IN THE SUPREME COURT OF IOWA
Supreme Court No. 17-1834

IOWA STATE EDUCATION ASSOCIATION and
DAVENPORT EDUCATION ASSOCIATION,

Plaintiffs/Appellants,

v.

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

AMICUS CURIAE BRIEF OF KEVIN ROHNE IN SUPPORT OF DEFENDANTS-APPELLEES

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IOWA R. APP. P. 6.906(4)(d) STATEMENT

No party or party's counsel authored this brief in whole or in part nor contributed money to fund the preparation or submission of this brief. No other person contributed money to fund the preparation or submission of this brief.

INTEREST OF THE AMICUS CURIAE

Kevin Rohne is a public school special education teacher who became a teacher to help vulnerable children. He is an involuntary member of the bargaining unit exclusively represented by the Waverly-Shell Rock Education Association and its affiliates, the Iowa State Education Association, and the National Education Association (collectively "WSREA"). Though not a member of WSREA, Mr. Rohne is forced to accept its representation as a condition of his employment. The result is that Mr. Rohne must give up his individual First Amendment right to petition his employer and speak for himself. *See* U.S. Const. amend. I.

Mr. Rohne chooses not to join WSREA because he opposes, on political and religious grounds, political positions WSREA supports. For example, WSREA promotes abortion rights, including partial birth abortion, to which Mr. Rohne is religiously and politically opposed. Another reason why Mr. Rohne does not join WSREA is its support and promotion of public officials who Mr. Rohne does not or would not support. WSREA, moreover, bars nonmembers from voting on contract provisions or serving in any capacity in negotiating the collective bargaining agreement. In order to have such a vote, an individual would have to become a member of WSREA. Those who do join WSREA, however, are required to financially support its political and

ideological views. Thus, because of WSREA's exclusive representation, Mr. Rohne is forced to choose between retaining his "voice" to refrain from supporting political positions he finds morally repugnant and his "vote" on his working conditions.

The House File 291 ("H.F. 291") amendments to Chapter 20 of the Iowa Code protect Mr. Rohne's First Amendment rights; therefore, he has an interest in assisting this Court in determining whether the amendments are constitutional. Specifically, the H.F. 291 amendments include: restrictions on the mandatory subjects of bargaining; the exclusion of dues checkoffs and political contributions and activities from the scope of negotiations; the requirement that collective bargaining agreements be no longer than five years; and the requirement that recertification elections be held at the expiration of each collective bargaining agreement. *See* H.F. 291.

These amendments provide important restrictions on the ability of WSREA to bargain in areas that Mr. Rohne may disagree with, including political contributions. In particular, the periodic recertification requirement will ensure that if WSREA does not enjoy majority support it will not remain the exclusive bargaining representative for Mr. Rohne.

In light of these protections, Mr. Rohne submits this amicus brief to give this Court a unique perspective on the constitutional scrutiny that should be

applied to Iowa's H.F. 291 amendments to Chapter 20—and the ramifications that level of scrutiny will have on the State of Iowa's ability to manage public employees.

SUMMARY OF ARGUMENT

This appeal concerns the State of Iowa's ability to manage its workforce. The people of Iowa—acting through their state legislature—decided that the State would limit the subject of bargaining for some, but not all, employees and would allow state employers to utilize their payroll systems to collect dues payments for some, but not all, organizations. *See* H.F. 291. The Appellants ("Unions") challenge these amendments as violating Article 1, section 6 of the Iowa Constitution. To get to this conclusion, the Unions need this Court to apply a heightened form of rational basis review to the State's management of its employees. The Appellees ("State" or "Iowa"), for their part, do not argue with the Unions' position that a rational basis scrutiny should apply—they only argue that the H.F. 291 amendments satisfy this test.

Amicus agrees with the State—and the district court below—that the H.F. 291 amendments to Iowa Code chapter 20 are constitutional. (Appellee's Brief at 17-48.) But Amicus writes this brief to offer a unique perspective on the level of constitutional scrutiny the Court should apply when the State acts within its proprietary function as an employer in the equal protection context: that scrutiny is none.

