary Judgment ("Ruling") (Oct. 18, 2017)). The ISEA and DEA filed a timely Notice of Appeal to the Iowa Supreme Court. (App. 176-79, Notice of Appeal, November 13, 2017).

STATEMENT OF THE FACTS

A. PERA Prior to House File 291

Between 1967 and 1970, Iowa experienced a series of major public-sector strikes, most notably by the teachers in the town of Keokuk. *See* University of Iowa Labor Center, *"To Promote Harmonious and Cooperative Relationships"*: *A Brief History of Public Sector Bargaining in Iowa, 1966 to 2016* (2016) at 1-3, (Second Supp. App. 7-9; Exh. 20 to Affidavit of Teague B. Paterson, Plf. App. pp. 254-56). By 1969, Governor Robert Ray had announced his support for adopting a statewide legal framework for public sector bargaining, and the legislature established a

study committee to consider the issue. (Second Supp. App. 9, *Id.* p. 256). Initial efforts to pass legislation did not bear fruit, but in 1974 "an exceptionally bi-partisan coalition in the House" passed the Public Employment Relations Act ("PERA"), and the Senate proceeded to pass the bill with amendments. *Id*.

PERA created an orderly system of public sector collective bargaining.[1] Under PERA no employee was obligated to join or pay any fee to a public employee organization (union), *see* Iowa Code § 20.8(4), but all employees were entitled to vote to select a public employee union to represent the employees as their bargaining representative. If an employee organization was certified as the employees' bargaining representative, it could bargain on their behalf with their employer over a wide range of workplace issues, 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.

Id. § 20.9.

[1] PERA, as it stood prior to the enactment of House File 291, is included in the record at App. 180-195, Plf. App. pp. 2-17.

All of these bargaining subjects were mandatory, meaning that both the employee organization and the employer had a duty to bargain in good faith over each of these subjects. The only employment-related subject that the 1974 legislature excluded from the scope of the bargaining duty was the public employee retirement system, *id.*, which is governed by separate and detailed statutory schemes such as are set forth in Chapters 97B and 411 of the Iowa Code.

PERA set forth an extensive set of rules and procedures to govern the collective bargaining process, which, except as described *infra*, are largely unchanged by H.F. 291. *See id.* §§ 20.17, 20.19-22. Of particular importance here, PERA establishes procedures to resolve impasses in collective bargaining through mediation and binding interest arbitration. *Id.* §§ 20.19-22. In interest arbitration, each party submits its final offer on the impasse subjects to an arbitrator, who holds a hearing and, based on consideration of specified factors, "select[s] … the most reasonable offer, in the arbitrator's judgment, of the final offers on each impasse item submitted by the parties." *Id*. § 20.22(10)(a).

In PERA the legislature outlawed public sector strikes for the first time and authorized injunctions to restrain any actual or "imminently threatened" strike. *Id.* § 20.12(3). Any failure to comply with such an

injunction is punishable by imprisonment, heavy fines, automatic discharge from employment for any employee who is "held to be in contempt of court for failure to comply with an injunction …, or is convicted of violating [the no-strike provision]," and, for an employee organization, immediate decertification. *Id.* § 20.12(5).

PERA's balanced approach of an effective system of collective bargaining and impasse resolution coupled with a strong prohibition of strikes proved successful. Since the enactment of PERA, no public-sector strikes have occurred in Iowa. (App. 59, *See* Answer ¶ 25). Where interest arbitration has been invoked, school districts and ISEA's local associations have prevailed with roughly equal frequency: in the 48 arbitration proceedings involving those parties from 1997 through 2016, arbitrators made determinations on 71 issues, ruling for local associations on 39 of those issues and for school districts on 32 of them. (*See* App. 244; Second Supp. App. 4; Affidavit of Coy Marquardt, Plf. App. pp. 71-72). And the availability of interest arbitration has encouraged parties to reach agreement without the need for arbitration, such that among ISEA's more than 400 local affiliates, most of which engage in bargaining every year, there have been on average only about two interest arbitrations a year (48 arbitrations over a 20-year period). *Id.*

Collective bargaining has enabled school districts and local affiliates to reach considered, comprehensive and thoughtful solutions to complex issues raised by such subjects as base wages, supplemental pay, insurance, transfer procedures, evaluation procedures and staff reduction procedures. (App. 405, Affidavit of Tim Taylor , Plf. Supp. App. p. 2). For example, school districts often have negotiated total-package-cost agreements which include mutually acceptable trade-offs between pay and benefits, with local associations agreeing to offset increased the costs of benefits (particularly health insurance) through reductions in salary or in salary increases. (*See* App. 238-240, 244, 405-406; Marquardt Aff., Plf. App. pp. 65-67, 71; Taylor Aff., Plf. Supp. App. pp. 2-3). And, as to procedures for transfers, evaluations and staff reductions, as well as many other rules and policies, bargaining has served to identify the concerns of both the employer and the employees and to provide an effective means of exploring solutions that will accommodate the parties' respective interests. Through a process of give-and-take with a dispute resolution procedure available in the event of impasse, collective bargaining has enabled school districts and local associations to reach comprehensive agreements addressing a wide range of subjects in a mutually acceptable manner. (App. 238-244, 406-08; Marquardt Aff., Plf. App. pp. 65-71; Taylor Aff., Plf. Supp. App. pp. 3-5).

On the 40th anniversary of PERA, former Governor Ray described the successful operation of PERA thus:

> Iowa has a system that is envied by many states that struggle to achieve the proper balance of protecting workers while maintaining effective management of government. In Iowa, it is an equal balance of power at the table between labor and management that has provided positive results that work for all Iowans.

Statement from Governor Robert D. Ray on 40 years of PERB, available at https://archive.is/GbwD (last visited Jan. 9, 2018).

B. H.F. 291 Drastically Alters PERA

H.F. 291 was introduced on February 9, 2017 and passed by the Iowa legislature a few days later, in unprecedented time and with limited debate. (App. 401, Affidavit of Bradley Hudson, Plf. App. p. 305). On February 17, 2017, Governor Terry Branstad signed H.F. 291 into law. The legislation makes drastic changes to the PERA framework that has governed public sector labor relations in Iowa for more than forty years.[2] The changes that are challenged in this appeal concern two crucial areas: (1) the scope of

[2] App. 196-235, H.F. 291 is at Plf. App. pp. 19-61.

collective bargaining and interest arbitration, and (2) the permissibility of payroll deduction of dues.[3]

1. House File 291's Discriminatory Deprivation of Bargaining and Impasse Resolution Rights

a. H.F. 291 divides employees into two classes: "public safety employees" and all others. The statute does not explain what makes a position one of "public safety" for purposes of this law; Section 1 of the new law simply lists the positions that will be treated as falling within the "public safety" category, as follows:

> a. A sheriff's regular deputy.
>
> b. A marshal or police officer of a city, township, or special purpose district or authority who is a member of a paid police department.
>
> c. A member, except a non-peace officer member, of the division of state patrol, narcotics enforcement, state fire marshal, or criminal investigation, including but not limited to a gaming enforcement officer, who has been duly appointed by the department of public safety in accordance with section 80.15.
>
> d. A conservation officer or park ranger as authorized by section 456A.13.

[3] H.F. 291 also enacted several changes to the provisions of PERA that govern elections to certify a bargaining representative. Plaintiffs challenged certain of those changes, *see* App. 47-48, 53-54; Petition for Declaratory and Injunctive Relief ¶¶ 44-48, 62-66, but are not pursuing those claims on appeal.

> e. A permanent or full-time firefighter of a city, township, or special-purpose district or authority who is a member of a paid fire department.
>
> f. A peace officer designated by the department of transportation under section 321.477 who is subject to mandated law enforcement training.

