IN THE SUPREME COURT OF IOWA

NO. 17-1841

AFSCME IOWA COUNCIL 61, et. al.,
Appellants,

v.

STATE OF IOWA AND IOWA PUBLIC EMPLOYMENT RELATIONS BOARD

Appellees.

On Appeal from the Iowa District Court for Polk County

The Honorable Arthur E. Gamble, Judge

APPELLANTS' REPLY BRIEF (AMENDED)

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I. INTRODUCTION

Defendants' Appeal Brief ("Appellees' Brief") is based on two primary points: (1) a misarticulation of Plaintiffs' Right of Association claim, which leads them down an irrelevant doctrinal path; and (2) an incorrect formulation of rational basis review under Iowa's Uniformity Clause, for which Defendants substitute a federal standard developed for the review of tax laws. Defendants' error is compounded by their failure to evaluate H.F. 291's effect on identically-situated Iowans under this Court's "searching" standard, which requires an analysis of facts, an endeavor Defendants decline. Instead, they rely on a Wisconsin law, "Act 10," which they describe as H.F. 291's "duplicate." In fact, Act 10 is very different, particularly in its treatment of identically-situated persons.

Plaintiffs address these points in below, while also showing H.F. 291 is too arbitrary to effectuate the rationales Defendants offer to justify its discriminatory treatment.

II. DEFENDANTS FAIL TO OPPOSE PLAINTIFFS' RIGHT OF ASSOCIATION CLAIM

Defendants fail to adequately address Plaintiffs' right of association claim and instead defend against legal theories never asserted by Plaintiffs. They tear down straw-men, mischaracterizing Plaintiffs'

argument. Despite Defendants' vigorous defense of undisputed points of law, they barely acknowledge Plaintiffs' actual claim: that H.F. 291 intentionally and incidentally[1] infringes upon the Individual Plaintiffs' right to associate together in a *particular* union. Clearly while the Legislature may regulate collective bargaining, even eliminate it, it may not pass a law stripping employees of rights associated with a *particular* union, here AFSCME. Just as the Legislature may not pass a law stating: "State employers shall not negotiate with AFSMCE-represented employees," the Legislature may not pass a law that accomplishes the same effect, as does H.F. 291. *Speiser v. Randall*, 357 U.S. 513, 526 (1958) ("For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which (it) could not command directly.")

[1] Defendants claim Plaintiffs may not address incidental infringement because Plaintiffs allegedly did not raise it to the District Court. This lacks merit, as Plaintiffs raised the implication of their fundamental right of association and the District Court ruled on it. Ruling, p. 5 ("The Court rejects Plaintiffs' contention that H.F. 291 'red circles' AFSCME bargaining units or *impinges on freedom of association with AFSCME*."; emphasis added).

It is no defense for Defendants to argue AFSCME's state safety employees can dissociate from their non-safety bargaining unit members and/or AFSCME, as they argued to the District Court, because "a state actor cannot constitutionally condition the receipt of a benefit… on an agreement to refrain from exercising one's constitutional rights." *R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427, 434 (6th Cir. 2005).

Plaintiffs made a straightforward claim that Defendants have sought to obfuscate as they meander illogically between: the right to collectively bargain as a fundamental right (not asserted by Plaintiffs); the lack of legislative animus (not required to show infringement of associational rights); and the existence of lawsuit brought by the Iowa State Education Association (irrelevant to Plaintiffs' associational claim).

A. Contrary to Defendants' Argument, Plaintiffs Do Not Claim that they have a Fundamental Right to Collectively Bargain

Defendants claim that the strict level of scrutiny does not apply to Plaintiffs associational claim because there is no fundamental right to collectively bargain. Plaintiffs never made that assertion. In fact, Plaintiffs have explained several times that this is *not* Plaintiffs' argument, Appellants' Proof Brief, pp. 54-55, 562 Nonetheless,

Defendants pin on Plaintiffs the argument that because H.F. 291 grants some public employees collective bargaining rights and not others, they are entitled to collective bargaining as a fundamental right. Appellees' Brief, p. 5. Rather than engage Plaintiffs' legitimate associational claim, Defendants distort it.

The 8th Circuit recently made plain the distinction between legislation implicating the right of association reviewed under strict scrutiny and legislation regulating non-suspect matters, noting a state "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Planned Parenthood of Greater Ohio v. Himes*, _ F.3d _, 2018 WL 1833196, *4 (8th Cir. 2018)(quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958).)

