BEFORE THE 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 DISTRICT COURT
OF POLK COUNTY
HON. MICHAEL D. HUPPERT

APPELLEES' BRIEF

Michael R. Reck, AT0006573
Matthew C. McDermott, AT0005085
Kelsey J. Knowles, AT0004233
Espnola F. Cartmill, AT0010237

BELIN McCORMICK, P.C.
666 Walnut Street Suite 2000
Des Moines, IA 50309-3989
Telephone: (515) 283-4643
Facsimile: (515) 558-0643
E-Mail: mrreck@belinmccormick.com;
mmcdermott@belinmccormick.com;
kjknowles@belinmccormick.com;
efcartmill@belinmccormick.com

ATTORNEYS FOR DEFENDANTS/ APPELLEES STATE OF IOWA, IOWA PUBLIC EMPLOYMENT APPEAL BOARD, MIKE CORMACK, JAMIE VAN FOSSEN and MARY GANNON

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether Iowa's equal protection clause compels the Legislature to limit the statutory collective bargaining rights of Public Safety Employees because other state employees do not enjoy the same statutory rights.

Baker v. City of Iowa City, 867 N.W.2d 44, 51, 57-58 (Iowa 2015).

State v. Groves, 742 N.W.2d 90, 92 (Iowa 2007).

Qwest Corp. v. Iowa St. Bd. of Tax Review, 829 N.W.2d 550, 557 n.4, 558, 563-64 (Iowa 2013).

McQuisition v. City of Clinton, 872 N.W.2d 817, 830 (Iowa 2015).

State v. Dudley, 766 N.W.2d 606, 616 (Iowa 2009).

NextEra Energy Res. LLC v. Iowa Utilities Bd., 815 N.W.2d 30, 45-46 (Iowa 2012).

Ames Rental Prop. Ass'n v. City of Ames, 736 N.W.2d 255, 259 (Iowa 2007).

State Bd. of Regents v. United Packing House Food & Allied Workers, Local No. 1258, 175 N.W.2d 110, 113 (Iowa 1970).

Sanchez v. State, 692 N.W.2d 812, 817 (Iowa 2005).

Kelly v. State, 525 N.W.2d 409, 411 (Iowa 1994).

Sherman v. Pella Corp., 576 N.W.2d 312, 317 (Iowa 1998).

Slifer v. Pub. Employee Relations Bd. of Kansas, No. 90-4026-R, 1992 WL 25457, at *6 (D. Kan. Jan. 28, 1992).

King v. State, 818 N.W.2d 1, 27 (Iowa 2012).

Wisconsin Educ Ass'n Council v. Walker, 705 F.3d 640, 653, 655-56 (7th Cir. 2013).

Vorbeck v. McNeal, 407 F. Supp. 733, 739 (E.D. Mo. 1976).

Varnum v. Brien, 763 N.W.2d 862, 879 (Iowa 2009).

Residential & Agric. Advisory Comm., LLC v. Dyersville City Council, 888 N.W.2d 24, 50 (Iowa 2016).

Racing Ass'n of Cent. Iowa v. Fitzgerald (RACI), 675 N.W.2d 1, 7 (Iowa 2004).

Margiotta v. Kaye, 283 F. Supp. 2d 857, 865 (E.D.N.Y. 2003).

Beverlin v. Bd. of Police Comm'rs of Kansas City, Mo., 722 F.2d 395, 396 (8th Cir. 1983).

Confederation of Police v. City of Chicago, 481 F. Supp. 566, 568 (N.D. Ill. 1980).

March v. Rupf, No. C00-03360WHA, 2001 WL 1112110, at *2 (N.D. Cal. Sept. 17, 2001).

Scott County Prop. Taxpayers Ass'n, Inc. v. Scott County, 473 N.W.2d 28, 31 (Iowa 1991).

State v. Mann, 602 N.W.2d 785, 792 (Iowa 1999).

State v. Mitchell, 757 N.W.2d 431, 437 (Iowa 2008).

LSCP, LLLP v. Kay-Decker, 861 N.W.2d 846, 857-58 (Iowa 2015).

U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 175 (1980).

FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).

Adams v. Fort Madison Cmty. Sch. Dist. in Lee, Des Moines & Henry Ctys., 182 N.W.2d 132, 139 (Iowa 1970).

State ex rel. Cairy v. Iowa Co-op. Ass'n, 95 N.W.2d 441, 443 (Iowa 1959).

Dickinson v. Porter, 35 N.W.2d 66, 71 (Iowa 1948).

Des Moines Metro. Area Solid Waste Agency v. City of Grimes, 495 N.W.2d 746, 749 (Iowa 1993).

Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130 (1810).

Madison Teachers, Inc. v. Walker, 851 N.W.2d 337 (Wis. 2014).

Harwell v. Leech, 672 S.W.2d 761, 764 (Tenn. 1984).

Adams v. Fort Madison Community School Dist. in Lee, Des Moines and Henry Counties, 182 N.W.2d 132, 141 (Iowa 1970).

Zaber v. City of Dubuque, 789 N.W.2d 634, 645-46 (Iowa 2010).

Ames Rental Prop. Ass'n v. City of Ames, 736 N.W.2d 255, 263 (Iowa 2007).

State v. Drake, 219 N.W.2d 492, 496 (Iowa 1974).

Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 314 (1976).

2. Whether the State is compelled to provide public employees payroll deduction for payment of union dues for collective bargaining when the State does not wish to facilitate collective bargaining.

Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 358-59 (2009).

South Carolina Educ. Ass'n v. Campbell, 883 F.2d 1251, 1257, 1263 (4th Cir. 1989).

West Cent. Mo. Reg'l Lodge No. 50 v. Bd. of Police Comm'rs of Kansas City, 916 S.W.2d 889, 892 (Mo. Ct. App. 1996).