That list does not correspond with any previous categorization of public employees in Iowa law. For example, university police, who by law "shall have the same powers, duties, privileges, and immunities as conferred on regular peace officers," Iowa Code § 262.13, are excluded from the "public safety employee" classification in H.F. 291, even though they are classified by Iowa law as "law enforcement officers" who, pursuant to Iowa Code Ch. 80B, are trained and certified by the Iowa Law Enforcement Academy (ILEA). *See* Iowa Attorney General Opinion No. 70-4-28 (opining that the term "law enforcement officer" includes "college and university security police"); (App. 287-89, 311-314, 315-324; Affidavit of Ryan De Vries, Plf. App. pp. 119-21; Job Description for Regents Police Officer, Plf. App. pp. 157-60; Regents Police Arming Agenda Packet, Plf. App. pp. 162-70). Also excluded from H.F. 291's "public safety employee" classification are probation/parole officers and Fraud Bureau investigation officers, who likewise are ILEA-certified law enforcement officials. (App. 293-94, 291-92, Affidavits of John Meeker, Plf. App. pp. 127-28 and Gabriel Jordan

Schaapveld, Plf. App. pp. 124-25). In addition, H.F. 291 places most firefighters in the "public safety employee" classification, but inexplicably excludes airport firefighters. (App. 295-97, Affidavit of Michael Peters, Plf. App. pp. 130-32). And all corrections officers, jailers and emergency medical service providers are excluded, even though all of those employees – as well as university police, probation/parole officers, Fraud Bureau investigation officers and airport firefighters – work in what are classified as "protection occupations" by the statute governing the Iowa Public Employees Retirement System. *See* Iowa Code § 97B.49B(1)(e).

b. Under H.F. 291, an employee organization retains broad bargaining rights only if at least thirty percent of the members of the bargaining unit represented by the organization are "public safety employees" as listed in the statute. But if that threshold is met, Section 6 of H.F. 291 provides that the organization may exercise broad bargaining rights with respect to *all* members of its unit, including those who are *not* "public safety employees." Conversely, Section 6 provides that an employee organization representing a unit of which fewer than thirty percent of the members fall within the "public safety employee" category cannot exercise broad bargaining rights on behalf of *any* of its members, including those who are public safety employees under the statute.

Thus, large numbers of peace officers employed by the State of Iowa who are in positions classified by H.F. 291 as "public safety" positions nevertheless are subjected to H.F. 291's severe restrictions on bargaining, because those officers happen to be part of a large mixed unit of which fewer than thirty percent of the members are in "public safety" positions. (App. 395, Affidavit of Danny Homan ¶ 5, Plf. App. p. 297). The same is true of the police officers or deputy sheriffs in a number of communities, such as Humboldt County and the cities of Guttenberg and Decorah. (App. 402-03, Affidavit of Andrew F. Williams, Plf. App. pp. 351-52).

For the favored employee organizations – those representing bargaining units in which at least thirty percent of the members are "public safety employees" as listed in H.F. 291 – Section 6 of the statute provides that, for all members of the unit, the right to bargain continues to be broad, extending to "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, grievance procedures for resolving any questions arising under the agreement, and other matters mutually agreed upon." In contrast, for employee organizations representing all other units of public employees,

Section 6 provides that the right to bargain encompasses only "base wages and other matters mutually agreed upon," and the legislation specifies that these subjects "shall be interpreted narrowly and restrictively." *Id.* Moreover, these disfavored employee organizations are expressly prohibited by Section 6 from any bargaining over "insurance, leaves of absence for political activities, supplemental pay, transfer procedures, evaluation procedures, procedures for staff reduction, and subcontracting public services."

The inequality in bargaining rights that H.F. 291 imposes extends as well to the interest arbitration process that is available in the event of impasse. As an initial matter, because arbitrators can only consider parties' proposals on issues for which bargaining is allowed, the extreme disparity in bargaining rights described above means that interest arbitration awards for disfavored units are limited to resolving disputes over base wages and the handful of "other matters" that are not specifically prohibited and as to which bargaining is permissive but not mandatory. Impasse resolution is no longer permitted for all other disputes, including those over insurance, preventing arbitrations from considering, for disfavored units, the full sweep of tradeoffs that favored units may still seek. For favored units, on the other hand, employee organizations may submit to the arbitrator proposals on the

broad range of issues as to which negotiating continues to be mandatory or permissive as was the case prior to the new law.

In addition, under Sections 12 and 13 of H.F. 291, the factors the arbitrator is to consider in determining which party's proposal should be selected differ depending on whether an employee organization is in the favored or disfavored category. If the arbitration involves a favored unit, the arbitrator must consider past collective bargaining agreements between the parties and the parties' bargaining history, but those matters are barred from consideration in an arbitration involving a disfavored organization. And for a favored unit, an arbitrator must compare the employees' wages, hours and conditions of employment to those of other public employees, whereas for a disfavored unit, private sector base wages, hours and working conditions must form part of the comparison.

On top of these restrictions on the scope, topics and factors that govern impasse arbitration for disfavored units, an award for such units is subject to two additional severe restrictions that do not apply to the favored "public safety employee" units. First, Section 13 provides that in an arbitration involving a disfavored unit, the arbitrator "shall not consider … [t]he public employer's ability to fund an award through the increase or imposition of new taxes, fees, or charges, or to develop other sources of

revenues;" but no such prohibition applies in an arbitration involving a favored "public safety employee" unit. Second, for disfavored units, notwithstanding PERA's basic requirement, retained by H.F. 291, that an arbitrator must "select … the most reasonable offer, in the arbitrator's judgment, of the final offers on each impasse item submitted by the parties," Iowa Code § 20.22(10)(a), Section 12 of the new law dictates that an arbitrator is prohibited from selecting an offer – no matter how reasonable – providing for an increase in base wages that would exceed in any year the increase in a specified consumer price index or 3%, whichever is less.

2. The Legislators' Articulation of the Purpose Served By the Two-Class Scheme of Bargaining Rights

Although H.F. 291 was rushed through the legislature with little deliberation, one feature of the legislation – the adoption of a two-class scheme of bargaining rights – was subject to sustained debate. An amendment was introduced to eliminate this distinction between classes of employees, and each house devoted several hours of debate to the proposed amendment. Plaintiffs and defendants both submitted a transcript of this debate in support of their cross-motions for summary judgment. (App. 245-286, 460-501; Plf. App. pp. 76-117; Def. App. pp. 51-92).

As the transcript shows, no fewer than eighteen legislators spoke to this subject, and every one of them recognized that the purpose of the two-

class scheme was to provide greater bargaining rights to workers who were thought to face such job hazards that those workers had a special need to be able to bargain over certain subjects. The entire debate was over that asserted need of "public safety" employees for special protection.

Thus, in response to questions by Senator Petersen about "the haves and the have nots, those that are considered public safety and those who are not," (App. 461, Def. App. p. 52), proponents of the two-class scheme acknowledged that many workers outside the "public safety" list face serious risks on the job, but insisted that those risks "aren't comparable" to the risks faced by "public safety" employees such as firefighters. (App. 461-62, Def. App. pp. 52-53 (Sen. Segebart)). For example, Senator Zaun – who claimed credit for having persuaded Senator Schultz, the Chair of the Labor Committee, to adopt the two-class scheme – acknowledged that "[t]here's a lot of state employees that put their life at risk," but maintained that police and firefighters are unique in the way they "put their life on the line on an hourly basis." (App. 464, Def. App. p. 55).

When Senator Petersen continued to maintain that "[w]e shouldn't be putting people in two separate classes," Senator Chelgren took the floor to explain why he had concluded that this feature of the legislation was appropriate and constitutional. (App. 464, Def. App. p. 55). Senator

Chelgren stated that when he met with Senator Shultz to discuss the bill, "one of the very first questions I asked him was whether or not this would be constitutional … because the question was whether or not we were going to be creating two separate classes." (App. 467, Def. App. p. 58). He received a "really interesting response from Senator Schultz," which Senator Chelgren described as follows:

> It wasn't a question of whether or not [various kinds of employees] would go into a safe or unsafe environment, because I totally agree that we can have unsafe environments all over the place. Nurses deal with that, doctors deal with that, correction workers deal with that, teachers deal with that. The difference ends up being that … a firefighter or a police officer is more likely to go into … an unregulated dangerous environment. That was the whole situation with 911. Those were not teachers running into the buildings. Those were not EMTs running into the buildings. There were only firefighters and police officers running into the buildings.
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> [I]t comes down to that uncontrolled environment and the training for it. Do we want to allow somebody who is going to have to put themselves out there more frequently in higher risk situations to have more flexibility in determining what is … going to impact, for instance, their healthcare, or the dangerous situation? That was the response I got.