Compounding their misdirection, Defendants cite a number of cases that ostensibly support their contention that granting rights to one labor organization and not another "[does] not transform a non-fundamental right into a fundamental one." Appellees' Brief, p. 51. None of the cases cited for that point include such a holding. Instead, the

issue in the cited-to cases was not whether the aggrieved unions were entitled to the same privileges as other unions, but whether the treatment of the unions amounted to a violation of the union's right of free speech. This is distinct from whether the laws penetrated individual members' associational rights to associate with a *particular* union. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 48 (1983) (quoting *Connecticut St. Federation of Teachers v. Bd. of Education Members*, 538 F.2d 471, 481 (CA2 1976)) (strict scrutiny not applied because employee mailboxes were not public forums to which constitutional guarantees applied); *Brown v. Alexander*, 718 F.2d 1417, 1422-23 (6th Cir. 1983) ("…the state may condition the privilege of union dues checkoff upon an organization's meeting certain requirements without violating the first amendment.") (internal citations omitted); *Afro-Am. Police League v. Fraternal Order of Police, Chicago Lodge No. 7*, 553 F. Supp. 664, 670 (N.D. Ill. 1982) ("…there has been no allegation that the City's labor policy denies members of the minority union the right to meet, to speak, to persuade, or to collect dues in the same manner as those organizations who do not enjoy the benefits of the checkoff provision."). Notably, none of the legislation in these cases pre-ordained or privileged any specific union, explicitly or incidentally.

In contrast, H.F. 291 unfairly singles out and punishes only AFSCME-represented state safety and state PSE employees, while favoring other state PSE and safety employees. H.F. 291 is therefore focused on such employees' decision to associate with each other in a particular union, disfavoring that associational choice, while granting privileges to non-AFSCME-represented state safety employees. *See Hearst Corp. v. Iowa Dep't of Revenue & Fin*., 461 N.W.2d 295, 305 (Iowa 1990) ("Statutes are subjected to a higher level of scrutiny if they interfere with the *exercise* of a fundamental right." Emphasis added); *United Food and Commercial Workers Local 99 v. Brewer*, 817 F.Supp.2d 1118, 1124 (2011) ("A regulation that burdens speech may discriminate by viewpoint through its underinclusiveness—that is, because it fails to burden all similarly situated parties equally. In particular, an exemption from an otherwise permissible regulation of speech may represent a governmental attempt to give one side of a debatable public question an advantage in expressing its views to the people.") (internal citations and quotation marks omitted).

B. H.F. 291 Substantially Burdens Plaintiffs' Right of Association

Plaintiffs' association claim is not, as Defendants argue, based on an impairment to collective bargaining. Plaintiffs have stated often that

the legislature may reduce or eliminate collective bargaining. Plaintiffs further recognize the legislature need not provide equal collective bargaining rights to all public employees. Rather, Plaintiffs have alleged and proven that H.F. 291 singles out AFSCME-represented state safety employees for disfavored treatment. This imposes a substantial burden on their choice to associate together as AFSCME members.

Courts have found that generally-applicable laws do not implicate the right of association where the impediments are minor. But those decisions focus on the impairment of a union's effectiveness and involve minor burdens. Unlike the matter at hand, the courts found that these burdens were not significant enough to prevent individuals from exercising their associational rights. In *South Carolina Educ. Ass'n. v. Campbell*, the legislation imposed a burden on all unions and was only economic, and not associational. *South Carolina Educ. Ass'n. v. Campbell*, 883 F.2d 1251 at 1256. ("The burden, identified by the SCEA, is the loss of dues from members who might have paid, if a more convenient method of collecting dues was available."); *see also Smith v. Arkansas State Highway Emp., Local 1315*, 441 U.S. 463 at 465-66 (1979) ("We may assume that it would and, further, that it tends to impair or undermine-if *only slightly*-the effectiveness of the union in

representing the economic interests of its members…. Far from taking steps *to prohibit or discourage* union membership or association, all that the Commission has done in its challenged conduct is simply to ignore the union.") (citations omitted; emphases added).

Moreover, in the cases cited by Defendants, the impairment was on the *organization's* effectiveness and not targeted at depriving rights to members of specific unions. In the case at hand, H.F. 291 causes a significant burden to AFSCME-represented state PSEs, who are denied privileges granted to all similar members of other unions (a fact that was established and remains uncontroverted).

Defendants admit that H.F. 291 imposes significant burdens. Appellees' Brief, p. 52 (H.F. 291 makes a "significant change"). And while Defendants highlight that AFSCME is the largest state public employee union, not a single AFSCME-represented state PSE is conferred favored bargaining rights, while all others who belong to other unions are favored. This significant penalty or disability on association is unconstitutional. *Tabbaa v. Chertoff*, 509 F.3d 89, 102 (2nd Cir. 2007) (quoting *Lyng v. Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am.*, UAW, 485 U.S. 360, 367, (1988)): "[A] burden is merely incidental when it is 'exceedingly unlikely' that a defendant's

actions would prevent someone from exercising his or her associational rights.").

Defendants emphasize that H.F. 291 does not *facially* disadvantage AFSCME, and offer unsubstantiated claims that Plaintiffs must show some sort of targeting or legislative animus. To the contrary, in assessing infringements of associational rights, courts draw no distinctions between intentional and incidental infringement. *NAACP v. Alabama*, 357 U.S. 449, 461 (1958) ("In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action."); *see also Tabbaa,* 509 F.3d at 101–02 (citing *Healy v. James*, 408 U.S. 169, 181–84 (1972)) ("It did not matter that the plaintiffs… had not demonstrated a chilling effect on their desire or ability to associate in the future… rather, there was a substantial burden because of the significant 'disabilities imposed' by the defendant's actions.").

The facts of this case stand established and conceded by Defendants, which are that H.F. 291 singles out AFSCME-represented state safety employees and PSEs for disfavored treatment, and no others.

