BEFORE THE IOWA SUPREME COURT

No. 17-1841

AFSCME IOWA COUNCIL 61,
JOHNATHAN GOOD, RYAN De VRIES,
TERRA KINNEY, and SUSAN BAKER,

Appellants,

vs.

STATE OF IOWA and IOWA PUBLIC
EMPLOYMENT RELATIONS BOARD,

Appellees.

APPEAL FROM THE DISTRICT COURT
OF POLK COUNTY
HON. ARTHUR E. GAMBLE

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LATIONS BOARD

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

2. Whether strict scrutiny applies to Plaintiffs' claims where no fundamental right is at issue because Plaintiffs had, and retain, all the rights the First Amendment protects.

Bennett v. City of Redfield, 446 N.W.2d 467, 473 (Iowa 1989).

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

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Cent. State Univ. v. Am. Ass'n of Univ. Professors, Cent. State Univ. Chapter, 526 U.S. 124, 127 (1999).

Sweeney v. Pence, 767 F.3d 654, 669 (7th Cir. 2014).

South Carolina Educ. Ass'n v. Campbell, 883 F.2d 1251, 1256-57, 1263 (4th Cir. 1989).

Smith v. Arkansas State Highway Emp., Local 1315, 441 U.S. 463, 465 (1979).

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Flying J Inc. v. City of New Haven, 549 F.3d 538, 546 (7th Cir. 2008).

ROUTING STATEMENT

Defendants-Appellees State of Iowa and the Iowa Public Employment Relations Board (together, 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 AFSCME Iowa Council 61, Johnathan Good, Ryan DeVries, Terra Kinney, and Susan Baker (together, "Plaintiffs") from the final order of the district court granting summary judgment in favor of the State and against Plaintiffs. AFSCME is an employee organization representing public employees, and the individuals are employees of the State of Iowa.

Plaintiffs filed a Petition for Declaratory and Injunctive Relief on February 20, 2017 (App. 5-13), and a First Amended Petition for Declaratory and Injunctive Relief on March 15, 2017 (App. 14-95). In the Amended 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 Amended Petition contained one count alleging the Amendments violated Plaintiffs' equal protection rights. (App. 19-20.)

The State filed its Answer and Affirmative Defense on March 17, 2017. (App. 96-100.) The State filed a motion for summary judgment the same day. (App. 101-02.) Plaintiffs filed a resistance on May 10, 2017 (App. 103), and then a notice that its resistance should be viewed as a cross-motion for summary judgment on May 23, 2017 (App. 104). The district court granted the State's motion for summary judgment and denied Plaintiffs' on October 30, 2017, dismissing the case with prejudice. (Ruling and Order on Motions for Summary Judgment ("Ruling") (App.105-27).) Plaintiffs filed a timely Notice of Appeal to the Iowa Supreme Court on November 20, 2017. (App.128-29.)

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).

ARGUMENT

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

A. Preservation of Error

The State agrees that Plaintiffs have preserved error on their claims of equal protection violations based on the classifications alleged lack of a rational relationship to a legitimate state interest and alleged failure to further the legitimate purposes of the law. Plaintiffs have failed to preserve error, however, on their claim first made in this appeal that equal protection has been violated because the Court should be limited to analyzing only those rationales for the classification that were expressly stated in the legislative record, as that issue was never raised or decided in the district court.

B. Scope and Standard of Review

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 equal protection challenge in this appeal. (Plaintiffs' Brief at 26-27.) Plaintiffs contend strict scrutiny applies to their freedom of association challenge. (*Id.* at 52.)

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.

Wisconsin Educ. Ass'n Council, 705 F.3d at 655; *see* Ruling at 17-18.

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, many more employees should be deemed Public Safety Employees. (*See* Plaintiffs' Brief at 59.) 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.

In establishing classifications, the Legislature "can rely on actual or hypothetical facts, and can attack only certain aspects of a problem without having to justify its failure to fashion a comprehensive solution." *Record Head Corp. v. Sachen*, 682 F.2d 672, 679 (7th Cir. 1982); *see Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 489 (1955) ("The legislature may select one phase of one field and apply a remedy there, neglecting the others."). Indeed, one can only imagine the ensuing paralysis if the Legislature was required to address an entire issue with all of its nuances or not act at all. As the law recognizes, such a demand cannot be reconciled with how the legislative process actually works. *Id.* For example, if the Legislature later deems it too disruptive to risk labor unrest among campus police, it can revisit its decision and grant them greater bargaining rights in subsequent legislative terms. This principle has been applied to uphold the very distinctions at issue here:

> Even if we agree with the Unions that Act 10 should have placed prison guards in the public safety category, "a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked."

Wisconsin Educ. Ass'n Council, 705 F.3d at 656 n.11 (quoting *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 809 (1969)).