There is no precedent requiring this Court to apply rational basis review—heightened or otherwise—in this case. Instead, judicial review is not appropriate when the issue at stake is limited to the employment function of the State and does not involve the regulatory function. Although this Court is not bound to follow the Federal Constitution, it has construed Article 1, section 6 as being similar in most ways to the Federal Equal Protection Clause. In this way, this Court will look to the U.S. Supreme Court's case law for guidance when construing the Iowa Constitution. Nonetheless, this Court has deviated from the Federal Equal Protection Clause's framework. For example, when construing Article 1, section 6's application to *economic* legislation, this Court has in some cases applied a higher form of rational basis review. But Chapter 20 and the H.F. 291 amendments do not involve economic legislation. Chapter 20 and thus the H.F. 291 amendments are concerned with the government's management of its employees. In other words, Chapter 20 and the H.F. 291 amendments regulate the State's proprietary function as employer. Thus, this Court, as it has done in the past, should look to the Federal Constitution and the case law interpreting it to decide what level of scrutiny to apply.

The U.S. Supreme Court, in *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008), held that not even rational basis review is appropriate, for

equal protection purposes, when the government is acting in its proprietary function as an employer. The Supreme Court in that case recognized that at-will employment is the presumptive position when the government acts as an employer, and absent discrimination based on an employee's status within a protected class, or the denial of a fundamental right, the judiciary has no role to play.

The members of the Unions here are not members of a protected class, and the State of Iowa is not impinging on any of their fundamental rights. House File 291 only applies to public employees, and arises out of the State's employer function, not its governing function. Thus, this Court should uphold the constitutionality of the H.F. 291 amendments by applying no constitutional scrutiny at all.

ARGUMENT

The House File 291 amendments comply with the State and Federal Constitutions because judicial scrutiny does not apply to a public employer's work rules that do not involve a suspect classification or violate a fundamental right.

A. The House File 291 amendments are not "economic legislation" that require this Court to apply a heightened form of rational basis review and thus this Court should look to the Federal Constitution for guidance.

Article I, section 6 of the Iowa Constitution provides 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." Iowa Const., Art. I, § 6. Generally, this Court construes article I, section 6 as "identical in scope, import, and purpose" to the Federal Constitution's Equal Protection Clause. U.S. Const. amend XIV, § 1. *State v. Nail*, 743 N.W.2d 535, 539 (Iowa 2007) (citations omitted); *Callender v. Skiles*, 591 N.W.2d 182, 187 (Iowa 1999) (citation omitted). Nevertheless, this Court has held it reserves the right to deviate from the Federal Equal Protection Clause in certain circumstances and apply a higher level of scrutiny to state legislation. *See, e.g.*, *Varnum v. Brien*, 763 N.W.2d 862, 878 n. 6 (Iowa 2009) (citation omitted).

Though the Court has the power to deviate, it still looks to federal constitutional law for instruction. *See id.*; *see also, Bierkamp v. Rogers*, 293

N.W.2d 577, 579 (Iowa 1980) ("The result reached by the United States Supreme Court in construing the federal constitution is persuasive, but not binding upon this court in construing analogous provisions in our state constitution.") (citations omitted). Therefore, while the Court need not blindly follow the principles of the Federal Equal Protection Clause, it nonetheless "provides a useful starting point for evaluation of Iowa's constitutional equal protection provision." *Varnum*, 763 N.W.2d at 878 n. 6.

The Unions argue that when evaluating economic legislation, this Court's precedent requires it to apply the rational basis test under Article 1, section 6 in a more rigorous fashion than its federal counterpart. (Appellants' Brief at 30.) While that might be true in some cases, H.F. 291 is not "economic legislation" in which Iowa regulates as a sovereign—as opposed to a proprietor or employer. Indeed, H.F. 291 amends Iowa Code chapter 20, which is titled as the "Public Employment Relations Act" ("PERA"). This section of the Iowa Code regulates public employment—not commerce.