C. ISEA's Lawsuit is Irrelevant to Plaintiffs' Association Claim

Plaintiffs have previously explained why ISEA's challenge is irrelevant to Plaintiffs' claim, as it does not involve state employees or a red-circling of a specific union. Evidently, the state's interest, as the party bargaining with and appropriating a budget for state employees entail a distinct group than county, city or school district, who operate independently of the state. Therefore, Defendants' reference to ISEA's challenge is immaterial because: (1) teachers are not employees of the state; and (2) that lawsuit is not forwarded by PSE employees of the state; and (3) ISEA does not contend its members were singled-out for disadvantaged treatment while other identically-situated employees represented by other unions were not.

* * * * *

While AFSCME can establish a violation of equal protection as a "class of one" on these grounds, *see, e.g., Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000), this claim is forwarded by individual plaintiffs who include a PSE, and other public safety officers not designated as PSEs, that are affected by H.F. 291's red-circling of AFSCME members. (App. 5-8, 23-24; 1st Amended Complaint at para. 3 & 4; Answer to First Amended Complaint, paras. 3 & 4).

Therefore, because Defendants cannot meet their burdens under a strict scrutiny standard, H.F. 291 should be found to be unconstitutional. *See Vorbeck v. McNeal*, 407 F.Supp. 733 (E.D. Miss. 1976) ("[A] governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly.") Indeed, "the appropriate method for protecting the state's legitimate interest in averting [strikes] is not to restrict freedom of association, but rather to fashion precise legislation declaring such strikes illegal." *Id*. (quoting *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964), *Police Officers' Guild v. Washington*, 369 F.Supp. 543, 553 (D.D.C.1973) (three-judge court)).

III. DEFENDANTS FAIL TO JUSTIFY H.F. 291'S LACK OF UNIFORM APPLICATION AMONG IDENTICALLY-SITUATED IOWANS

Defendants make several errors in their formulation of the Iowa Constitution's Uniformity Clause. As explained previously, Iowa's Uniform Laws clause is not identical to the federal Constitution's Equal Protection guarantee – the wording, import and context of each is distinct. Defendants, however, rely almost entirely on federal jurisprudence, including Iowa cases that apply the federal standard. Defendants compound this error by further misapplying the standard to

the particulars of this case. For example, they state as threshold matte: "Plaintiffs must first show that the different bargaining units they seek to compare are similarly situated." Appellees' Brief, p. 20. Yet the Uniformity Clause applies to *individuals* or *persons*, and always compares treatment of "similarly-situated individuals" without reference or deference to legislative classifications. *E.g. Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7 (2004) (Iowa Constitution "essentially" directs "that all persons similarly situated should be treated alike."). By focusing on state-mandated "bargaining units," Defendants default to legislative classifications, of which plaintiffs have complained, rather than H.F. 291's discriminatory effect on individuals.

In their Brief, Defendants' offer a standard that is no standard at all. They accomplish this by providing the Court with authorities predicated on federal law and tax cases. They also assert that the issue presented here was already decided by the 7th Circuit in a case analyzing Wisconsin's Act 10, which is a very different law that does not treat identically-situated personnel differently like H.F. 291.

Defendants have offered various rationales – some never asserted previously -- to satisfy their federal standard. But none of the rationales excuse or explain H.F. 291's extreme arbitrary application among

identically-situated individuals, nor its extreme over/underinclusion, revealing the rationales as implausible and not predicated on conceivable facts.

A. This is not a Federal Equal Protection Claim nor a Tax Case, and H.F. 291 is not Wisconsin Act 10

1. Defendants' Reliance on Federal Equal Protection is Misplaced

Defendants' Appeal Brief relies primarily on federal equal protection law, which applies a standard that, for reasons stated in Plaintiffs' opening brief, is narrow and more indulgent than Iowa's Uniformity Clause. Of the Iowa cases that Defendants cite, they primarily apply the federal constitution and jurisprudence. Under Iowa law, the Court looks to not only whether a rational reason can conceivably justify discriminatory treatment among similarly-situated individuals, but whether "the rationales are realistically conceivable in light of the statute's *effect.*" *RACI II*, 675 N.W.2d at 7–8 (emphasis added). The proper analysis requires ascertaining a law's *effect* to ensure the discriminatory treatment is justified by its purpose. If "the purpose of the classification" and its effect is "weak," then the "classification must be viewed as arbitrary." *RACI I*I, 675 N.W.2d at 7–8. As noted in prior briefing, a chief indicator of arbitrariness is the statute's over- and under-

inclusion in relation to its goal or legislative purpose. *Id.* This Iowan analysis is a departure from the federal standard, which only considers a statute's over/underinclusiveness under heightened or strict-scrutiny review. For that reason, federal caselaw can be used to justify H.F. 291's extreme and arbitrary over- and under-inclusiveness.