City of Charlotte v. Local 660, Int'l Ass'n of Firefighters, 426 U.S. 283, 288 (1976).

State Board of Regents v. United Packing House Food & Allied Workers, Local No. 1258, 175 N.W.2d 110, 113 (Iowa 1970).

King, 818 N.W.2d at 39 *Matter of Div. of Criminal Justice State Investigators*, 674 A.2d 199, 204 (N.J. App. Div. 1996)

Wisconsin Educ Ass'n Council v. Walker, 705 F.3d 640, 659 (7th Cir. 2013).

ROUTING STATEMENT

Defendants-Appellees State of Iowa, Iowa Public Employment Relations Board, Mike Cormack, Jamie Van Fossen, and Mary Gannon (collectively, the "State") agree this case should properly be retained by the Iowa Supreme Court as it presents substantial constitutional questions as to the validity of a statute. *See* Iowa R. App. P. 6.1101(2)(a).

STATEMENT OF THE CASE

This is an appeal by Plaintiffs-Appellants Iowa State Education Association and Davenport Education Association (together, "Plaintiffs") from the final order of the district court granting summary judgment in favor of the State and against Plaintiffs. Plaintiffs are employee organizations representing employees of public schools.

Plaintiffs filed a Petition for Declaratory and Injunctive Relief on April 4, 2017. (App. 35-56.) In the Petition, Plaintiffs' challenged recent amendments to Iowa Code Chapter 20, the Public Employment Relations Act. *See* Acts 2017 (87th G.A.) ch. 2, H.F. 291, §§1, 6, 9, 12-14, 22 (eff. February 17, 2017) (the "Amendments"). The

Petition pled three theories: (1) the Amendments' granting of additional bargaining rights to bargaining units with thirty percent or more "Public Safety Employees" than units not meeting that threshold violates equal protection; (2) the Amendments' prohibition on payroll deduction for payment of dues to "employee organizations" while continuing to permit payroll deduction for professional or trade organization dues violates equal protection; and (3) the Amendments' requirements to certify, retain, and decertify an employee organization violates substantive due process.[1] (App. 35-56.)

The State filed its Answer and Affirmative Defense on May 9, 2017. (App. 57-65.) The State filed a motion for summary judgment the same day. (App. 66-67.) Plaintiffs filed a resistance and cross-motion for summary judgment on June 23, 2017. (App. 68-71.) The district court granted the State's motion for summary judgment and denied Plaintiffs', dismissing the case with prejudice. (Ruling on Motions for Summary Judgment "Ruling" (App. 17-34) (Oct. 18,

[1] Plaintiffs have declined to pursue their third theory on appeal. (Plaintiffs' Brief p. 10.)

2017).) Plaintiffs filed a timely Notice of Appeal to the Iowa Supreme Court on November 13, 2017. (App. 176-79.)

STATEMENT OF THE FACTS

Iowa's Legislature first enacted Iowa Code Chapter 20 in 1974. Chapter 20 statutorily granted certain bargaining rights, previously lacking, to public employees. Such rights never were granted equally to all public employees, but instead granted as the Legislature saw fit through legislative balancing. For example, supervisors were excluded. Iowa Code § 20.4(2) (1974). Likewise, among other positions, most students working twenty or fewer hours a week, most Office of the Attorney General employees, Commission for the Blind employees, and various judicial branch employees were excluded. Iowa Code §§ 20.4(4), (7), (9) (10) (1974). Those granted bargaining rights have varied over time with, for example, Commission for the Blind employees dropped from the exclusions, and Department of Commerce banking division employees added. *Compare* Iowa Code § 20.4 (1983) *with* Iowa Code § 20.4 (1987).

As relevant to this appeal, the Amendments update the scope of collective bargaining for most employees while preserving certain bargaining topics for bargaining units with thirty percent or more "Public Safety Employees" as defined therein. H.F. 291 at §1; Iowa Code § 20.3(10A) (2017). Negotiation of wages and any other agreed upon non-prohibited topics remains available for all employees previously granted that ability, but bargaining units containing thirty percent or more Public Safety Employees retain broader bargaining ability. H.F. 291 at §§ 6, 12; Iowa Code §§ 20.9(1), (3); 20.22(3), (7), (8)(b), (9)(b) (2017).

In addition, the Amendments prohibit payroll deduction for "employee organizations," while allowing deductions for professional associations. H.F. 291 at § 22; Iowa Code § 70A.19 (2017). An employee organization is "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) (2017). The use of payroll deduction for payment of

membership dues or fees related to a "professional or trade organization" is unaffected by the Amendments. *See* Iowa Code § 70A.17A(1) (2017).

ARGUMENT

I. Plaintiffs' challenges are subject only to a rational basis review.

The State agrees that Plaintiffs have preserved error on both issues in this appeal. The Iowa Supreme Court reviews district court summary judgment rulings for correction of errors at law. *Baker v. City of Iowa City*, 867 N.W.2d 44, 51 (Iowa 2015). The review of constitutional claims is de novo. *State v. Groves*, 742 N.W.2d 90, 92 (Iowa 2007).

Article I, section 6 of the Iowa Constitution guarantees 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." This section has come to be known as the "equal protection clause" of the Iowa Constitution. *Qwest Corp. v. Iowa St. Bd. of Tax Review*, 829 N.W.2d 550, 557 n.4 (Iowa 2013). Like its federal counterpart, the Iowa equal protection clause "is

essentially a direction that all persons similarly situated should be treated alike." *Id.* at 558 (quoting *Varnum v. Brien*, 763 N.W.2d 862, 878 (Iowa 2009)).