In trying to overcome deference due the Legislature when exercising its constitutionally delegated functions, Plaintiffs ask this Court to ignore that it accepts under rational basis review a legislature's generalizations. *Baker*, 867 N.W.2d at 57. Instead, they parse vigorously through various job titles trying to find positions that possess *some* similarities to those deemed favored while wholly *ignoring* differences. That analysis leads Plaintiffs down a road where in their view, for example, psychiatric aides are similar to state troopers. Why? Because they both face danger in their work. That might be true, but that is not how the constitutional analysis works. By focusing solely on one issue, Plaintiffs ignore numerous differences between troopers and psychiatric aides, such as that there would be private sector psychiatric aides who could fill in if public sector psychiatric aides struck,[1] psychiatric aides would not

[1] *E.g.*, U.S. DEPT. OF LABOR BUREAU OF LABOR STATISTICS, Occupational Employment and Wages, May 2016, https://www.bls.gov/oes/current/oes311013.htm (App. 185-93).

be called upon to enforce the law if there was labor unrest, and it is within the Legislature's prerogative to conclude it fears labor unrest among the State's 280 state troopers more than among the State's 72 psychiatric aides. Phipps Decl. at ¶¶ 3-4 (App. 195-96). Singling out individual similarities while ignoring differences improperly asks the Court to substitute its priorities for those of the elected representatives.

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 legislators set forth in the legislative record all their reasons for enacting the Amendments.

Plaintiffs' attempt to incorporate arguments made in a different pending case concerning the lack of a legislative record for the strike-avoidance rationale for the classification. Plaintiffs concede the record in the present case does not support their argument. (*See* Plaintiffs' Brief at 12 n.1: "Although not directly in the record, incorporated herein are legislative facts on which the Court should take judicial notice. The entire legislative record is also incorporated in the record of the *ISEA* case which is pending before the Iowa Supreme Court.") Plaintiffs thus do not cite to anything in the

record in this case on this argument, but rather, simply cite generally to the other pending lawsuit.[2] Courts generally do not take judicial notice of records in other cases. *Cunha v. City of Algona*, 334 N.W.2d 591, 594 (Iowa 1983); *Hawkeye-Security Insurance Co. v. Ford Motor Co.*, 174 N.W.2d 672, 685 (Iowa 1970) ("We do not take judicial notice of records in another case tried in the same court.") *Bales v. Iowa State Highway Comm'n,* 86 N.W.2d 244, 248 (Iowa 1957) ("It is fairly well settled that judicial notice will not be taken of the records of the same court in a different proceeding.")

In the district court Plaintiffs never argued, as they do throughout their appeal brief, that "a proper standard is one that holds the Legislature to its articulated rationales" and "that those rationales—and only those rationales—[should be] scrutinized" to determine the constitutionality of a law. (Plaintiffs' Brief at 50.) In fact, Plaintiffs in the district court argued the opposite:

> But, in challenging H.F. 291's classifications as unconstitutional under Iowa's Equal Protection Clause, Plaintiffs neither ask nor expect the courts to require proof of

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[2] Plaintiffs repeatedly cite to evidence beyond the district court record throughout their brief. *See* Plaintiffs' Brief at 20 n.2; 20 n.3; 35 n.4; 36 n.5; 45 n.6; 45 n.7; 55 n.9.

> legislative judgments, inquire into the motivations of particular legislators in search of animus, or to prevent the legislature from testing solutions to novel legal problems.

(Plaintiffs Summary Judgment Reply Brief at 6 (internal citations omitted).) A party must ordinarily raise an issue in the district court and the district court must decide that issue before this Court may decide it on appeal. *Estate of Gottschalk by Gottschalk v. Pomeroy Dev., Inc.*, 893 N.W.2d 579, 585 (Iowa 2017). The rule prevents parties "from presenting one case at trial and another on appeal." *Id.* The fact that Plaintiffs' argument is constitutional in nature "matters not to our analysis of this issue. Our rule of error preservation applies with equal strength to constitutional issues." *State v. Kinkead*, 570 N.W.2d 97, 102 (Iowa 1997). Accordingly, the Court should not reach Plaintiffs' argument that our courts may not consider "unstated Legislative rationales" in analyzing the constitutionality of the Amendments.

Even if the Court reached this argument, the Amendments still fail rational basis review. The record to which Plaintiffs attempt to cite in the ISEA case 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 that appeal record focuses on failed amendments proposed by opponents to the Amendments. It is undisputed the legislative transcript in that appeal record does 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 the other case's appeal record.

Even if the appeal record in the ISEA case 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 (advanced on appeal for the first time), the State must be limited to statements in the legislative record to establish the rational basis for the Amendments. (Plaintiffs' Brief at 47-50). Under this theory, 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 United States v. O'Brien,* 391 U.S. 367, 384 (1968) (noting "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it"); *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. Wisconsin's Act 10 resulted in the same political debate now presented to this Court. (Def. App. p. 44.) 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 as the district court's "conjectured rationale" was 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 ignore all these facts. Indeed, the word "Wisconsin" never appears in Plaintiffs' brief. As the district court correctly found, an Iowa legislator could look at strikes in Wisconsin, or the fact strikes occurred before enactment of Chapter 20, and conclude strikes were possible in Iowa without acting unconstitutionally irrationally. (Ruling at 14: "While the likelihood of a public sector strike following the passage of Chapter 20 may be reduced by the continued statutory prohibitions and consequences, a strike by public employees including public safety employees is conceivable. The possibility of a strike by public employees, including employees charged with the protection of the public, is a credible and rational concern.")