2. Defendants' Reliance on Wisconsin Act 10 is Misguided

At every turn, Defendants seize on the 7th Circuit's decision in *Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640 (7th Cir. 2013) ("*WEAC*") suggesting that case is dispositive of the outcome here. The Court could be forgiven for assuming the Wisconsin law at issue in *WEAC* -- "Act 10" -- is identical to H.F. 291, as Defendants assert the Legislature sought to "duplicate" Act 10 when it drafted H.F. 291. Appellees' Brief, p. 40. In fact, the two laws are very different in their application and effect. Unlike H.F. 291, Act 10 draws a bright line and treats all safety the same, and all non-safety the same, regardless of their unit placement.

As explained in *WEAC*, Act 10 imposed severe restrictions on the bargaining rights of general public employees but preserved them for *all* so-defined public safety employees. *WEAC*, 705 F.3d 643-44. But unlike H.F. 291, the Wisconsin law did not extend collective bargaining

rights to some, but not other, identical public safety employees, nor did it extend collective bargaining rights to some, but not other non-safety employees. This is because Act 10's provisions do not any percentage threshold as does HF. 291. Thus under Act 10, all of Wisconsin's city police, firefighters, sheriffs' deputies, etc., have fulsome collective bargaining rights, and all employees not designated as safety do not. *Id*. Act 10 is therefore nothing like H.F. 291 in its arbitrariness and over/underinclusion.

To be sure, *WEAC* permitted the exclusion of prison guards from "public safety employees" under Act 10, which Plaintiffs contend violates Iowa's Uniformity Clause as a result of the irratonailty of the justifications for their exclusion. Notably, Wisconsin's constitution has no uniformity clause.[2] In any event, the *WEAC* court upheld the exclusion of prison guards based on existing state statutory schemes noting that "the Trust Fund statute, which Act 10 cross-references, also excludes" prison guards and finding reliance on such schemes was

[2] Wisconsin's constitution contains a general provision providing: "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed." Wis. Const. art I, § 1.

reasonable. *WEAC*, n. 11. As explained in Plaintiffs' opening brief and to the District Court, H.F. 291's designation of "PSEs" do not adhere to any of the existing legislative schemes relating to public safety employees, including corrections and jailers, but instead contradicts them in its definition of PSE.

Also, *WEAC* was decided under federal equal protection jurisprudence and, therefore, an assessment of Act 10's over/underinclusiveness was never part of the Seventh Circuit's analysis. There is indication that, had inclusiveness been considered, Act 10 would not have survived scrutiny. This requires some explanation. The *WEAC* plaintiffs forwarded a first amendment public forum claim, but a majority of the court declined to find Act 10 infringed speech because no public forum of speech rights were implicated, ending the analysis. In a concurring in part, dissenting in part opinion, Justice Hamilton indicated that he would have found an infringement of speech based on the presence of a *nonpublic* forum. Upon finding an infringement, heightened review is triggered under federal jurisprudence, which entails an over/underinclusion analysis. The Justice wrote that Act 10 would *fail* such analysis:

> The State argues that public safety employees were treated more generously because they were in a position to strike (albeit illegally) and thereby to undermine public safety. A closer look undermines that explanation. The state employs many police officers, firefighters, and others with important public safety responsibilities who are excluded from the "public safety" classification of Act 10. *If the State's proffered explanation for treating "public safety" employees differently were actually true, it would be hard to understand why that explanation would not apply as well to police officers at the University of Wisconsin, Capitol Police officers, the State's thousands of correctional and probation officers, and many others with important public safety duties*.

WEAC, 705 F.3d at 665 (emphasis added). The majority did not reach the issue of under/overinclusion, but the one jurist who did found Act 10 impermissible on that basis.

In sum, if Act 10 were evaluated under the standards this Court applies under the Uniformity Clause, it is likely Act 10 would fail review. Yet H.F. 291 raises more profound uniformity concerns than Act 10 by reason of its arbitrary means of granting privileges among identically-situated employees. In short, H.F. 291 is not a "duplicate" of Act 10, but represents a quantum leap in arbitrariness and over/underinclusion.

3. Defendants Too Heavily Rely on Tax Cases

Defendants rely primarily on two Iowa decisions, and several federal cases, involving equal protection challenges to tax laws. Both

Iowan and federal courts have found that uniformity and equal protection guarantees are at their lowest ebb in the tax context. Defendants thereby offer the Court a lax standard not appropriately applied in this case. Defendants' heavy reliance on *Qwest Corp*., *LSCP, LLLP*, *Zaber*, and *Scott County Prop Taxpayer Ass'n*, leads to their argument that the legislature is not held to "mathematical niceties" but may mete rough justice. *E.g*., Appellees' Brief, p. 31. The cited-to authorities make clear their limited application to the tax context. In *Qwest Corp*., which upheld differential tax treatment between legacy "Baby Bells" and new entrants following de-monopolization of telephone services, the Court explained the unusually wide latitude accorded tax laws, stating:

> When we have applied the rational basis test to tax laws, they have generally been upheld without much difficulty. "The rational basis standard is easily met in challenges to tax statutes." *Hearst Corp. v. Iowa Dep't of Revenue & Fin*., 461 N.W.2d 295, 306 (Iowa 1990); accord *Heritage Cablevision*, 436 N.W.2d at 38 ("It is widely recognized that the rational basis standard is easily satisfied in challenges to tax statutes."); *City of Waterloo v. Selden*, 251 N.W.2d 506, 508–09 (Iowa 1977) ("An iron rule of equal taxation is neither attainable nor necessary.").