To prove an equal protection claim, Plaintiffs must first establish some disparate treatment of similarly situated persons. *McQuisition v. City of Clinton*, 872 N.W.2d 817, 830 (Iowa 2015). Stated differently, Plaintiffs must first show that the different bargaining units they seek to compare are similarly situated. Analyzing whether classifications involve similarly situated persons, however, ultimately is intertwined with whether the identified classification has a rational basis. *See State v. Dudley*, 766 N.W.2d 606, 616 (Iowa 2009) (difficulty in this analysis "is attributable to the inescapable relationship between the threshold test and the ultimate scrutiny of the legislative basis for the classification"). Identifying the classifications' differences is thus unlikely to decide this case without also conducting the equal protection analysis.

Depending on the context, three different levels of scrutiny may apply to equal protection challenges—strict scrutiny, intermediate scrutiny, or rational basis review. *NextEra Energy Res. LLC v. Iowa Utilities Bd.*, 815 N.W.2d 30, 45-46 (Iowa 2012).

Strict scrutiny applies in equal protection analysis when fundamental rights or suspect classifications are involved. *Ames Rental Prop. Ass'n v. City of Ames*, 736 N.W.2d 255, 259 (Iowa 2007). Public sector collective bargaining is not a fundamental right, as such a right did not exist at all until our Legislature created it. *State Bd. of Regents v. United Packing House Food & Allied Workers, Local No. 1258*, 175 N.W.2d 110, 113 (Iowa 1970) (granting collective bargaining rights to public employees "is a matter for the legislature, not the courts"). Likewise, nothing within a distinction between Public Safety Employees and other employees, or between trade associations and labor unions, implicates a suspect classification that Iowa law recognizes. *See Sanchez v. State*, 692 N.W.2d 812, 817 (Iowa 2005) (suspect classifications involve race, alienage, or national origin); *Kelly v. State*, 525 N.W.2d 409, 411

(Iowa 1994) ("no suspect classification is involved in union membership or nonmembership").

In equal protection analysis, intermediate scrutiny applies to what have been described as "quasi-suspect" classifications "based on gender, illegitimacy, or sexual orientation." *NextEra*, 815 N.W.2d at 46. No party has been subject to a history of invidious discrimination or anything else justifying heightened intermediate scrutiny. *See Sherman v. Pella Corp.*, 576 N.W.2d 312, 317 (Iowa 1998); *Slifer v. Pub. Employee Relations Bd. of Kansas*, No. 90-4026-R, 1992 WL 25457, at *6 (D. Kan. Jan. 28, 1992) (collective bargaining groups do "not involve . . . quasi-suspect classes" and do not trigger intermediate scrutiny).

Social and economic legislation, such as the collective bargaining provisions at issue here, are reviewed under the rational basis test. *Qwest*, 829 N.W.2d at 558; *King v. State*, 818 N.W.2d 1, 27 (Iowa 2012). Courts properly and uniformly analyze classifications like those at issue through rational basis review. *E.g.*, *Wisconsin Educ Ass'n Council v. Walker*, 705 F.3d 640, 653 (7th Cir. 2013); *Vorbeck v. McNeal*, 407 F. Supp. 733, 739 (E.D. Mo. 1976) ("since as

we have stated, there is no constitutional right to collective bargaining, the issue is whether the classification has a rational relation to a legitimate governmental interest."), *aff'd*, 426 U.S. 943 (1976). Plaintiffs concede the rational basis test is the proper standard of review concerning their challenges in this appeal. (Plaintiffs' Brief at 30, 53.)

Rational basis review under Iowa's equal protection clause, while "not toothless," presents "a very deferential standard." *Varnum*, 763 N.W.2d at 879. Under this lowest level of scrutiny, Plaintiffs bear "the heavy burden of showing the statute unconstitutional and must negate every reasonable basis upon which the classification may be sustained." *NextEra*, 815 N.W.2d at 46. Iowa courts "will not declare something unconstitutional under the rational-basis test unless it clearly, palpably, and without doubt infringes upon the constitution.'" *Residential & Agric. Advisory Comm., LLC v. Dyersville City Council*, 888 N.W.2d 24, 50 (Iowa 2016) (internal quotation omitted).

Equal protection requirements are satisfied "as long as there is a plausible policy reason for the classification, the legislative

facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *NextEra*, 815 N.W.2d at 46 (quoting *Varnum*, 763 N.W.2d at 879 and *Racing Ass'n of Cent. Iowa v. Fitzgerald (RACI)*, 675 N.W.2d 1, 7 (Iowa 2004)).

II. Allowing units with more Public Safety Employees more bargaining rights does not violate equal protection.

A. Preservation of public safety and protection of the public fisc are proper policy reasons supporting the challenged classifications.

A classification among similarly situated persons is reasonable "if it is based upon some apparent difference in situation or circumstances of the subjects placed within one class or the other which establishes the necessity or propriety of distinction between them." *NextEra*, 815 N.W.2d at 46 (quoting *In re Morrow*, 616 N.W.2d 544, 548 (Iowa 2000)). A classification does not violate equal protection "simply because in practice it results in some inequality;

practical problems of government permit rough accommodations." *Id.*

Several valid bases exist for the classification concerning Public Safety Employees. First, the Legislature could rationally conclude Public Safety Employees filled too critical a role to risk a work stoppage if their statutorily-created bargaining rights were curtailed. *See Wisconsin Educ. Ass'n Council*, 705 F.3d at 655. Public Safety Employees provide such essential services that, if momentarily disrupted, would cause clear and present danger to public health and safety. *See Margiotta v. Kaye*, 283 F. Supp. 2d 857, 865 (E.D.N.Y. 2003). Accordingly, the Legislature rationally could conclude this risk of labor unrest by Public Safety Employees was greater than the risk from other employees.

As the district court noted, events in Wisconsin give rise to a reasonable fear of labor unrest by public employees following enactment of the Amendments:

> [E]xperience has borne out the state's fears: in the wake of Act 10 [Wisconsin's version of H.F.291]'s proposal and passage, thousands descended on the state capital in protest and numerous teachers organized a sick-out through their unions, forcing schools to close, while the state avoided the large societal cost of immediate labor

> unrest among public safety employees. Wisconsin was free to determine that the costs of potential labor unrest exceeded the benefits of restricting the public safety unions.