Id.

To illustrate this point, Senators Chelgren and Chapman engaged in a colloquy to explain why emergency medical service employees were not included in the "public safety" category. Those Senators asserted that EMS personnel "do not enter situations that are unsafe." (App. 466, Def. App. p. 57). Instead, when confronted with a hazardous situation, EMS workers "call upon those brave men and women who do put their selves in line, who have been trained, who are willing to make those sacrifices …, which would be either a police officer or a firefighter." (App. 466, Def. App. p. 57). For that reason, although the proponents of the two-class scheme acknowledged "the importance of what EMTs and paramedics do," they argued that "there is a vast difference when it comes to putting yourself in harm's way as our law enforcement does every single day, as Senator Zaun so eloquently put [it]." (App. 466, 469; Def. App. p. 57 and Def. App. p. 60 (Senator Zaun reiterating that it was "so important to vote against" the amendment that would have treated all employees alike because "[e]very move [police officers] make they put their life on the line")). And in response to Senator Danielson, who gave other examples of employees for whom "a dangerous situation" is a "regular occurrence" but who nevertheless are excluded from "the special class," (App. 62, Def. App. p. 62), Senator Schultz reiterated what Senator Zaun had "so powerfully said" about "[the] situation [of police

officers who] have a different need to get to the table with different items." (App. 472, Def. App. p. 63).

The debate then turned to the fact that university police are excluded from H.F. 291's list of "public safety" employees even though they are "equally qualified, show up on scene, [and] do the same day-to-day work as other police." (App. 475, Def. App. p. 66 (Sen. Danielson)). (*See also* App. 475, 484-85, Def. App. pp. 66, 75-76 (Sen. Kinney); App. 476, Def. App. p. 67 (Sen. Bolkcom); App. 477-78, Def. App. pp. 68-69 (Sen. Dotzler); App. 478-79, Def. App. pp. 69-70 (Sen. Dvorsky); App. 480, Def. App. p. 71 (Sen. Hogg.); App. 481, Def. App. p. 72 (Sen. Bisignano)). Senator Bouten argued that because "the very real risks of danger" that are confronted by "public safety" employees had been "identified as the reason why [those employees] need enhanced protections and enhanced rights that have been recognized under [H.F. 291]," it should follow that employees who confront the same kinds of risks, such as university police, should have the same bargaining rights. (App. 478, Def. App. p. 69).

In the House, as in the Senate, legislators expressed their "concern and anger about how [the proponents of the two-class scheme] have decided who is important and who is not, and who is allowed protections under this bill and who is not." (App. 495, Def. App. p. 86 (Rep. Mascher)). Those

legislators recognized that the rationale offered by the proponents for the two-class scheme was the existence of "dangerous, unexpected, unpredictable, uncertain environments," but they maintained that "all of our public employees" confront such environments. (App. 495, Def. App. p. 86 (Rep. Mascher)). They pointed out, for example, that the victims of the November 1991 shooting at the University of Iowa were teachers. (App. 495, Def. App. p. 86 (Rep. Mascher)).

As in the Senate, the exclusion of university police from the "public safety" category drew particular criticism, with opponents of the two-class scheme arguing that those employees face the very kinds of risks that were identified by the proponents as the basis for providing special rights to "public safety" employees. (App. 493, Def. App. p. 84 (Reps. Smith and Kressig) (arguing that if the "public safety" category is based on exposure to "uncertainty and a dangerous … environment," university police should be included); App. 494, Def. App. p. 85 (Rep. Taylor) (university police "deal with unpredictable, unexpected situations. So there's no reason why they should be excluded")). The contention that "public safety" employees "work[] in an uncertain, uncontrolled situation" (App. 497, Def. App. p. 88) also was invoked by Representative Taylor in arguing against H.F. 291's reduction of the bargaining rights of corrections officers, who he noted are at

constant risk of assault and have the second highest mortality rate of any occupation. (App. 496, Def. App. p. 87. *See also* App. 498, Def. App. p. 89 (Rep. Heddens) ("Social workers, healthcare providers, probation officers, all of them encounter various levels of harmful situations, or potentially harmful situations")).

Thus, every one of the legislators who spoke in the debate over the two-class scheme understood that the question before the legislature was whether special bargaining rights should be conferred on "public safety" employees as defined in Section 1 of H.F. 291 so that they may use the bargaining process to address the special risks they allegedly faced on the job. The legislature adopted the two-class scheme for that purpose.

3. H.F. 291's Prohibition of Dues Checkoffs Only for Employee Organizations

H.F. 291 also eliminated the right of public employees to pay dues to an employee organization through payroll deduction where the public employer has agreed to such a procedure. This loss of rights extends to "public safety" employees as well as to all others; the discrimination embodied in *this* prohibition is not between classes of employees or of employee organizations, but between employee organizations and all other organizations.

Before the enactment of H.F. 291, public employees were allowed, if they so chose, to pay voluntary dues for membership in employee organizations by authorizing deductions from their pay in writing. Iowa Code § 20.9 (2016). And PERA's duty-to-bargain provision specifically extended to "terms authorizing dues checkoff for members of the employee organization," which may be used to collect dues from members upon their written authorization. *Id*. Public employees also were permitted – and are still permitted – to make other types of payments through such payroll deductions, including payments for insurance premiums and charitable contributions (App. 408, Plaintiffs' Supp. App. p. 5) as well as for membership dues in professional associations. *See* Iowa Code § 70A.17A.

H.F. 291 departs from this even-handed approach. Section 6 of H.F. 291 provides that no employee organization – defined as "an organization of any kind in which public employees participate and which exists for the primary purpose of representing employees in their employment relations," Iowa Code § 20.3(4) – will be permitted to bargain regarding "dues checkoffs, and other payroll deductions for political action committees or other political contributions or political activities." And, under Section 22 of the new statute, all public employers will be prohibited from providing payroll deduction for membership dues to "an employee organization as

defined in section 20.3." That prohibition applies even though administering payroll deductions imposes no burdens on public employers, which administer payroll deductions for multiple purposes, and even though it will cost public employers that are administering employee organization dues deductions more to remove those deductions than to continue making the deductions. (App. 408, Plf. Supp. App. p. 5).

At the same time, H.F. 291 leaves local governments, including school districts, free to allow payroll deductions for virtually any purpose other than checkoff of employee organization dues, including the payment of dues to any other kind of organization, such as other professional or trade associations. And H.F. 291 leaves in place Iowa Code § 70A.17A, which expressly authorizes state employers to administer payroll deduction of dues to any professional or trade association. Thus, under H.F. 291, public employees remain free to make virtually any other type of payment by payroll deduction, including payments for membership dues to professional associations, so long as such associations do not also qualify as employee organizations under PERA. But public employees may not, under H.F. 291, pay membership dues to organizations that are both professional associations *and* employee organizations, such as plaintiffs ISEA and DEA. (App. 58, 38-39, Answer ¶ 9; *see also* Petition for Declaratory Injunctive Relief ¶ 9).

C. The District Court's Summary Judgment Ruling

The district court concluded that H.F. 291's provisions creating an unequal collective bargaining scheme and imposing a ban against payroll deduction of employee organization dues do not violate Article I, Section 6 of the Iowa Constitution. In reaching those conclusions, the district court found that these provisions satisfy rational basis scrutiny under the Iowa Supreme Court's three-part test, which requires the court to determine (1) whether the statute's classification has a "realistically conceivable" purpose; (2) whether that legislative purpose has a "basis in fact"; and (3) "whether the relationship between the classification and the purpose for the classification is so weak that the classification must be viewed as arbitrary." Ruling at 5-7 (citations and quotation marks omitted).