Qwest Corp., 829 N.W.2d at 558 (Iowa 2013). The Court added that in *Hearst*, a case involving taxes applicable to magazines but not newspapers, "we held that… in tax matters even more than in other

fields, the legislature possesses the *greatest freedom in classification*." *Id*. (emphasis added; quoting *Hearst*, 461 N.W.2d 295, 305 (Iowa 1990)[3]; *LSCP, LLLP v. Kay-Decker*, 861 N.W.2d 846, 856 (Iowa 2015)(courts are "especially deferential in the context of classifications made by complex tax laws."); *Zaber v. City of Dubuque*, 789 N.W.2d 634, 646 (Iowa 2010) ("fairness of retroactivity vis-à-vis the taxpayer is fundamentally different in these situations."); see also *Madden v. Kentucky*, 309 U.S. 83, 88 (1940) ("in taxation… legislatures possess the greatest freedom in classification.")

B. H.F. 291's Extreme Over- and Under-Inclusiveness is Arbitrary

The District Court held that H.F. 291 discriminates among identically and similarly-situated individuals, easily finding that identically-situated police officers, firefighters, dispatchers, or clerical employees, to name a few, receive unequal treatment. App. 115. Yet, Defendants fail to address H.F. 291's extreme over- and under-inclusion in its discriminatory treatment among identically-situated Iowans.

[3] *Hearst's* outcome would likely have been different had only some newspapers but not others and only some magazines but not others, been taxed. *Hearst*, 461 N.W.2d 306 ("Uniform treatment of same source media… forestalls any content discrimination claims by members of the same media.")

Instead, they brush past this defect by stating only that the Legislature is not held to "mathematical niceties" and may "draw lines" wherever it pleases, relying on two types of cases: tax cases and cases involving the drawing of bright-lines predicated on dates certain. Appellees' Brief, p. 31-32. As noted, tax laws are particularly indulged, but the other cases relied upon draw bright-line distinctions based on moments in time. *See* Appellees' Brief, p. 31-32, citing *State v. Mann*, 602 N.W.2d 785, 792 (Iowa 1999) (Defendant's age at time of commission of crime under law applicable to juveniles); *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 177 (1980) (Grandfathering of statutory change applicable to beneficiaries with 25 years of railroad employment). Even accepting that the Legislature is permitted "some inequality" in formulating classifications, Appellees' Brief, p. 25, the term "some" suggests that *not a lot* may be condoned, as does the term "niceties." S*ee* Merriam-Webster Dictionary (defining "Nicety" as a "fine point or distinction."). Rather, H.F. 291's extreme arbitrary application is too gross to fall within the margin of error permitted under the Uniformity Clause.

In the proceeding below and in Plaintiffs' appeal brief, H.F. 291's extreme over/underinclusion was proved. But if further evidence is necessary, particularly in light of Defendants' new justifications, Iowa

PERB Decisions make clear exactly how extreme and arbitrary is H.F. 291's different application among identically-situated Iowans.

Thus, for example, in Tama County (population 17,337), Sheriffs' Deputies are denied collective bargaining rights, as well as in Fayette County (pop. 20,257), Delaware County (pop. 17,403), Dubuque County (pop. 97,125), Harrison County (pop. 14,265) and Black Hawk County (pop. 133,455) which are all *disfavored* because they negotiate in a PERB-defined bargaining unit with Jailers, Dispatchers and others; Whereas the Sheriffs' Deputies of Floyd County (pop. 15,960), Woodbury County (pop. 102,782), Cedar County (Pop. 18,340), Webster County (pop. 37,071) and Washington County (pop. 22,247) are *favored* under H.F. 291. *Compare* PERB Case Nos. 8579 (Tama), BU-0962 (Fayette), BU-0880 (Delaware), No. 8080 (Dubuqe); BU-0001 (Harrison), 5200 (Black Hawk) *with* Case Nos. BU-1094 (Floyd), 8260 (Woodbury), 100704 (Cedar), 3387 (Webster), and 8114 (Washington), respectively.

Likewise, H.F. 291 strips police officers of the cities of Cedar Rapids (pop. 131,276), Ames (pop. 66,191) and West Des Moines (pop. 64,560) of their bargaining rights, while preserving them for police officers of the cities of Carlisle (pop. 4,249), Toledo (pop. 2,187) and

Missouri Valley (pop. 2,662). *Compare* PERB Case No. 8742 (Cedar Rapids), 8231 (Ames) and BU-0628 (West Des Moines) *with* Case No. 8490 (Carlisle), 5701 (Toledo), and 7030 (Missouri Valley), respectively.

Similarly arbitrary is the fact that under H.F. 291 police *and* fire employees of Shenandoah (pop. 4,972) are excluded from full bargaining rights, whereas the police *and* firefighters of Red Oak (pop. 5,476) are preserved their bargaining rights. *Compare* PERB Case Nos. 6973 *with* 100067 and 6231. In Decorah (pop. 7,918) and Harlan (Pop. 4,932) police are disfavored, whereas in Denison (Pop 8,308) and Humboldt (Pop. 4,558) they are favored. *Compare* PERB Case No. 8556, No. BU-1103 with No. 8323 and No. 2669). These are just some of many examples of H.F. 291's arbitrary effect.