Ruling at 9 (quoting *Wisconsin Educ. Ass'n Council*, 705 F.3d at 655).

Further, should State employees strike, it would fall upon Public Safety Employees to enforce Chapter 20's penalties. It is rational for our Legislature to seek to avoid the creation of such a conflict for Public Safety Employees who would, in that instance, be asked to enforce penalties against fellow members of their own collective bargaining units. The Legislature rationally could seek to avoid the potential morale and related problems facing Public Safety Employees in such a situation. The Legislature "was free to determine that the costs of potential labor unrest exceeded the benefits of restricting the public safety units." *Wisconsin Educ. Ass'n Council*, 705 F.3d at 655.

Moreover, the Legislature likewise was free to conclude Public Safety Employees face different and unique safety issues that create different importance for bargaining on particular topics, including health insurance. *See, e.g., Beverlin v. Bd. of Police Comm'rs of*

Kansas City, Mo., 722 F.2d 395, 396 (8th Cir. 1983) (affirming "police can constitutionally be treated differently from any other type of government employee"); *Confederation of Police v. City of Chicago*, 481 F. Supp. 566, 568 (N.D. Ill. 1980) ("There is no question that police officers occupy a unique position in society. The functional differences between police officers and other city employees may justify different treatment for the police officers."); *March v. Rupf*, No. C00-03360WHA, 2001 WL 1112110, at *2 (N.D. Cal. Sept. 17, 2001) (finding police officers "face unique dangers in the course of their jobs").

In arguing the State acted irrationally, Plaintiffs do not argue the State may not treat Public Safety Employees differently than other employees. Instead, Plaintiffs argue virtually everyone could, sometimes, affect public safety and, thus, all should be deemed Public Safety Employees. The Seventh Circuit Court of Appeals heard and rejected this argument before Iowa's Legislature acted:

> We cannot, as the Unions request, determine precisely which occupations would jeopardize public safety with a strike. Even if we accept that Wisconsin imprudently characterized motor vehicle inspectors as public safety employees or the Capitol Police as general employees,

> invalidating the legislation on that ground would elevate the judiciary to the impermissible role of supra-legislature. . . . Distinguishing between public safety unions and general employee unions may have been a poor choice, but it is not unconstitutional.

Wisconsin Educ. Ass'n Council, 705 F.3d at 656.

The district court correctly found Iowa's classification is not arbitrary, as Public Safety Employees will reasonably be called upon to preserve public safety in the event of labor unrest after enactment of the Amendments. "If the classification has some 'reasonable basis,' it does not offend the constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Scott County Prop. Taxpayers Ass'n, Inc. v. Scott County,* 473 N.W.2d 28, 31 (Iowa 1991) (quoting *U.S. R.R. Ret. Bd. v. Fritz,* 449 U.S. 166, 175 (1980)). "Defining the class of persons subject to a regulatory requirement . . . requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line . . . [and this] is a matter for legislative, rather than judicial, consideration." *Wisconsin Educ. Ass'n Council*, 705 F.3d at 655 (quoting *FCC v. Beach*

Commc'ns, Inc., 508 U.S. 307, 315–16 (1993)); *see State v. Mann*, 602 N.W.2d 785, 792 (Iowa 1999).

B. The classification rationally may have been considered to be true by the Legislature, and there is no requirement that the legislators set forth in the legislative record all their reasons for enacting the Amendments.

Plaintiffs' primary argument in this appeal centers on the lack of statements in the legislative record by supporters of the Amendments concerning the strike-avoidance rationale for the classification. Plaintiffs contend that without discussion by legislators on the record explaining this rationale, the Amendments fail rational basis review.

The record contains very few statements by legislative proponents of the Amendments speaking on the floors of the Iowa Senate or House. Instead, the legislative transcript in this appeal record focuses on failed amendments proposed by opponents to the Amendments.[2] In fact, the legislative transcript in the appeal record does

[2] These failed amendments by opponents include Senate Amendment 3030, Senate Amendment 3033, and House Amendment 1031. *See* App. 246-50 (legis. tr. 3-18) (first speaker in the Senate transcript concluding her remarks with "I certainly support this amendment, 3030"); App. 258 (legis. tr. 53) (speaking in support of Senate

not even contain the entire legislative debate surrounding the Amendments. We know this from, among other things, numerous references to statements made by other legislators that do not appear in the transcript in this appeal record.[3]

Nevertheless, Plaintiffs make the unsupported claim that, with respect to the strike-avoidance rationale, "no *legislator* saw them as a reason for giving special treatment to 'public safety' employees." (Plaintiffs' Brief p. 36-37 (emphasis in original).) Of

---

Amendment 3030); App. 261 (first speaker in the House transcript speaking in support of House Amendment 1031).

[3] *See, e.g.*, App. 246 (legis. tr. 5) (reference to the Senate having just heard Senator Bolkcom "read a letter from a nurse," but transcript contains no prior statements by Sen. Bolkcom); App. 249 (legis. tr. 14) (referencing "what's been said here tonight, certainly what Senator Taylor talked about," but transcript contains no prior statements by Sen. Taylor); App. 252 (legis. tr. 27) (reference to hearing "Senator Hogg talk about the constitutionality of what we're doing," but transcript contains no prior statements by Sen. Hogg); App. 254 (legis. tr. 36) (statement that "Senator Hogg talked about people being treated as second-class citizens," but transcript contains no prior statements by Sen. Hogg); App. 278 (legis. tr. 131) (reference to hearing "the comments from Representative Holt last night," but transcript contains no prior statements by Rep. Holt); App. 282 (legis. tr. 148) (reference to statements "Representative Holt said in his opening comments," but transcript contains no prior statements by Rep. Holt).

course, simply because a legislator did not see fit to explain on the floor of the Iowa House or Senate the reasons for her or his vote does not invalidate the resulting legislation.