With respect to what the district court described as H.F. 291's "two-class structure for collective bargaining rights," the court credited the rationale proffered by the state's counsel – namely, that the legislature retained full collective bargaining rights for units with the specified percentage of "public safety employees," while restricting bargaining rights for all other employee units, out of a fear of the ill effects that would result if public safety employees went out on strike to protest any diminution of their bargaining rights. (App. 25-26, Ruling pp. 9-10). In finding this proffered

rationale to satisfy Article I, Section 6 of the Iowa Constitution, the district court relied on the decision in *Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 655 (7th Cir. 2013), where the court found such a purpose to be sufficient, under federal equal protection analysis, to justify Wisconsin's enactment of bargaining restrictions and payroll deduction restrictions from which all "public safety employees" were exempted.

The district court reached this conclusion notwithstanding its acknowledgement that: (a) PERA already prohibits public employee strikes and contains harsh penalties against employees and unions for illegal strike activity that are "more severe than the potential sanctions set out in Wisconsin's counterpart"; (b) unlike the case in Wisconsin, no public employee strikes have occurred in Iowa since the anti-strike provisions came into effect; and (c) the list of "public safety employee" positions in H.F. 291 is both overinclusive and underinclusive. (App. 25-27, Ruling pp. 9-11). The court explained its conclusion as follows:

> It is not for this court to decide whether the decades of freedom from public employee strikes enjoyed in Iowa is the result of its statutory sanctions for violating this prohibition, or perhaps happenstance; likely [*sic*], it is not for this court to parse the respective statutory schemes in Iowa and Wisconsin to resolve whether they are comparably punitive in dealing with a potential illegal strike by public employees. What the record before the court does show is that Wisconsin's example is a valid

> justification to conclude that even when potentially stringent penalties are available to enforce a no-strike provision implemented by the legislature, strikes can and may still occur. As a result, the court concludes that the claimed justification for the enactment of the dichotomy in bargaining rights contained within H.F. 291 has a basis in fact. That classification is therefore upheld as not violative of the equal protection clause of the Iowa Constitution.

(App. 28, Ruling p. 12).

With respect to H.F. 291's provisions banning payroll deduction for employee organization dues while leaving public employers free to allow payroll deduction for virtually any other purpose, the court accepted the assertions of the state's counsel that the legislature had determined "that collective bargaining is 'expensive, disruptive and not in the best interest of citizens,'" and had decided, "as a cost-saving measure for the public," to prohibit payroll deduction of dues payments that would be used for that purpose. (App. 30, Ruling p. 14). The court stated that the "distinction drawn in this classification clearly serves the stated goal of fiscal responsibility, in that it applies to all employee organizations, even those who are 'favored' in other portions of H.F. 291." (App. 31, Ruling p. 15). Noting plaintiffs' argument that the proffered rationale was at odds with PERA's policy in favor of collective bargaining, the district court declared that that policy

does not mean that the state is "required to ratify policies that assist in an organization's ability to collectively bargain." (App. 31, Ruling p. 15).

ARGUMENT

I. HOUSE FILE 291'S TWO-CLASS SCHEME OF COLLECTIVE BARGAINING RIGHTS VIOLATES ARTICLE I, SECTION 6 OF THE IOWA CONSTITUTION.

Preservation of Error

Plaintiffs raised this issue in their motion for summary judgment, (*see* App. 69, Plf. Motion for Summ. Jdg. p. 2), and their briefs in support of that motion, (*see* App. 88-105, Plf. Mem. In Support of Summ. Jdg. pp. 17-34; App. 151-169, Plf. Reply to Def. Resistance to Plf. Motion for Summ. Jdg. pp. 4-22). The district court ruled on the issue in its Ruling on Motions for Summary Judgment at pp. 4-7, 8-12. (App. 20-23, 24-28).

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). Because the district court granted the defendants' motion,

the record must be reviewed in the light most favorable to the plaintiffs' claims. Furthermore, "[e]ven when the facts are undisputed, summary judgment is inappropriate if reasonable minds could draw different inferences from those facts." *Frontier Leasing Corp. v. Links Eng'g, LLC*, 781 N.W.2d 772, 775-76 (Iowa 2010).

A. The Two-Class Scheme of Bargaining Rights Was Not Adopted to Avoid Harmful Strikes and Cannot Be Sustained on that Basis.

In discriminating against disfavored employee organizations with respect to bargaining rights, H.F. 291 cannot be reconciled with the command in Article I, Section 6 of the Iowa Constitution that "[a]ll 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."

1. Statutes Challenged Under Article I, Section 6 Must Withstand Rigorous Rational Basis Scrutiny.

Although Article I, Section 6 sometimes is referred to as Iowa's "equal protection clause," its language differs significantly from that of the federal Equal Protection Clause. For that reason, as the Iowa Supreme Court recently reiterated, "[w]e may conclude [Article I, section 6] is more protective [than the Fourteenth Amendment]." *Tyler v. Iowa Dept. of Revenue*, 904 N.W.2d 162, 166 (Iowa 2017) (quoting *LSCP, LLLP v. Kay-*

Decker, 861 N.W.2d 846, 856 (Iowa 2015)). Consequently, in cases arising under Article I, Section 6, Iowa Courts "jealously reserve the right to develop an independent framework under the Iowa Constitution." *NextEra Energy Res., LLC v. Iowa Utilities Bd.*, 815 N.W.2d 30, 45 (Iowa 2012).

In particular, although a rational basis test applies to the review of economic legislation under both Article I, Section 6 and the Federal Equal Protection Clause, *see Tyler*, 904 N.W.2d at 166; *LSCP, LLLP*, 861 N.W.2d at 858, Iowa courts have "appli[ed] the rational basis test … independently in a more rigorous fashion" than applies to federal Equal Protection Clause claims. *NextEra Energy Res., LLC*, 815 N.W.2d at 47. Under that more rigorous approach, the rational basis test "'is not a toothless one' in Iowa." *Varnum v. Brien*, 763 N.W.2d 862, 879 (Iowa 2009) (quoting *Racing Ass'n of Cent. Iowa*, 675 N.W.2d at 7) ("*RACI*") (in turn quoting *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 107 (2003)).

Statutory classifications challenged under Article I, Section 6, are scrutinized by applying "a three-part framework," *Residential & Agric. Advisory Comm., LLC v. Dyersville City Council*, 888 N.W.2d 24, 50 (Iowa 2016) ("*RAAC*"), which differs substantially from the analysis that applies to claims under the federal Equal Protection Clause. *Compare LSCP, LLLP*, 861 N.W.2d at 856-58 (assessing the plaintiff's claim under the federal

Equal Protection Clause without applying Iowa's three-part framework), *with id.* at 858-63 (assessing the plaintiff's claim under Article I, Section 6 by applying the three-part framework). Consequently, a law may fail to withstand rational basis scrutiny under Article I, Section 6 even though it does not violate the federal Equal Protection Clause. *See RACI* (striking down tax differential between gambling receipts of racetracks and riverboats under Article I, Section 6 even though the U.S. Supreme Court had upheld that differential under the federal Equal Protection Clause).

Under the three-part framework that must be applied "when [a court] evaluate[s] whether the rational-basis test has been met under the Iowa Constitution," *RAAC*, 888 N.W.2d at 50, "[f]irst, [the court] must determine whether there was a valid, 'realistically conceivable' purpose that served a legitimate government interest." *Id*. (quoting *McQuistion v. City of Clinton*, 872 N.W.2d 817, 831 (Iowa 2015) (in turn quoting *RACI*, 675 N.W.2d at 7)). Second, the court must "decide whether the identified reason has any basis in fact." *McQuistion*, 872 N.W.2d at 831. In conducting that inquiry, "[a]lthough 'actual proof of an asserted justification [i]s not necessary, … the court wi[ll] not simply accept it at face value and w[ill] examine it to determine whether it [i]s credible as opposed to specious.'" *LSCP, LLLP*, 861 N.W.2d at 860 (quoting *Qwest Corp. v. Iowa State Bd. of Tax Review*,

829 N.W.2d 550, 560 (Iowa 2013)). Finally, the court must "evaluate 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 (quoting *McQuistion*, 872 N.W.2d at 831) (in turn quoting *RACI*, 675 N.W. 2d at 8)).