This extreme arbitrariness is not justified by any of the rationales offered by Defendants. Defendants assert that H.F. 291's 30% PSE threshold forwards their "labor peace" rational because "the risk from labor unrest is materially greater in a unit with a larger percentage of Public Safety Employees" and a "unit containing a small percentage of Public Safety Employees simply does not present the same risk as a unit containing a large percentage." Appellees' Brief, pp. 42-43. But that is clearly implausible and not "realistically conceivable" in light of H.F.

291's effect, in which the police force of a city of 130,000 is stripped of meaningful bargaining rights while the force of a city of 2,000 is not. Therefore, H.F. 291 neither favors larger units or units with more numbers of PSEs.

Further, the 30% PSE Favored Unit threshold cannot be analyzed in a vacuum as simply a matter of "line drawing." Defendants refer generally to "Public Safety Employees" as if the term is objectively defined and proceed to justify H.F. 291 through rationales that assume "PSE" and public safety generally are synonymous.[4] Such reasoning improperly defers to Legislative classifications rather than the actual application of the law. By way of example, Defendants discuss their "labor peace" rationale in reference to maintaining public safety, but neglect to address how, for example, gaming enforcement officers or park rangers – defined as PSEs – are more critical to public safety than Regents Police or Corrections Officers. Simply, accepting Defendants'

[4] Defendants note Chapter 20, at various times, has excluded specified employees from it coverage, including supervisors, and employees of the judiciary, Attorney General or Commercial Banking Enforcement division. Appellees' Brief, p. 18. Those exclusions do not justify H.F. 291's differential treatment among identically-situated employees as those exclusions applied across-the-board: All supervisors are excluded, not just some; and all employees of the particular departments were excluded, not just some.

argument requires finding it is "realistically conceivable" that labor unrest will have greater spillover effects in state parkland or on riverboats than in jails, correctional facilities or university campuses. This is then compounded when the 30% PSE threshold is applied, resulting in extreme, unjustifiable arbitrariness.

C. Defendants' Proffered Rationales Do Not Justify H.F. 291's Arbitrary Discrimination

Each policy rationale offered by Defendants' to justify H.F. 291's arbitrary treatment among Iowans is centered on Defendants' contention that the legislature may treat "Public Safety Employees" differently than non-safety employees. Defendants do not address H.F. 291 treatment of PSEs as distinct from public safety employees generally, stating only "[s]everal valid bases exist for the classification concerning Public Safety Employees." Appellees' Brief, p. 25. Defendants never explain those bases or how they support any rationales that may justify H.F. 291's discriminatory effect.

1. Strike/Labor Peace Rationale

Defendants offer a "labor peace" rationale for H.F. 291's arbitrary effect, suggesting the "legislature could rationally conclude Public Safety Employees filled too critical a role to risk a stoppage if their statutorily-created bargaining rights were curtailed" as "the risk of labor unrest by

Public Safety Employees was greater than the risk from other employees." Appellees' Brief, p. 26. But Defendants do not address how such a rationale plausibly leads to a conclusion that, for example, a strike by PSE-defined gaming enforcement officers and park rangers is more disastrous than among the Regents' police, correctional officers or the entire fire, police and sheriffs forces of a large number of Iowa cities and counties.

Rather than engage with facts, Defendants merely point to Wisconsin's Act 10 and *WEAC* as having decided this issue. As noted above, Act 10 and H.F. 291 are very different. Defendants incorrectly state that Iowa like "Wisconsin was free to determine that the cost of potential labor unrest exceeded the benefits of restricting the public safety unions." Appellees' Brief, p. 26 (*quoting WEAC*, 705 F.3d at 655). However they neglect to note that -- *unlike* Act 10 -- H.F. 291 does not confer bargaining rights on public safety units or even on similarly-situated public safety employees. Instead, it creates a random quilt that extends privileges to some safety and many non-safety, while denying such privileges many safety and non-safety.

Nor does a smattering of "blue flu" examples from other states advance the rationale because a threat of "blue flu" in the town of Toledo

(population ~2,000) warrants favoring its police officers, but not the police force of Cedar Rapids (population ~131,000), to name but one example.

Relatedly, Defendants offer a more particularized "labor peace" rationale that acknowledges the discriminatory treatment among identically-situated employees, but suggests the Legislature had in mind only to ensure a "cadre" of public safety personnel is available in the event of a major labor unrest. Such a cadre would, according to Defendants, police those who, being disfavored, joined a strike. This rationale suggests that county park rangers and gaming enforcement officers must be on hand to maintain order and subdue the state's corrections officers and county jailers, or restore peace when the disfavored fire and police departments of various towns and cities walk off the job.