Even if the appeal record contained a complete transcript of the entire legislative debate (which it does not), and even if the entire legislative debate only contained the few statements Plaintiffs cite as supporting the Amendments, Plaintiffs' argument would still fail. The Legislature "need not articulate its reasoning at the moment a particular decision is made." *State v. Mitchell*, 757 N.W.2d 431, 437 (Iowa 2008). Courts uphold legislative classifications "based on judgments the legislature *could* have made, without requiring evidence or 'proof' in either a traditional or a nontraditional sense." *King*, 818 N.W.2d at 30 (emphasis added); *see also LSCP, LLLP v. Kay-Decker*, 861 N.W.2d 846, 857-58 (Iowa 2015) (finding "alternative rational bases" based on what the Legislature "*may* have wished," "*may* have had reasonable grounds for," and "*could have* believed")(emphasis added); *Qwest Corp.*, 829 N.W.2d at 563-64 (addressing what the Legislature "*might logically* conclude")(emphasis added).

In considering whether "the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker," *NextEra,* 815 N.W.2d at 46, hypothetical bases for legislation not only may, but *must*, be considered under deferential rational basis review to determine if legislation survives constitutional scrutiny. *See Fritz,* 449 U.S. at 175 (cited in *Scott County,* 473 N.W.2d at 31) ("It is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision, because this Court has never insisted that a legislative body articulate its reasons for enacting a statute."); *Beach Commc'ns, Inc.,* 508 U.S. at 315 ("[T]he absence of legislative facts explaining the distinction on the record has no significance in rational-basis analysis.").

Under Plaintiffs' theory, the State would be limited to a few statements in the legislative record to establish the rational basis for the Amendments. To avoid being limited in rational basis review to some other legislator's explanation of that legislator's reasons in supporting legislation, presumably every legislator would have to address every aspect of every piece of legislation to have their views

considered in any subsequent challenge. Fortunately for the length of legislative debates (and the Legislature's ability to get anything done), this Court has made clear Plaintiffs' view is mistaken:

> A State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification. "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." A statute is presumed constitutional and "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it," whether or not the basis has a foundation in the record.

Baker, 867 N.W.2d at 57–58 (quoting *Heller v. Doe by Doe*, 509 U.S. 312, 319–21 (1993)).

Iowa's Supreme Court always recognized it is not the State's burden to support its action, but rather the challenger's to negate every conceivable basis that could support it. *Baker*, 867 N.W.2d at 57–58; *Adams v. Fort Madison Cmty. Sch. Dist. in Lee, Des Moines & Henry Ctys.*, 182 N.W.2d 132, 139 (Iowa 1970) (same); *State ex rel. Cairy v. Iowa Co-op. Ass'n*, 95 N.W.2d 441, 443 (Iowa 1959) (same); *Dickinson v. Porter*, 35 N.W.2d 66, 71 (Iowa 1948) (same). Because no legislator is required to state the reason for his or her

vote, rational basis review does *not* require the reason stated to uphold legislative action be included in the legislative debate, or that it even be the real reason for a legislator's vote—just that it be rational. *See Des Moines Metro. Area Solid Waste Agency v. City of Grimes*, 495 N.W.2d 746, 749 (Iowa 1993) ("As long as a rational basis exists for passing an ordinance, it need not be the real reason for the government's action . . .."); *see also Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130 (1810) (Chief Justice John Marshall, in 1810, recognizing the principle that the judiciary may not look to legislative motivation to invalidate state statutes); *South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1257 (4th Cir. 1989) ("[T]here is no way of knowing why those, who did not speak, may have supported or opposed the legislation.")

Further, as the district court correctly found, the Legislature was not writing on a blank slate. Iowa's Amendments came on the heels of virtually identical legislation in Wisconsin. *See* 2011 Wis. Act 10 (App. 523-45; Supp. App. 4-26.) Wisconsin's Act resulted in the same political debate now presented to this Court. Critics of Wisconsin's Act claim it undermined unions and harmed education.

(App. 423, 439, 441, 450.) Well before Iowa acted, supporters of Wisconsin's Act presented evidence it saved billions of dollars that could be devoted to other priorities within education and other fields. (App. 410-12.) Both the risks and rewards of such action were well documented before Iowa's Legislature acted.

Indeed, before Iowa's Legislature acted, two courts accepted the rational bases for the Amendments that Plaintiffs here insist *nobody* could deem rational. *See Wisconsin Educ. Ass'n Counsel*, 705 F.3d at 640; *Madison Teachers, Inc. v. Walker*, 851 N.W.2d 337 (Wis. 2014). What Plaintiffs derisively described in the district court as "figment[s] of defense counsel's imagination" and "cooked up after the fact by defense counsel," were identified by a state supreme court and a federal circuit court of appeals as rational bases for the Amendments' distinctions *before* Iowa's Legislature drew them. *See id.*

Plaintiffs bear the burden to negate every conceivable basis that may support the Amendments—including those courts already recognized—and it is not the State's burden, or Court's role, to delve into each legislator's thought process. *See Baker*, 867 N.W.2d at 57–

58 ("[R]ational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness or logic of legislative choices.") (quoting *Heller*, 509 U.S. at 319–21).

Plaintiffs contend Iowa's Legislature could not rationally have drawn lessons from Wisconsin's experience because Iowa employees, unlike Wisconsin employees, would never strike due to Iowa's harsher anti-strike penalties. To support this supposition, Plaintiffs note Wisconsin's public employees had previously gone on strike notwithstanding statutory anti-strike provisions, while we have no such evidence in Iowa.