Section 1 of the Public Policy section of the Iowa Code chapter on public employment relations explicitly confirms this as the purpose of the legislation:

> The 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; to protect the

> citizens of this state by assuring effective and orderly operations of government in providing for their health, safety, and welfare; to prohibit and prevent all strikes by public employees; and to protect the rights of public employees to join or refuse to join, and to participate in or refuse to participate in, employee organizations.

Iowa Code § 20.1(1); *cf. Clay Cty. v. Pub. Employment Relations Bd.*, 784 N.W.2d 1, 7 (Iowa 2010) ("[T]he purpose of the PERA is not to deal with the free flow of commerce, but to promote harmonious and co-operative relationships between government and its employees … Thus, the PERA's focus is … centered on the relationship between government and its employees.") (citations and quotation marks omitted).

Consequently, this Court's precedent does not require it to apply a rational basis test normally used for "economic regulations" to this legislation —either under the Federal Equal Protection Clause or past rational basis applications of Article 1, section 6 of the Iowa Constitution. Rather, this Court should look to the Federal Equal Protection Clause and how the U.S. Supreme Court has applied it in the "government as proprietor" context.

B. The Federal Equal Protection Clause does not require the government prove a rational basis when it regulates the employee-employer relationship unless the State discriminates based on a suspect classification or violates a fundamental right.

United States Supreme Court precedent makes it plain that government decisions in the proprietary employee-employer context are not subject to the

same levels of judicial scrutiny as when it acts in its capacity as a sovereign. Indeed, "there is a crucial difference, with respect to constitutional analysis, between the government exercising the power to regulate or license, as lawmaker, and the government acting as proprietor, to manage [its] internal operation." *Engquist*, 553 U.S. at 598 (internal quotations omitted; alteration in original).

This difference "has been particularly clear in [the Court's] review of state action in the context of public employment." *Id*. Accordingly, "[t]ime and again [the Court has] recognized that the Government has a much freer hand in dealing with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *NASA v. Nelson*, 562 U.S. 134, 148 (2011) (internal quotation omitted); *see also Waters v. Churchill*, 511 U.S. 661, 675 (1994) (plurality opinion) ("The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.").

More specifically, in *Engquist* the U.S. Supreme Court held that for equal protection analysis there is a fundamental difference between the government acting as "regulator" and acting as "proprietor." *Engquist*, 553 U.S. at 598. When acting as proprietor, the "government has significantly

greater leeway in its dealings with citizen employees than it does … with citizens at large" in making decisions about its workforce. *Id.* at 599. Thus, when a state acts in its role as a proprietor—which Iowa did in passing the H.F. 291 amendments—it need not treat all employees the same. Rather, to treat some employees differently is simply "to exercise the broad discretion that typically characterizes the employer-employee relationship." *Id.* at 605. In other words, the State can act in its discretion as employer and does not need a rational basis for its choices.

The Supreme Court buttressed this conclusion by citing the "historical understandings of the nature of government employment." *Id.* at 606. It is a "settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer … [t]he basic principle of at-will employment is that an employee may be terminated for a good reason, bad reason, or no reason at all." *Id.* (citations and quotation marks omitted). To subject every employment decision by the State to a rational basis judicial inquiry would end this long-held principle. This is something the "Constitution does not require[.]" *Id.* Thus government decisions when it is acting within its proprietary function to regulate its workforce do not warrant equal protection rational basis review. *See Ind. State Teachers Ass'n v. Bd. of Sch. Comm'rs of the City of Indianapolis*, 101 F.3d 1179, 1181 (7th Cir. 1996)

("The concept of equal protection is trivialized when it is used to subject every decision made by state or local government to constitutional review by federal courts."). Of course, this does not preclude a state government from affording its workers greater protection, but this is an "act of legislative grace, not [a] constitutional mandate." *Engquist*, 553 U.S. at 607.

For an illustrative example, the Supreme Court noted Congress's choice to give some workers greater protection than others. The Federal Government implements civil service protections that cover most—but not all—federal employees. These protections do not apply to the Federal Bureau of Investigation, the Central Intelligence Agency, or Defense Intelligence Agency. And to apply equal protection rational basis review to Congress's choice not to include these workers, or to apply that review "for every allegedly arbitrary employment action . . . [would undo] Congress's (and the States') careful work." *Id*.