It is axiomatic that, to enforce the uniformity mandate of Article I, Section 6, "[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." *Varnum*, 763 N.W.2d at 883. In other words, "[e]qual protection … requires *the Legislature* to have reasonably believed that the means chosen would promote the [legislative] purpose." *Id.* (emphasis added).

Consequently, under Article I, Section 6, the focus must be on what the record shows to have been the legislature's purposes, not on other purposes that may spring from the imagination of defense counsel or a reviewing court but that played no part in the enactment of the legislation. *See, e.g.*, *LSCP, LLLP*, 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).

This does not mean that the government must always be able to point to specific evidence showing the purpose for which it was acting. But it does mean that where, as in this case, the record reveals the legislative purpose with clarity, a court cannot sustain a statute on the basis of some purpose invented by defense counsel that is unrelated to what the record shows to have been the *legislature's* purpose. What matters are "the legislative facts on which the classification is *apparently based*," *Varnum*, 763 N.W.2d at 879 (emphasis added) (quoting *RACI*, 675 N.W.2d at 7) (in turn quoting *Fitzgerald*, 532 U.S. at 107). A fictitious purpose cannot satisfy the requirement of Iowa's rational basis test that a proffered legislative purpose must be "realistically conceivable," *RACI*, 675 N.W.2d at 7, and must be

"credible as opposed to specious," *LSCP, LLLP*, 861 N.W.2d at 860 (quoting *Qwest Corp.*, 829 N.W.2d at 560).

2. The Rationales Embraced by the District Court Cannot Sustain H.F. 291's Discrimination in Bargaining Rights Because They Are Not Purposes the Legislature Sought to Promote.

As we have recounted, *supra* at 22-28, every one of the legislators who spoke in favor of or against H.F. 291's two-class scheme of bargaining rights recognized that the scheme was predicated on the view that public employees who face severe risks of an unpredictable and unregulated nature have a particular need to be able to seek protective measures through collective bargaining. Indeed, defendants acknowledged in the district court that "the one recorded statement of the rationale for the Legislature's distinction" was that "a firefighter or a police officer is more likely to go into what they consider to be an unregulated, dangerous environment." (App. 131, Def. Reply p. 13 (quoting Def. App. p. 58)). Yet the district court chose "not [to] entertain th[at] … justification," (App. 28, Ruling p. 12 n. 6) – no doubt recognizing that, as we show *infra* at 55-57, this rationale does not square with what H.F. 291 actually provides.

Instead, the district court sustained the "[t]wo-class structure for collective bargaining rights," (App. 24, Ruling p. 8), on two other "proffered … rationales": "1) [that] public safety employees should be allowed to

maintain their bargaining rights because of the risks posed in the event they undertook a work stoppage in response to being included in H.F. 291" (which we will call the "strike avoidance rationale") and "2) [that,] should other public employees go on strike in response to H.F. 291, it would fall upon public safety employees to enforce the law in the ensuing labor unrest." (App. 24-25, Ruling pp. 8-9).

The district court's reliance on rationales that the legislative history shows not to have been the legislature's actual purpose is "flaw[ed]" in precisely the way the Court found to be fatal to one of "the public interest[s] asserted by the State on appeal" in *RACI*, 675 N.W.2d at 15. In that case, the government argued that the legislature had decided to favor riverboats over racetracks with respect to the taxation of gambling revenue in order to provide an incentive for excursion boats located on the border rivers not to move to another state, but the Court found that "the legislative history belies that argument," *id.*, because the legislative study committee that had identified measures to provide such incentives had not identified the tax reduction as serving that purpose. *Id.*

In the Court's recent decision in *Tyler*, where the Court discussed the circumstances in which a law can fail rational basis scrutiny even in the "especially deferential … context of classifications made by complex tax

laws," *Tyler*, 904 N.W.2d at 166, (quoting *LSCP, LLLP*, 861 N.W.2d at 856), the Court recognized the importance of *RACI's* discussion of legislative history. Quoting *RACI's* statement that "the legislative history belie[d] th[e] argument" proffered by the government in that case, the Court explained that *Tyler* "differs from *RACI*" because "the alleged government interest [is not] undermined by the actual legislative history." Slip op. at 15. This case is like *RACI* and unlike *Tyler*, because the interest the legislature sought to promote is established by the "actual legislative history," which "undermine[s]" the government's attempted reliance on the very different purposes proposed by defense counsel and embraced by the district court.[4]

[4] In the district court, defendants were unable to cite a single case in which an Iowa court has sustained a statute against a challenge under Article I, Section 6 where the purpose articulated by the legislature was insufficient to justify the statute but the court found that the statute furthered some *different* purpose proffered by counsel for the government. The district court's statement that "[a] legitimate interest can be any reasonable justification, not just the one the legislature actually chose" (App. 22, Ruling p. 6) is incorrect to the extent that it would allow a court to sustain a statute on a ground that the legislature plainly did not embrace, where the actual purpose of the legislation is clear on the record. In *LSCP, LLLP*, which contains the sentence quoted by the district court, *see* 861 N.W.2d at 858, the Court did *not* sustain a statute on such a basis. On the contrary, noting that "the legislature expressly identified the interests it sought to advance," *id.* at 860, the Court evaluated what "the legislature sought to promote," *id.*, and confined its inquiry to "th[e] objective" that "[t]he legislature chose to advance," *id.*

Any suggestion that deference to the legislature requires the Court to consider such counter-factual proffered purposes gets things backwards. The rationales on which the district court relied were proffered after the fact by *defense counsel*; no *legislator* saw them as a reason for giving special treatment to "public safety" employees. Indeed, the rationales on which the district court sustained the two-class bargaining scheme are, if anything, *at odds with* the judgments of the legislature. The strike avoidance rationale embraced by the district court rests on the premise that if "public safety" employees were not spared from the restrictions on bargaining, they would retaliate by conducting unlawful work stoppages, refusing to perform their services to the public. But there is no hint in the legislative record that the legislature held that view of police, firefighters and other public safety employees. On the contrary, in explaining why those employees should be granted superior bargaining rights, the legislators praised the dedication and selflessness with which they subject themselves to danger in serving the public. *See supra* at 22-28. The district court's suggestion that public safety employees would refuse to perform their duties unless their loyalty were purchased by exempting them from the injurious provisions of H.F. 291 impugns those employees in a manner that is contrary to the legislative record.

3. The Rationales Embraced By the District Court Could Not Survive Rational Basis Scrutiny In Any Event.

Had the rationales embraced by the district court been embraced by the legislature, they would not survive rational basis scrutiny because they lack "any basis in fact," *RAAC*, 888 N.W.2d at 50, and "the relationship between the classification and [this asserted] purpose for the classification 'is so weak that the classification must be viewed as arbitrary,'" *id.* (quoting *McQuistion*, 872 N.W.2d at 831) (in turn quoting *RACI*, 675 N.W.2d at 8).

a. As defendants acknowledged (App. 59, Answer ¶ 25) and the district court noted, there has not been a single strike by public employees in Iowa in the more than forty years since PERA was enacted. (App. 26-27, Ruling pp. 10-11). That is readily explained by PERA's extraordinarily powerful anti-strike penalties, which the court enumerated, (App. 27, Ruling p. 11):

> These penalties include 1) the ability to obtain an injunction restraining a violation or imminent violation of the statutory prohibition against striking (without the need to prove irreparable harm or to post a bond); 2) the failure to comply with such injunction being treated as a contempt under chapter 665 of the Iowa Code, punishable by a daily fine of $500 for each individual found to be in contempt (or $10,000 per day for any employee organization found to be in contempt) and/or imprisonment of up to six months in jail; 3) any public employee found to be in violation of the

> statutory prohibition or in contempt shall be immediately discharged from his employment and "shall be ineligible for any employment by the same public employer for a period of twelve months;" and 4) any employee organization found to be in violation or contempt shall be immediately decertified, shall cease to represent the bargaining unit, shall cease to receive dues and may only be recertified after twelve months has elapsed from the effective date of decertification.