Plaintiffs offer mere correlation without evidence of causation. The district court correctly declined to engage in speculation about why Iowa employees have not struck while Wisconsin employees have. Certainly an Iowa legislator could look at strikes in neighboring states—that undeniably also have anti-strike statutes, even if less harsh—and conclude strikes were nevertheless possible in Iowa without acting unconstitutionally irrationally. As the dis-

trict court correctly found, "even when potentially stringent penalties are available to enforce a no-strike provision implemented by the legislature, strikes can and may still occur." (App. 28.)

Plaintiffs also complain Wisconsin did a "detailed pre-enactment analysis of the extent to which a strike by particular bargaining units would endanger public health or safety" as distinguishing the Wisconsin Legislature's action and the courts' upholding of Wisconsin's Act accordingly. (Plaintiffs' Brief p. 44.) Plaintiffs suggest this allowed Wisconsin to draw the distinctions at issue while Iowa could not. But again, Iowa clearly patterned its law after Wisconsin's law. *Compare* Wisconsin Act 10 *with* H.F. 291. The legislative record includes reference to communications between Wisconsin's Governor and Iowa legislators concerning the Amendments. *See* App. 272 (legis. tr. 107-08). Not only did Wisconsin's study already exist when Iowa materially duplicated Wisconsin's law, but there was six years of history under the Wisconsin Act to allow our Legislature to weigh its benefits and detriments.

It is not reasonable to say Iowa's attempt to duplicate a neighboring state's experience in this instance was so irrational the

Court must intervene. Numerous examples of labor unrest among law enforcement can be found and, when it occurs, the results can be catastrophic, just as a rational Legislature could fear.[4] As the district court found, a rational Iowa legislator reasonably could look at experiences in neighboring states and take steps to address similar concerns in Iowa. Legislators were free to conclude that, even

[4] *E.g.*, Michael Cooper, *Police Picket Traffic Courts, as Pact Protests Go On* N.Y. TIMES (Jan. 29, 1997) http://www.nytimes.com/1997/01/29/nyregion/police-picket-traffic-courts-as-pact-protests-go-on.html (App. 502-04); Taylor Wofford, *550 Memphis Cop Call In Sick 'Blue Flu' Epidemic* NEWSWEEK (July 8, 2014) http://www.newsweek.com/550-memphis-cops-call-sick-blue-flu-epidemic-union-pensions-healthcare-257805 (App. 505-08) ("We are in a crisis mode."); Marty Roney & Alvin Benn, *Alabama Officers Call In Sick In 'Blue Flu' Protest* MONTGOMERY ADVERTISER (Aug. 12, 2016), https://www.policeone.com/OfficerSafety/ articles/209489006-Ala-officers-call-in-sick-in-Blue-Flu-protest/ (App. 509-11); Jean Reynolds, *Detroit and Memphis Face Police Benefit Cuts* LAW ENFORCEMENT TODAY (July 10, 2014), http://www.lawenforcementtoday.com/detroit-and-memphis-face-police-benefit-cuts/ ("Wharton also expressed concern about the safety of residents") (App. 512-15); *Selma Cops Get "Blue Flu," Call In Sick To Protest Unsafe Conditions And Low Pay* BLUE LIVES MATTER (Aug. 15, 2016) https://bluelivesmatter.blue/selma-alabama-blue-flu/ (App. 516-18); *Blue Flu* AMERICAN POLICE BEAT (Feb. 22, 2016) https://apbweb.com/east-orange-police-officers-call-out-sick-amid-contract-dispute/ (App. 519).

if the risk was small, the effect would be so severe as to justify its decision.

C. The Legislature had a rational basis to set the threshold for determining whether a bargaining unit has sufficient Public Safety Employees at thirty percent.

The district court also correctly upheld the Legislature's thirty-percent threshold for determining whether a bargaining unit has enough Public Safety Employees. It is perfectly rational to conclude the risk from labor unrest is materially greater in a unit with a larger percentage of Public Safety Employees. *See Harwell v. Leech*, 672 S.W.2d 761, 764 (Tenn. 1984) (upholding legislation prohibiting sale of fireworks in larger county because "[t]he likelihood of injury resulting from the use or misuse of fireworks is greater in a thickly populated county than in a county with a small population"). A unit containing a small percentage of Public Safety Employees simply does not present the same risk as a unit containing a large percentage—or at least the Legislature could properly so conclude.

As the district court also noted, the fiscal interests of the government are routinely accepted as a rational basis for legislative

cost-saving measures for the public. (App. 30.) (citing cases). The State has a compelling interest in seeing that government is maintained in healthy financial condition. *Adams v. Fort Madison Community School Dist. in Lee, Des Moines and Henry Counties*, 182 N.W.2d 132, 141 (Iowa 1970); *see also Zaber v. City of Dubuque*, 789 N.W.2d 634, 645-46 (Iowa 2010) (identifying "protection of the public fisc" as a rational legislative purpose).

Plaintiffs argue creating the thirty-percent threshold was unnecessary and only served to produce unlawful classifications. To the contrary, the line lawfully addresses competing objectives—preservation of public safety, and protection of the public fisc—which the Legislature reasonably sought to balance in the Amendments.

The Legislature rationally held two goals in mind when setting the thirty-percent threshold: seeking to limit the number of public employees eligible for expanded bargaining rights, while ensuring sufficient numbers of Public Safety Employees to preserve public safety in the event of labor unrest. Providing enhanced bargaining rights for units with thirty percent or more Public Safety

Employees reasonably provided the Legislature greater assurance that in the event of labor unrest the State would have, while not every law-enforcement employee available to preserve public safety, certainly a critical mass of public safety personnel available. It is rational for a legislator to have believed, with the thirty percent threshold, the risk to public safety was sufficiently alleviated.