This directly applies to what Iowa has decided to do in the H.F. 291 amendments. Here, the State has simply made a choice, through the legislative process, of what bargaining subjects it will listen to from its workforce. This Court should not undue the Iowa Legislature's careful work.

To be sure, *Engquist* did not eliminate all judicial review of equal protection claims against a government when it is acting in its proprietary role

as employer. Indeed, The Supreme Court specifically noted that when the government engages in invidious discrimination against protected classes of "*distinct* groups of individuals categorically different[,]" judicial review is appropriate. *See id.* (citing cases) (emphasis added). Thus, for example, if the State of Iowa attempted to discriminate in its proprietary function based on race, alienage, or national origin, that legislation would certainly trigger heightened judicial review. *See Sanchez v. State*, 692 N.W.2d 812, 817 (Iowa 2005).

Moreover, *Engquist* did not foreclose other constitutional challenges when the government's regulation of its workforce impinges on the fundamental rights of its employees. For example, the Court cited *Pickering* and its speech case progeny to show that workers' constitutional protections are lessened when the government acts as proprietor. *Engquist*, 553 U.S. at 599–600. But these cases still apply a form of judicial balancing to protect workers' First Amendment rights when the actions of these employees fit more in their role as citizens than employees. *See Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 568 (1968); *see also, O'Connor v. Ortega*, 480 U.S. 709, 725 (1987) (eliminating most requirements of the Fourth Amendment to searches of public employees). Thus, while workers cannot challenge the government's choices in how it runs

its workplace on equal protection grounds, workers are not completely unprotected when the government oversteps its constitutional bounds.

The Unions here, however, do not, and cannot, make such a challenge. The H.F. 291 amendments neither invidiously classify anyone, nor abridge any fundamental rights.

1. Being a public employee in a non-public safety union is not a protected class or a group.

The Unions' brief describes the classification in this case as "public safety employees and all others." (Appellant's Brief at 10.) Presumably this means all other public employees. But neither the United States Supreme Court nor this Court has ever considered being a "public employee" a protected class.

Protected classes are those groups that are made up of "discrete and insular minorities who are relatively powerless to protect their interests in the political process." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 104–05 (1973) (citations omitted and quotation marks omitted). In *Sanchez*, this Court drew on federal law and outlined what groups fall into these categories:

> If a statute affects a fundamental right or classifies individuals on the basis of race, alienage, or national origin, it is subjected to strict scrutiny review … If a statute classifies individuals on the basis of gender or legitimacy, it is subject to intermediate

> scrutiny and will only be upheld if it is substantially related to an important state interest.

Sanchez, 692 N.W.2d at 817 (citations omitted) (emphasis added).

No one thinks that non-public safety union employees are part of one of these discrete and insular minority groups—with reduced power in the legislative process. In fact, public employees—at least ones who find collective bargaining advantageous—dominated the political landscape for decades. Prior to H.F. 291 amendments to Chapter 20, the state legislature granted expansive bargaining rights where there were none before. *See State Bd. Of Regents v. United Packing House Food & Allied Workers, Local No. 1258*, 175 N.W.2d 110, 113 (Iowa 1970). Indeed, for years after the passage of Chapter 20, many public employees—of all kinds—enjoyed the legislative grace of having the State recognize collective bargaining in almost every area. This is strong evidence that public employees can obtain results through the legislative process.

But now, the State has decided that collective bargaining on certain subjects, and only providing payroll deductions for specific job organizations, is beneficial to its workforce. This is managerial choice that Iowa has made through the H.F. 291 amendments, both in its capacity as a proprietor and through its elective representatives. These decisions should not be second guessed by the courts.

One can only imagine if this Court applied rational basis review to every employment decision by the State based on some arbitrary classification. Would differences in pay for public employees based on experience subject the State to equal protection challenges? After all, an individual can classify these public employees by who gets what salary. If the State decides to give bonuses to certain workers for good performance, would this subject the state to an equal protection challenge? In that case there are two classes: those who receive bonuses and those that do not. The examples are endless.