Further, Defendants' rationale is not "*realistically* conceivable" because it is founded upon layers of fantastical hypotheticals culminating in a dystopian-inspired general strike in Iowa.[5] For Defendants'

[5] Consider Defendants' formulation of this rationale requires accepting the following list of hypotheticals: (1) a conflict and morale issue among bargaining unit members; (2) a greater likelihood of a strike among some unit members; (3) an illegal strike among some members of the

dystopian vision to come to pass, all Iowa public employees including public safety employees would have to strike. Next, taking Defendants' argument, those randomly-favored bargaining units would then determine that their common cause lay not with the rest of the state workers, but in arresting strikers. Finally, the Legislature must have determined that this select cadre of public safety officers on whom public order rests as bulwark against anarchy, required designating park rangers, gaming enforcement officers and motor vehicle code enforcers as more critical to maintaining order in that environment than the many sworn police officers with statewide functions who are either excluded as PSEs or have been placed Disfavored Units. The Rationale is too attenuated and too divorced from reality to withstand rational scrutiny.

2. H.F. 291 Does not Confer Rights on Units with More PSEs

Defendants contend that H.F. 291 allows "units with more [PSEs] more bargaining rights." Appellees' Brief, p. 25, *et seq*. In fact all of Defendants' offered rationales are predicated on that conclusion. But in conferring privileges, H.F. 291 has nothing to do with unit size or the

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bargaining unit; (4) orders by authorities for some members of the unit to arrest others; and (5) a refusal to carry out such orders. This fanciful conjecture is insufficient to obviate constitutional guarantees of equal treatment.

actual number of PSEs in a bargaining unit, and basic mathematical principles reveal Defendants' rationales as illogical. As noted above, H.F. 291 strips the police forces and fire departments of large cities, and the Sheriffs' Deputies of large counties of meaningful collective bargaining, while the forces and fire departments of tiny towns and sparse counties are not. Defendants' authority suggesting distinctions based on size are therefore unhelpful. They cite a Tennessee case, *Harwell v. Leech*, 672 S.W.2d 761, 764 (Tenn. 1984), which involved a law applicable to counties of certain population size as to the sale of fireworks. The Tennessee law established a bright line based on population. Had it made distinctions between counties not based on population, but the percentage of a statutorily defined subgroup of citizens residing in each county -- a situation perhaps more analogous to H.F. 291 – the statute would not have passed rational review.

Further, in evaluating this rationale, the Court should also consider how H.F. 291 defines the term PSE, and ask why a unit that consists of, for example, five county park rangers is more critical to public safety or labor peace than a unit consisting of eighty Campus Police officers, or five-hundred corrections officers.

3. "Unique Safety Issues" Rationale

Defendants offer that the Legislature "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." Appellees' Brief, p. 27. But Defendants fail to address how H.F. 291 forwards that legislative purpose. If safety concerns were at the forefront of the Legislatures' minds, why does H.F. 291 afford elevated bargaining rights to so many non-safety employees while excluding so many other safety and PSE-defined employees who Defendants concede are deserving of consideration?

The Legislature may be "free to conclude" PSEs require such elevated health considerations, but when enacting ameliorative legislation it must forward that goal in a rational manner. To evaluate the rationality of the Legislature's action, the Court considers whether "the relationship between the classification" and "the purpose of the classification is so weak that the classification must be viewed as arbitrary." *RACI II*, 675 N.W.2d at 7–8; *Varnum*, 763 N.W.2d at 879. Here, because PSEs do not suffer higher safety issues than many safety employees excluded from the PSE definition (for example corrections officers and road safety workers), and because H.F. 291 confers rights on non-PSEs while

excluding many PSEs, the classification is too "weak" to be viewed as anything but arbitrary.

Defendants incorrectly boil Plaintiffs' argument down to whether "psychiatric aides are similar to state troopers." Appellees' Brief, p. 30. In doing so, they fail to address Plaintiffs' argument focused on the fit between the legislative purpose and H.F. 291's application. Because (1) PSEs do not suffer from elevated or even higher safety risk or injury than many excluded employees, such as corrections officers, EMTs, and road safety workers and, yes, attendants of state psychiatric hospitals; (2) H.F. 291 confers rights on many non-safety employees who do not face elevated health and safety issues; and (3) also *denies* such rights to many police, firefighters and deputy sheriffs, the health and safety rationale is too tenuous to justify H.F. 291's discriminatory treatment.

Similarly, because H.F. 291's conferral of privileges is so arbitrary, Defendants one-dimensional argument that police may be treated differently due to their unique position falls short. Appellees' Brief, p. 27-28. In support of this surface-level argument, Defendants cite three unrelated cases, *Beverlin v. Bd. Of Police Comm'rs of Kansas City*, 722 F.2d 395 (8th Cir. 1983), *Confederation of Police v. City of Chicago*, 481 F.Supp. 566 (N.D. Ill. 1980) and *March v. Rupf*, No. C00-

03360WHA, 2001 WL 1112110, at *2 (N.D. Cal. Sept. 17, 2001) (Appellees' Brief, p. 28). None of these cases address H.F. 291's arbitrary definition of PSE and its arbitrary conferral of rights to some police officers but not others. Thus, *Bervelin* involved an ordinance that allowed firefighters to collectively bargain but excluded all law enforcement broadly. The 8th Circuit's holding turned only on the conclusion that law enforcement personnel are not similarly-situated to firefighters. *Beverlin*, 722 F.2d at 396.