With respect to the balance sought to protect the public fisc, the legislative record provides evidence of statements by opponents to the Amendments that the proponents sought to limit the number of employees to receive expanded bargaining rights. *See, e.g.,* App. 259 (legis. tr. 57) (Sen. Boulton: "Senator Schultz [the floor manager of the Amendments in the Senate] conceded that the goal of this legislation was to keep the definition narrow of who public sector public employees who will be covered by this exemption will be."); App. 260 (legis. tr. 58) (Sen. Boulton: "We are denying rights and benefits based on a shrug and a desire to keep the winners group narrow while apparently designing the losers' group to be as big as possible.").

Plaintiffs' argue the Legislature could have mandated enhanced bargaining rights for all Public Safety Employees regardless of the percentage of Public Safety Employees in their units. In other words, Plaintiffs contend the Legislature should have required the State to engage in differentiated bargaining within the same unit for those with expanded rights, and those without.[5]

But the potential inter-unit differences in bargaining rights would not involve, as Plaintiffs imply, a simple difference on a limited issue or two. To the contrary, the Amendments require bar-

[5] Plaintiffs suggest the fact no similar thirty percent threshold appears in Wisconsin's Act proves including the threshold was unnecessary. (Plaintiffs' Brief p. 47 n.7.) But Plaintiffs fail to note Wisconsin restricts how bargaining units may be formed in the first place. Public safety employees in Wisconsin only are allowed to form bargaining units with other public safety employees. *See* Wis. Stat. Ann. § 111.825(1)(g). In contrast, Iowa grants employees greater freedom to form units of their own choosing to represent them, so long as there exists a sufficient "community of interest." *See* Iowa Code § 20.13(2) (2017) (requiring a "community of interest" to bargain collectively). Because Iowa, unlike Wisconsin, allows Public Safety Employees greater choice to affiliate with non-Public Safety Employees based on where employees feel their interests lie, Iowa's Legislature reasonably determined a threshold at which bargaining units were sufficiently comprised of Public Safety Employees to warrant granting broader bargaining rights.

gaining on topics for Public Safety Employees that are quantitatively different in scope than those for other employees. Plaintiffs' argument thus ignores the increased complexity of inter-unit negotiating between the State and Public Safety Employees, and the State and non-Public Safety Employees. The Legislature rationally could have sought to avoid such a process as too burdensome, too unwieldy, and too expensive for the State. Moreover, such inter-unit bargaining does not address the conflict and morale issues arising from Public Safety Employees enforcing Chapter 20's penalties against fellow members of their own units who do not receive the same bargaining rights and thus would be more likely to strike.

Although Plaintiffs do not argue a different percentage (other than zero percent) should have been used instead of thirty percent, the Legislature rationally could believe thirty percent struck the proper balance. Such line drawing is well within the auspices of legislative determination. *See, e.g., Varnum v. Brien*, 763 N.W.2d 862, 879 (Iowa 2009) ("Iowa's tripartite system of government requires the legislature to make difficult policy choices, including distrib-

uting benefits and burdens amongst the citizens of Iowa. . . . [D]eference to legislative policy-making is primarily manifested in the level of scrutiny we apply to review legislative action."); *Ames Rental Prop. Ass'n v. City of Ames*, 736 N.W.2d 255, 263 (Iowa 2007) ("The court's power to declare a statute unconstitutional is tempered by the court's respect for the legislative process."); *State v. Drake*, 219 N.W.2d 492, 496 (Iowa 1974) ("Sound reasons might be advanced for either side of this argument. However, determining the line which separates what is criminal from what is not lies peculiarly within the sphere of legislative discretion. . . .").

"The fit between the means and the end can be far from perfect so long as the relationship is not so attenuated as to render the distinction arbitrary or irrational." *Qwest Corp.*, 829 N.W.2d at 558 (internal quotation omitted). The Legislature's line-drawing need not, and cannot, be perfect. *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976) ("Perfection in making the necessary classifications is neither possible nor necessary."). There is nothing inherently irrational about the Legislature's choice of the thirty percent threshold.

III. Iowa's public employees have no constitutional right to payment of union dues through the State's payroll deduction system.

Plaintiffs challenge a classification created by the Amendments between "employee organizations," which represent employees in what the State could consider expensive and time-consuming collective bargaining, and advocacy groups like professional associations, which do not engage in collective bargaining. Plaintiffs object that organizations whose "primary purpose" surrounds collective representation are not treated the same as organizations advocating for professions.

Plaintiffs cite not a single case supporting their argument. In fact, the cases addressing a purported right to payroll deduction for unions uniformly run counter to Plaintiffs' argument. *E.g., Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009) (permitting elimination of payroll deduction for unions); *Campbell*, 883 F.2d at 1257 (rejecting "affirmative obligation on the state to assist the program of the association by providing payroll deduction services"); *West Cent. Mo. Reg'l Lodge No. 50 v. Bd. of Police Comm'rs of Kansas City*, 916 S.W.2d 889, 892 (Mo. Ct. App. 1996).

Plaintiffs contend they do not challenge this provision as an infringement of their right to free speech or of any other fundamental right, and thus concede their challenge is subject only to rational basis review. (Plaintiffs' Brief at 53.) Prior plaintiffs challenging similar provisions elsewhere have alleged impingement of protected expression (as opposed to merely not favoring unprotected bargaining as here). In each case courts have held it lawful to decline to allow payroll deduction even with respect to facilitating a fundamental right like free speech. *E.g.*, *Ysursa*, 555 U.S. at 358-59 ("While publicly administered payroll deductions for political purposes can enhance the unions' exercise of First Amendment rights, [the State] is under no obligation to aid the unions in their political activities."); *City of Charlotte v. Local 660, Int'l Ass'n of Firefighters*, 426 U.S. 283, 288 (1976).