Iowa Code § 20.12(3-5) (2017).

Yet the district court declared that the absence of public sector strikes in Iowa – in contrast with states like Wisconsin, which have weaker anti-strike laws, (App. 27-28, Ruling pp. 11-12) – may be nothing more than "happenstance," (App. 28, Ruling p. 12). Thus, having attributed to the legislature the belief that public safety employees might be inclined to violate the law and to abandon their duties if they were not mollified by being excluded from the reach of H.F. 291, the court apparently concluded that public safety employees would be so eager to pursue that lawless course that they would not be dissuaded even by the powerful no-strike penalties in PERA that have deferred public sector strikes in Iowa for four decades. That rampant speculation, unmoored from any indication of legislative intent, lacks "any basis in fact." *RAAC*, 888 N.W.2d at 50.

b. Further, if scrutinized as a strike avoidance measure, H.F. 291 "features [such] 'extreme degrees of overinclusion and underinclusion in

relation to [that asserted] goal'" that "it cannot [reasonably] be said to … further that goal." *LSCP, LLLP*, 861 N.W.2d at 861 (quoting *Bierkamp*, 293 N.W.2d at 584). This is so for two separate reasons.

(i) First, as we have noted, *supra* at 22-28, the drafters of H.F. 291's two-class scheme described the line they were drawing as one that was based on whether a particular job exposed employees to unpredictable and unregulated hazards. But the question of whether a work stoppage by certain employees would present a special risk *to the public* is very different from the question of whether the job to which they are assigned presents special risks *to the employees*. It therefore is inevitable that a line drawn by the legislature for the latter purpose will exhibit "extreme degrees of overinclusion and underinclusion in relation to [the former purpose]." *LSCP, LLLP*, 861 N.W.2d at 861. And that is certainly the case here.

For example, university police are not considered "public safety employees" by H.F. 291 even though they perform the same duties as other police officers and protect large populations that are both high-risk and prone to activities that necessitate police intervention. (App. 287-88, De Vries Aff. ¶¶ 3-7, Plf. App. pp. 119-120). The Legislature could not possibly have thought that the risk to public safety that would result from a strike by

university police was so inconsequential that there was no need to be concerned about such a strike even though there *was* a need to be concerned about a strike by town or city police – or by park rangers, gambling enforcement officers or fire marshal investigators, all of whom are listed as "public safety employees" in H.F. 291. Nor could the Legislature have believed that a strike by airport firefighters, who are excluded from the Section 1 list, would pose no serious threat to public safety, while a strike by municipal firefighters would pose such a risk. (App. 295-97, Peters Aff., Plf. App. pp. 130-32). *See RACI*, 675 N.W.2d at 9 (rational basis scrutiny is not satisfied if the factual basis for the challenged statutory distinction could not "rationally [be] considered to be true by the governmental decision maker").

Corrections officers and emergency medical service providers likewise are not "public safety employees" under H.F. 291, even though they are considered by Iowa law to work in a "protection occupation." *See* Iowa Code § 97B.49B(1)(e). Obviously, a strike by prison guards or emergency medical service providers could have a severe and immediate impact on public health and safety. The same is true of a strike by nurses and other employees caring for the physically or emotionally disabled in Iowa's Resource Centers, who likewise are excluded from the "public safety

employee" list. (App. 298-302, Affidavit of Susan Rowe, Plf. App. pp. 134-38.

A strike by educational employees represented by ISEA and its affiliates likewise would present a severe danger to public health and safety, as well as to public education. That is true not only with respect to school nurses and school security guards, whose work is entirely devoted to protecting health and safety, but also with respect to teachers and bus drivers, who are responsible for the safety of the hundreds of thousands of children who attend Iowa public schools, and who frequently are the sole staff in public schools. (Second Supp. App. 10-11; Marquardt Aff. ¶¶ 24-25, Plf. App. pp. 73-74).

It would be one thing for the legislature to conclude, as it did, that teachers and other educational employees do not confront risks to their safety that are comparable to those faced by police or firefighters. But that says nothing about the risk *to the public* that would be posed by a teacher strike. Students – including young children – could suddenly be left unsupervised when a walkout begins, and many would be without a safe environment in the days that would follow, when the schools would unexpectedly be closed and many parents or caregivers would be unable to stay home or to make other arrangements for the supervision of their

children. *Id.* ¶ 26. Indeed, the most prominent "illustrat[ion] of the kinds of community disruption" that led the legislature to enact PERA's anti-strike provisions was the 1970 Keokuk teachers' strike. University of Iowa Labor Center, *"To Promote Harmonious and Cooperative Relationships,"* at 530 (2016). No rational legislature could conclude that a wave of teacher strikes would cause less harm to the public than a strike by (for example) gambling enforcement officers or park rangers.

It is no answer to say that "such line drawing is not up to [the] courts, but is done by the legislature." (App. 26, Ruling p. 10) (quoting *Gregory v. Second Injury Fund of Iowa*, 777 N.W.2d 395, 404 (Iowa 2010) (Cady, J., dissenting)). As we have explained, the legislature did *not* seek to draw a line between employees who would endanger the public welfare if they were to strike and those who would not; the line the legislature sought to draw was a very different one, between employees who were exposed to unpredictable and unregulated hazards and those who were not. Thus, the situation here is unlike Wisconsin's Act 10, as to which "the Governor [of Wisconsin] stated in advance of [the] enactment that 'public safety employees' were exempted from the collective bargaining changes under the Act in order to avoid the prospect of law enforcement and firefighting employees striking … in response to its enactment." *Wisconsin Educ. Ass'n*

Council v. Walker, 824 F. Supp. 2d 856, 865 (W.D. Wis. 2012), *aff'd in pertinent part*, 705 F.3d 640 (7th Cir. 2013).

Unlike in Iowa, "public employees [in Wisconsin] ha[d] gone on strike in the past despite [Wisconsin's] statutory, anti-strike provisions," *Wisconsin Educ. Ass'n Council*, 824 F. Supp. 2d at 867 – provisions which, as the district court recognized, are much weaker than Iowa's. *See supra* at 31-32. Governor Walker's assertion that public safety employees were exempted from Act 10's bargaining restrictions so as to avoid provoking additional strikes may have been plausible in Wisconsin's very different circumstances; and that assertion was supported by an affidavit attesting that the composition of Act 10's "Public Safety Employee" category had been based on a detailed pre-enactment analysis of the extent to which a strike by particular bargaining units would endanger public health or safety. (Second Supp. App. 15-17; Plf. App. 292-94). But in the *Iowa* legislature, no such strike-avoidance concerns or judgments played any part in drawing the line between "public safety" employees and others in H.F. 291.[5]

[5] In any event, the *Second Injury Fund* case cited by the district court did not involve Article I, Section 6. The three-part framework the Court has fashioned for this context, *see supra* at 36-39, does not allow blind deference to legislative line-drawing. Rather, it forbids the "extreme degrees of overinclusion and underinclusion," *LSCP, LLLP*, 861 N.W.2d at 861, that exist in this case.

(ii) H.F. 291 exhibits extreme overinclusion and underinclusion in another respect as well. Having determined that "public safety" employees should be exempted from H.F. 291's reduction of bargaining rights, the statute inexplicably does *not* exempt those employees unless they happen to make up at least thirty percent of a particular bargaining unit. And by the same token, many employees who are *not* "public safety employees" under Section 1 of H.F. 291 *are* exempted from bargaining restrictions solely because some *other* employees in their bargaining unit – as few as thirty percent of the unit – are "public safety employees." As a result, many police officers and other public safety employees, including the entire police forces of some communities, are subjected to the loss of bargaining rights which – on the theory of defense counsel and the district court – may induce them to engage in harmful strikes. (App. 395, Homan Aff. ¶ 5, Plf. App. p. 297; App. 402-03, Williams Aff., Plf. App. pp. 351-52). Conversely, large numbers of *non*-public safety employees, whom (on the district court's theory) the legislature had no reason to exempt from the loss of bargaining rights, *are* exempt, merely because some fraction of the *other* employees in their bargaining unit – as few as thirty percent of the unit members – fall into the category that the legislature *did* wish to exempt.