If employees represented by Unions want more collective bargaining rights, they should seek to convince Iowa legislators that this would be good for the State's workforce though the legislative process—not by alleging they are part of some arbitrary class.

2. Collective bargaining with the State is not a fundamental right.

Neither the U.S. Supreme Court nor this Court has recognized a fundamental right for public employees to collectively bargain with a public employer. Indeed, the State can listen to whomever it wants on whatever subjects it wants.

The U.S. Supreme Court made this clear in two cases involving collective bargaining rights. First, in *Smith v. Arkansas State Highway Emp.*,

Local 1315, 441 U.S. 463 (1979), the Court reviewed the Arkansas State Highway Commission policy allowing only individual employees to file and discuss workplace grievances, and refusing to consider or discuss grievances filed by the union. The U.S. Court of Appeals for the Eighth Circuit ruled that this violated the U.S. Constitution, but the Supreme Court disagreed. *Id.* at 463-64. The Court held that when it comes to discussion about public employee working conditions, the government could dialog with the individual and not the collective. The Court further held that "the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the [collective] and bargain with it." *Id* at 465. Neither does the Equal Protection Clause of the Federal Constitution, nor Article 1, section 6 of the Iowa Constitution.

Second, the exact opposite of *Smith* happened in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), a case neither the Unions nor the State cited to the district court in their trial court briefs. In *Knight*, the public employer both bargained and conferred exclusively with the union, rather than the individual. This was also held constitutional, because nothing in the Constitution "suggests that the rights to speak, associate, and petition require government policy makers to listen or respond." *Id.* at 285.

The Supreme Court in *Knight* observed that legislatures enact bills "on which testimony has been received from only a select group." Public officials "at all levels of government daily make policy decisions based only on the advice they decide they need and choose to hear." *Id.* at 284. This creates absolutely no constitutional issue at all, according to the Supreme Court, because to "recognize a constitutional right to participate directly in government policymaking would work a revolution in existing government practices." *Id.* The Court continued, *"*[a]bsent statutory restrictions, the state [is] free to consult or not to consult whomever it pleases*." Id.* at 285.

Knight, moreover, explicitly states that speaking to one group (there, the collective) rather than to the individual does not trigger an equal protection analysis. After its extensive discussion of why the First Amendment is not violated, the *Knight* Court summarily dispatched the equal protection argument, calling it "meritless." 465 U.S. at 291. This Court should do the same here.

The *Knight* Court considered *Smith* to be a mirror image decision: "There the government listened only to individual employees and not to the union. Here the government [dialogs] with the union and not with individual employees. The applicable constitutional principles are identical." 465 U.S. at 286-87. *Smith* and *Knight* thus taken together show that the State can bargain

with whomever it wants—and it can pick and choose with whom it bargains. The Unions may be upset that Iowa shifted the needle of discussion in the direction of *Smith*, rather than *Knight*, but this is within the State's constitutional power to do—without any interference from the courts.

Just as government decision-makers can listen and dialog with whomever they wish, so too can the State, in its proprietary role as employer, treat employees (apart from protected classes or when employees exercise a fundamental right) differently without having to answer to constitutional claims. There simply is no fundamental right to bargain with the State.

CONCLUSION

Amicus agrees with the State—and the district court below—that the H.F. 291 amendments are constitutional. But this Court does not need to apply any level of scrutiny to come to that conclusion. Thus, this Court should affirm the district court on different grounds.

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CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Iowa R. App. P. 6.906(4) because this brief contains 3,869 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. 6.03(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this Brief has been prepared in a proportionately-spaced typeface using Microsoft Work in Times New Roman size 14 font.

Dated: March 9, 2018

/s/ *Adam D. Zenor*
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CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on the 9th day of March, 2018, the undersigned electronically filed this document using the Electronic Document Management System (EDMS), which will send notice of electronic filing to the following:

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Per Rules 6.106(1) and 6.701, this constitutes service for purposes of the Iowa Court Rules.

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