Plaintiffs cite to Chapter 20's preamble stating "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," and then

complain the Amendments do not, in their view, offer sufficient support for bargaining by permitting payroll deduction to unions. Plaintiffs ignore this Court's decision where analysis must begin: *State Board of Regents v. United Packing House Food & Allied Workers, Local No. 1258*, 175 N.W.2d 110, 113 (Iowa 1970). *State Board of Regents* makes clear Iowa recognizes no right to public sector collective bargaining. In Iowa, such bargaining is not allowed absent a specific legislative act. Whether to grant such bargaining "is a matter for the legislature, not the courts." *Id.*

Allowing bargaining at all after *State Board of Regents* in fact favors bargaining over prior law. Precisely how much the Legislature chooses to favor bargaining is within its discretion. It hardly can be argued the State must continue always to allow as much bargaining as it once did or it runs afoul of the Constitution. Should legislatively granted rights, such as those at issue here, somehow become immutable, surely the Legislature will hesitate to grant them in the first place. *See King*, 818 N.W.2d at 39 ("The petition, if true, may be a call to action, but it is a call under our constitutional structure for the legislature, not the courts."); *Matter of Div.*

of Criminal Justice State Investigators, 674 A.2d 199, 204 (N.J. App. Div. 1996) (quoting *Atkins v. City of Charlotte*, 296 F. Supp. 1068, 1077 (W.D.N.C. 1969)) ("The solution, if there be one, from the viewpoint of the firemen, is that labor unions may someday persuade state government of the asserted value of collective bargaining agreements, but this is a political matter and does not yield to judicial solution.").

As the district court held, the State can seek to promote labor peace by allowing collective bargaining, yet conclude it does not wish to facilitate funding it by allowing payroll deduction. The Legislature still allows collective bargaining, but now places a lower value on it than it did before the Amendments. Because disallowing payroll deduction does not prevent exercising a right, states can allow deductions for entities deemed more cooperative and not for those deemed less cooperative. *See Campbell*, 883 F.2d at 1263 (upholding allowing deduction to one labor organization deemed not controversial, and not another deemed more controversial).

The Legislature chose not to aid and promote what it could deem expensive and time-consuming collective bargaining, while

continuing to allow deductions for advocacy groups like professional associations. As the district court held, concerns regarding the cost of collective bargaining provide a rational basis for the classification limiting payroll deductions. (App. 30-31.)

Allowing funding for advocacy groups not devoted to collective bargaining does not change the analysis. Employees have a right to organize to advocate. *Campbell*, 883 F.2d at 1257. Organizing to advocate is constitutionally protected. *Id.* By allowing deductions for professional associations, which can advocate for teachers' priorities (including for collective bargaining), while eliminating deductions for those whose "primary purpose" is unprotected bargaining, the State rationally could believe it continued to support protected speech while withdrawing support for an unprotected activity it deemed less worthy of support. *Wisconsin Educ. Ass'n Counsel*, 705 F.3d at 659 (recognizing it is "a rational belief that public sector unions are too costly for the state"). The State continues support for the only activity that could be deemed protected, and thus does not violate the Constitution.

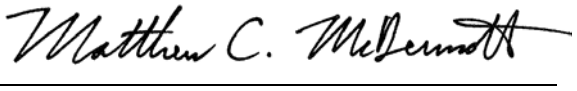
CONCLUSION

Plaintiffs' brief highlights what they really seek is for this Court to conclude our current Legislature's policy decision was inferior to the prior Legislature's. The Amendments are presumed constitutional, however, and Plaintiffs cannot meet their burden to negate every reasonable basis for the challenged classifications. The Legislature acted within its constitutional authority in passing amendments rationally directed to achieve greater fairness for Iowa taxpayers and financial flexibility for local governments, schools, and state government, while maintaining public safety in the event of widespread labor unrest. Accordingly, the district court order dismissing the action should be affirmed.

REQUEST FOR ORAL ARGUMENT

The State respectfully requests to be heard orally upon the submission of this appeal.

BELIN McCORMICK, P.C.

By: 

Michael R. Reck, AT0006573
Matthew C. McDermott, AT0005085
Kelsey J. Knowles, AT0004233
Espnola F. Cartmill, AT0010237

666 Walnut Street Suite 2000
Des Moines, IA 50309-3989
Telephone: (515) 283-4643
Facsimile: (515) 558-0643
E-Mail: mrreck@belinmccormick.com;
mmcdermott@belinmccormick.com;
kjknowles@belinmccormick.com;
efcartmill@belinmccormick.com

ATTORNEYS FOR DEFENDANTS/ APPELLEES STATE OF IOWA, IOWA PUBLIC EMPLOYMENT APPEAL BOARD, MIKE CORMACK, JAMIE VAN FOSSEN and MARY GANNON

PROOF OF SERVICE

I hereby certify that on the 16th day of March, 2018, I electronically filed the foregoing Appellees' Brief with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the following. Per Rule 16.317(1)(a), this constitutes service of the document for purposes of the Iowa Court Rules.

Becky S. Knutson
Davis, Brown, Koehn, Shors
& Roberts, PC
215 10th Street, Suite 1300
Des Moines, IA 50309
beckyknutson@davisbrownlaw.com

Jeremiah A. Collins
Bredhoff & Kaiser PLLC
805 15th Street NW
Washington, DC 20005
jcollins@bredhoff.com

Alice M. O'Brien
Lubna A. Alam
National Education Association
1201 16th Street N.W.
Washington, D.C. 20036
aobrien@nea.org
lalam@nea.org

Jay M. Smith
Smith & McElwain
Law Office
505 Fifth Street, Suite 530
P.O. Box 1194
Sioux City, IA 51102
smitmcel@aol.com

Lori McKimpson

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 6,516 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 Word 2007 in Century Schoolbook 14 pt.

Dated: March 16, 2018

Lori McKimpson

I0452\0002\ (2905276.1)