This anomaly defies reason and would cause H.F. 291's two-class scheme to fail rational basis scrutiny even if the list of "public safety" positions were itself reasonably drawn. The problem is not that the legislature drew the line at thirty percent rather than at some other percentage; the problem is that drawing *any* line of this nature was unnecessary and served to render the classification scheme grossly over- and under-inclusive.

Nothing in Iowa law, before or after H.F. 291, requires that all employees in a bargaining unit have the same bargaining rights. It often is the case that a bargaining unit consists of many different categories of employees and the union negotiates on different subjects for each employee category.[6] The legislature's determinations that certain subjects should be open for bargaining only as to "public safety" employees, *see supra* at 19, and that only "public safety" employees should be eligible for an arbitration award that increases base wages by more than 3%, *see supra* at 20-22, would

[6] For example, the 2013 Master Contract between the State of Iowa and AFSCME Council 61 includes separate appendices covering matters specific to employees of twelve separate departments. *See* 2013 Master Contract, Appendices G-J, L, M, O-T (available at https://das.iowa.gov/sites/default/files/hr/documents/union_contracts/afscme_contract_13-15.pdf). In addition, Appendix U to that contract includes Memoranda of Understanding containing separate provisions for several distinct occupational groups. *Id.*

call for allowing *all* unions to bargain and arbitrate on such matters for public safety members and for prohibiting *any* union from bargaining and arbitrating on such matters for *other* members. Instead, for no apparent reason, H.F. 291 allows some unions to bargain and arbitrate on a broad basis for members who are *not* in "public safety" positions, and prohibits other unions from bargaining and arbitrating on a broad basis for members who *are* in "public safety" positions.[7] This discrimination as to bargaining units would make no sense even if the discrimination as to categories of employees were rational.

(iii) Taken together, the arbitrary nature of the statutory list of "public safety employees" coupled with the "thirty percent" system results in a crazy quilt of favored and disfavored employees and employee organizations. University police, airport firefighters, prison guards, emergency medical service providers, Resource Center health personnel, school nurses, school security guards, school bus drivers and teachers all are subjected to the provisions of H.F. 291 that, on defendants' theory, may

[7] Wisconsin's Act 10 did not suffer from this defect; it simply "subject[ed] general employees but not public safety employees to Act 10's restrictions on union activity." *Wisconsin Educ. Ass'n Council*, 705 F.3d at 642. In any event, the scrutiny required by Article I, Section 6 is "more rigorous," *NextEra Energy Res., LLC*, 815 N.W.2d at 47, than the federal Equal Protection Clause standards that were applied in *Wisconsin Education Association Council*.

induce those employees to strike. So are police officers, firefighters, and other "public safety employees" listed in Section 1 of the statute, if they happen to be part of a bargaining unit where fewer than thirty percent of the members fall within the "public safety" category. On defendants' theory, the legislature chose to leave the public exposed to the risk of a strike by all of these kinds of employees, and yet the legislature supposedly feared the possibility of a strike by even a small number of park rangers, gambling enforcement officers or fire marshal investigators.

It is simply not "credible," *LSCP, LLLP*, 861 N.W.2d at 860, to assert that this system of "ins" and "outs" was adopted for the purpose of avoiding harmful strikes. And if that *were* thought to be the legislative purpose, "the relationship between the classification [of favored and disfavored employee organizations] and the [asserted] purpose for the classification 'is so weak that the classification 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). The classification "features [such] 'extreme degrees of overinclusion and underinclusion in relation to [the asserted] goal' [that] it

cannot [reasonably] be said to … further that goal," *LSCP, LLLP*, 861 N.W.2d at 861 (quoting *RACI*, 675 N.W.2d at 10).[8]

[8] In addition to the strike-avoidance rationale just discussed, counsel for the state proffered a second rationale for the two-class bargaining scheme: that, "should other public employees go on strike in response to H.F. 291, it would fall upon public safety employees to enforce the law in the ensuing labor unrest." (App. 25, Ruling p. 9). The court did not explain how this notion (which, like the strike-avoidance rationale, was not embraced by the legislature) could possibly justify H.F. 291's discrimination with respect to bargaining rights. It cannot.

In the first place, it would *not* "fall upon public safety employees" to enforce PERA's no-strike provisions; no public safety employees are charged with the duty of herding up strikers and conveying them back to work. If the court meant to suggest that violations of some other laws might occur in connection with "labor unrest" ensuing from the enactment of H.F. 291, it may be conceivable that some police officers could be called upon to enforce those laws, but none of the other categories of "public safety" employees, such as firefighters and park rangers, would have any role to play in that regard. More to the point, there is no basis for the suggestion implicitly made by the district court that, if some non-public safety employees were to violate the law in the course of labor unrest over H.F. 291, police officers would not be willing to arrest those employees unless the police had themselves been exempted from the statute. That chain of speculation is divorced from anything in the legislative history. It has no "basis in fact," *RAAC*, 888 N.W.2d at 50, and is entirely "specious," *LSCP, LLLP*, 861 N.W.2d at 860 (quoting *Qwest Corp.*, 892 N.W.2d at 560). What is more, this rationale, assuming as it does a need to motivate police to assist in suppressing labor unrest involving non-public-safety employees, is inconsistent with the rationale on which the district court principally relied, which assumes that potential work stoppages by non-public-safety employees are not a matter of concern in any event.

B. Nor Can the Discrimination in Bargaining Rights Be Sustained on the Ground Advanced by the Legislators.

The district court declined to "entertain the alternative justification for H.F. 291; namely, that public safety employees are exposed to greater risks to their health and safety." (App. 28, Ruling p. 12 n.6). This was, of course, the rationale the legislature actually embraced. *See supra* at 22-27.

We need not delve into the question whether Section 1 succeeds in identifying employees who face unregulated risks and who therefore may have a particular need to be allowed to bargain for measures to protect themselves, as the proponents of the two-class scheme argued. *See supra* at 25-27. Even if that were the case, the provisions of H.F. 291 bear no rational connection to such a purpose.

Section 6 of H.F. 291 provides that units consisting of at least thirty percent "public safety" employees have a right to insist on bargaining over seventeen specified subjects: "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] grievance procedures for resolving any questions arising under the agreement." For all other units, however, "base wages" constitute the only subject as to which bargaining is mandatory. Yet, of the sixteen

subjects as to which "public safety" units but not others are given a mandatory right to bargain, only one of those subjects – "health and safety matters" – is related to the factor the legislators cited as the reason for bestowing special bargaining rights on "public safety" units. Why those units should have greater bargaining rights with respect to everything from vacations to evaluation procedures is unexplained and inexplicable. Equally inexplicable is the legislators' decision to give "public safety" units greater rights than others in arbitrating over wages – the only subject as to which, absent employer agreement, a non-public-safety unit can insist on bargaining. *See supra* at 19-22.

What is more, for seven of the subjects as to which Section 6 of H.F. 291 makes bargaining mandatory in the case of "public safety" units – "insurance, leaves of absence for political activities, supplemental pay, transfer procedures, evaluation procedures, procedures for staff reduction, and subcontracting public services" – bargaining is *prohibited* for all other units. Nothing about any safety risks to which "public safety" employees may be subjected justifies granting those employees the exclusive right to bargain with respect to "leaves of absence for political activities," or "subcontracting public services," or any of the other listed subjects.

In short, the distinctions in H.F. 291 regarding bargaining rights have no conceivable nexus to the legislature's stated rationale. "[T]he relationship between the classification and [this stated] purpose for the classification 'is so weak that the classification 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).