Similarly, *Confederation of Police* entailed a challenge by police to a city's decision to pay non-sworn employees overtime at time-and-one-half, but police at the regular hourly rate. *Confederation of Police*, 481 F. Supp. at 568. The court dismissed an equal protection claim, noting differences between benefits and rates of pay enjoyed by sworn-employees as compared to civilians lent rationality. *Id*. Finally, *March v. Rupf* is far afield, as it involves a challenge to different procedures by a California county to obtain a concealed-carry gun permits, one for civilian and one for law enforcement. *March*, 2001 WL 1112110, at *2. It is likely these cases would have turned out differently had the various state laws applied only to some police, but not all, or only some law enforcement but not others.

4. Preservation of the Public Fisc

Defendants rationale related to preserving the public fisc does not justify H.F. 291's arbitrary application because, even under the indulgent federal equal protection standard, "[o]f course, a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." *Plyler v. Doe*, 457 U.S. 202, 227 (1982) (quoting *Graham v. Richardson*, 403 U.S. 365, 374–375 (1971).) In short, the State "must do more than justify its classification with a concise expression of an intention to discriminate." *Id*. (citing *Examining Board v. Flores de Otero*, 426 U.S. 572, 605 (1976). This Court noted in *Zaber v. City of Dubuque*, 789 N.W.2d 634, 656 (Iowa 2010) that safeguarding the public fisc was "rationally related to [the tax law's] retroactivity." Thus, preserving the public fisc standing alone does not legitimize discrimination, a point confirmed by this Court recently: "Although raising revenue is not sufficient on its own to be a legitimate interest, *see RACI II*, 675 N.W.2d at 13, we have held that generating tax revenues may be a sufficient governmental interest *when paired with the goal of achieving a fair distribution of the tax burden*." *Tyler v. Iowa Dep't of Revenue*, 904 N.W.2d 162, 168 (Iowa 2017)

(quoting *Dickinson v. Porter*, 240 Iowa 393, 406 (1948); emphasis added).

In short, public fisc considerations may be appropriate in tax cases when tied to assessments of taxes *if* the differential application is itself rational. However the Legislature may not bootstrap a rationale for a discriminatory conferral of statutory privileges by referring to an inchoate desire to preserve the public fisc.

5. New "Complexity" of Bargaining Rationale

For the first time on appeal, Defendants defend H.F. 291's highly arbitrary scheme as a means to avoid "complexity." They argue a bright-line application of H.F. 291's privileges is not preferable out of fear of "increased complexity of inter-unit negotiations." However inter-unit negotiations among safety and non-safety, involving groups with different interest and demands, has been the norm in Iowa for 40 years.

A hypothetical fear of "complexity" in negotiations is not sufficient to justify discrimination under the Uniformity Clause. Rather, the instances in which administrative complexity is accepted as a justification for unequal treatment are limited to tax cases. *See Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 682 (2012) ("Ordinarily, administrative considerations can justify a tax-related distinction; citing

Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 511–512 (1937) (tax exemption for businesses with fewer than eight employees rational in light of the "[a]dministrative convenience and expense" involved); *Lehnhausen v. Lake Shore Auto Parts*, 410 U.S. 356, 365 (1973)(comparing administrative cost of taxing corporations versus individuals); *Madden v. Kentucky*, 309 US 83, 90 (1940)(comparing administrative cost of taxing deposits in local banks versus those elsewhere).

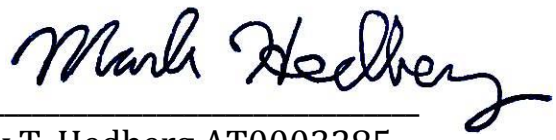
The Legislature has actually traded one form of hypothetical "complexity" for another, as illustrated in a recent PERB decision, PERB Case No. 100822 (May 30, 2017). In that case, PERB was required to determine whether a bargaining unit consisting of Chickasaw County's Sheriffs' Office was a "Public Safety Unit" under H.F. 291, as it consisted of six deputy sheriffs with the remaining personnel consisting of dispatchers, jailers and matrons. (*Id*., at 7). The PERB noted "If the unit had one less non-public safety employee, such as a matron, then it would qualify as a public safety unit." *Id*., pp. 7-8. The part-time matron position exists for the infrequent escorting of female prisoners, *Id*., thus the number of matrons in the unit is not reflective of the number of individuals regularly employed in the unit, nor indicative of how critical

Sheriffs' Deputies are to public safety and labor peace considerations. Rather than simplifying matters, H.F. 291 threatens havoc and instability by allowing the creation of part-time and additional positions which raises questions of when and how a unit is determined to be Favored versus Disfavored. Indeed, under H.F. 291, a police officer may have bargaining rights in one year, but the following year lose them because safety positions go unfilled or additional non-PSE employees have been hired.

V. CONCLUSION

For the foregoing reasons, the Decision and Order should be reversed and H.F. 291 found unconstitutional.

Respectfully submitted,



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1. This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this Brief contains 6,997 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 the Appellants' Amended Reply Brief was served on the 16th day of May, 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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