II. HOUSE FILE 291'S DISCRIMINATORY PROHIBITION AGAINST PAYROLL DEDUCTION OF EMPLOYEE ORGANIZATION DUES VIOLATES ARTICLE I, SECTION 6 OF THE IOWA CONSTITUTION

Preservation of Error

Plaintiffs raised this issue in their motion for summary judgment and in their briefs in support of that motion. (App. 69-70, Plf. Motion for Summ. Jdg. pp. 2-3; App. 105-07, Plf. Mem. in Support of Summ. Jdg. pp. 34-36; App. 169-172, Plf. Reply to Def. Resistance to Plf. Motion for Summ. Judg. pp. 22-25). The district court ruled on the issue in its Ruling on Motions for Summary Judgment at pp. 13-16. (App. 29-32).

Scope and Standard of Review

As this question involves the resolution of a constitutional issue, the court's review is de novo. *Bierkamp*, 293 N.W.2d at 580. In reviewing a grant of summary judgment, the Court must "view the entire record in the light most favorable to the nonmoving party" and "mak[e] 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).

Argument

As detailed in the statement of facts, H.F. 291 prohibits public employers from administering payroll deduction for employee dues payments to any employee organization and forbids collective bargaining over this subject, while continuing to leave public employers free to allow employees to make virtually any other type of payment by payroll deduction. In particular, payroll deduction may be used to pay membership dues to professional associations, so long as such associations do not also qualify as employee organizations under PERA, but public employees may not, under H.F. 291, pay membership dues to organizations such as plaintiffs ISEA and DEA, which are both professional associations and employee organizations. (App. 38-39, 58; Petition for Declaratory and Injunctive Relief ¶ 9, Answer ¶ 9). This discriminatory treatment violates the command of Article I, Section 6 that "[a]ll laws of a general nature shall have a uniform operation" and that "the general assembly shall grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens."

We must emphasize at the outset that Plaintiffs do not challenge this discriminatory provision as an infringement of their right to free speech or of any other fundamental right. Rather, Plaintiffs' contention is that this discrimination violates the equal treatment guarantee of Article I, Section 6 because it fails rational basis scrutiny. Consequently, the district court's emphasis on the proposition that free speech principles do not require the government to administer payroll deductions (App. 29, 32, Ruling pp. 13, 16) does not speak to the issue presented.

As explained above, under the three-part test for determining "whether the rational-basis test has been met under the Iowa Constitution," the court must (1) "determine whether there was a valid, realistically conceivable purpose that served a legitimate government interest." *RAAC*, 888 N.W.2d at 50 (quotation marks and citation omitted); (2) "decide whether the identified reason has any basis in fact," *id.*, that is, whether the rationale is "credible as opposed to specious," *LSCP, LLLP*, 861 N.W.2d at 860 (citations and quotation marks omitted); and (3) "evaluate 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 (citations and quotation marks omitted). The district court concluded that H.F.291's discriminatory payroll deduction ban passed this

test on the ground that it can be justified as a "cost-saving measure to the public" that is rationally related to "[t]he fiscal interests of the government." (App. 30, Ruling p. 14). That conclusion does not withstand rational basis scrutiny.

To begin with, there can be no serious contention that the administration of payroll deductions itself represents any appreciable cost to the government. On the contrary, the evidence on this point shows not only that administering payroll deductions imposes no burdens on public employers, which administer payroll deductions for multiple purposes, but also that public employers who have been administering deductions for employee organization dues will incur greater cost to remove those deductions from their payroll systems than to continue making the deductions. (App. 408, Taylor Aff., Plf. Supp. App. p. 5).

Consequently, the purported justification for H.F. 291's discriminatory treatment of employee organization dues rises or falls on the state's assertion, accepted by the District Court, that the legislature regarded collective bargaining as so "'expensive, disruptive, and not in the best interests of citizens" as to call for prohibiting the payroll deduction of employee organizations dues that would be used for that purpose. (App. 31, Ruling p. 15). The unstated premise behind this supposition is that

forbidding the payment of dues to employee organizations via payroll deduction will curtail collective bargaining, presumably by starving employee organizations of the funds they need to fulfill their purpose of representing public employees under PERA.

We can leave to one side the fact that there is no evidence that the legislature had this convoluted rationale in mind when it enacted the payroll deduction provision. For this rationale, based as it is on the notion that collective bargaining is a harmful activity to be curtailed or eliminated, must be rejected because is at odds with the public policy *favoring* collective bargaining that PERA expressly embraces and enacts. In the very first provision of PERA, "[t]he general assembly declares that it is the public policy of the state to promote harmonious and cooperative relationships between government and its employees by permitting public employees to organize and bargain collectively." Iowa Code § 20.1(1). To that end, PERA, *inter alia*, makes it unlawful for a public employer to refuse to bargain collectively with an employee organization that is certified to represent its members. *See id.* §§ 20.10(1), 20.10(2)(e).

To be sure, H.F. 291 has narrowed the subjects of bargaining for disfavored employee organizations. But within the allowed scope of bargaining, which includes such matters as base wages, collective bargaining

remains a duty that the state requires public employers to honor. And in the case of favored "public safety employee" organizations, the duty to bargain continues to apply to a broad range of subjects. *See supra* at 19-21. Yet H.F. 291 prohibits payroll deduction of dues for *any* employee organization, even though those dues will perforce be used for collective bargaining only with respect to the subjects as to which Iowa law mandates or permits bargaining.

Hindering employee organizations from receiving dues payments to carry out the collective bargaining that is not only permitted but *favored* and indeed *required* by Iowa law is not a "valid, realistically conceivable purpose" for H.F. 291's discriminatory prohibition, nor is it a purpose that "is credible as opposed to specious." On the contrary, by prohibiting payroll deduction for employee organization dues, H.F. 291 discriminates against the only kind of professional association that uses its dues for an activity that is required by law and that promotes an express public policy of the state.

That discrimination cannot be sustained on the notion that "the legislature can select winners and losers," (App. 31, Ruling p. 15). This Court's analysis under Article I, Section 6 of the Iowa Constitution requires that when a law discriminates among similarly situated entities or individuals, the discrimination must be justified by a valid purpose that has a basis in fact, and there must be a sufficient relationship between the

classification and that purpose. The district court therefore missed the mark in emphasizing that the state is not required to assist a union's ability to bargain. (App. 32, Ruling p. 16). The question here is not whether collective bargaining should be singled out for special *support*, but whether collective bargaining may, consistent with rational basis scrutiny under Article I, Section 6, be singled out for special *impediments*, which is what H.F. 291 does by prohibiting payroll deduction *only* for dues to be used to finance collective bargaining. In seeking to defend this discrimination on the ground that collective bargaining should be uniquely disfavored as "expensive, disruptive, and not in the best interests of citizens," (App. 31, Ruling p. 15), when in fact collective bargaining is *favored* by Iowa law and policy, defendants and the district court advance a rationale that, far from satisfying the rational basis scrutiny required by Article I, Section 6, is utterly irreconcilable with that provision.[9]

[9] For these reasons, the district court's reliance on *City of Charlotte v. Local 660, Int'l Ass'n of Firefighters*, 426 U.S. 283, 288 (1976), is misplaced. In that decision – which arose under the federal Equal Protection Clause and not under Article I, Section 6 of the Iowa Constitution –the rationale for withholding payroll deduction was based on the cost of *administering the deductions.* The municipality in *City of Charlotte*, having demonstrated "that it would be unduly burdensome and expensive for it to withhold money for every organization or person that requested it," made a distinction between deductions for "programs of general interest in which all city or departmental employees can, without more, participate" and "special interest

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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groups that claim only some departmental employees as members." *Id.* The Court upheld the municipality's decision to grant payroll deduction only for the former and to deny it to the latter. *Id.* Here, in contrast, as we have shown, there is not and cannot be any contention that the administration of payroll deductions is burdensome in itself. Rather, the rationale proffered by defense counsel and embraced by the district court is predicated on the supposed costs of *collective bargaining itself*. For the reasons stated in the text, this cannot justify the discriminatory treatment of employee organization dues under this Court's three-part rational-basis analysis.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this Brief contains 13,313 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 March, 2018, the undersigned electronically filed this document using the Electronic Document Management System.

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The undersigned certifies that the Appellants' Page Proof Brief was served on the 16th day of March, 2018, upon Matthew C. McDermott, Michael R. Reck, Kelsey J. Knowles, and Espnola 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.

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