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.[3] As the district court found, a rational Iowa legislator reasonably could seek to limit the risk of a strike by those most critical to ensuring sufficient protection of the public. Legislators were free to conclude that, even if the risk was small, the effect would be so severe as to justify its decision. (*See* Ruling at 13-16.) Plaintiffs bear the burden to negate every conceivable basis that may support the Amendments—including those courts already recognized—and it is not the

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[3] *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. 155-57); 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. 158-61) ("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. 162-63); 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. 165-68); *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. 169-71); *Blue Flu* AMERICAN POLICE BEAT (Feb. 22, 2016) https://apbweb.com/east-orange-police-officers-call-out-sick-amid-contract-dispute/ (App. 172).

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).

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.

The fiscal interests of the government are routinely accepted as a rational basis for legislative cost-saving measures for the public. *See 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). The State has a compelling interest in seeing that government is maintained in healthy financial condition. *Id.*

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.

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.

But the potential inter-unit differences in bargaining rights would not involve, as Plaintiffs imply, a simple difference on a lim-

ited issue or two. To the contrary, the Amendments require bargaining 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 distributing 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. . . ."); *State v. Darling*, 246 N.W. 390, 391–92 (Iowa 1933) ("[T]his court will not set aside a statute [as unconstitutional] unless the invalidity is clear and practically beyond doubt. This is a concession due to the co-ordinate branch of the government, and has always been recognized and followed by this court.")

The Legislature's line-drawing need not, and cannot, be perfect. "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); *see 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. Strict scrutiny does not apply to Plaintiffs' claims, as no fundamental right is at issue because Plaintiffs had, and retain, all the rights the First Amendment protects.

Plaintiffs presumably do not emphasize their claim that a fundamental right is implicated because the argument has been rejected frequently and forcefully. "The right to public employment is not a fundamental right." *Bennett v. City of Redfield*, 446 N.W.2d 467, 473 (Iowa 1989). Likewise, public sector collective bargaining is not a fundamental right. *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."). "Mandatory

collective bargaining is not a fundamental right, and public employees do not constitute a suspect class. Rather, the classification of public employees in the area of mandatory collective bargaining is purely an economic matter subject to the rational basis standard of review." *Slifer v. Pub. Employee Relations Bd. of Kansas*, No. 90-4026-R, 1992 WL 25457, at *6 (D. Kan. Jan. 28, 1992); *see Cent. State Univ. v. Am. Ass'n of Univ. Professors, Cent. State Univ. Chapter*, 526 U.S. 124, 127 (1999); *Sweeney v. Pence*, 767 F.3d 654, 669 (7th Cir. 2014).

Plaintiffs thus retreat to arguing that the limitations on collective bargaining under the Amendments unconstitutionally impinge freedom of association. This argument, too, is routinely rejected. The reason is simple: There is a fundamental distinction between the right to associate and whether someone must listen when you do. Declining to collectively bargain over certain topics does not inhibit the ability to associate. The Fourth Circuit Court of Appeals made this clear in a statement equally applicable here: "This legislation does not prohibit, regulate, or restrict the right of the [union]

or any other organization to associate, to solicit members, to express its views, to publish or disseminate material, to engage in political activities, or to affiliate or cooperate with other groups." *Campbell*, 883 F.2d at 1256.

Under the Amendments, Plaintiffs retain the right to associate with a union. What is different, and what Plaintiffs are really complaining about, is they no longer have the privilege of *forcing* the State to negotiate over certain topics. That distinction—between the right to associate and the absence of a right to compel bargaining—is the beginning and end of the analysis. No court has held public employees have a fundamental right to force a state to bargain on specific issues. Several courts have squarely rejected that argument. *See Smith v. Arkansas State Highway Emp., Local 1315*, 441 U.S. 463, 465 (1979) ("[T]he First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it."); *Campbell*, 883 F.2d at 1257; *Arkansas State Highway Employees, Local 1315 v. Kell*, 628 F.2d 1099, 1102 (8th Cir. 1980)

("while a public employer may not constitutionally prohibit its employees from joining together in a union, or from persuading others to do so, or from advocating any particular ideas, the First Amendment does not impose any duty on a public employer . . . even to recognize a union.").

Plaintiffs claim this case is somehow different because AFSCME is more disadvantaged than other unions. But that argument fails factually and, more importantly, legally. Obviously, units in other unions likewise face bargaining limitations, as evidenced by the previously referenced pending appeal by teachers' unions challenging the Amendments. Moreover, Public Safety Employees retain the option to organize and bargain through AFSCME, as the law applies to types of employees regardless of their union choice.

Even ignoring these facts, however, granting a right to one entity and not another does not transform a *non*-fundamental right into a fundamental one. Again, the U.S. Supreme Court and multiple other courts tell us so:

> The Court of Appeals also held that the differential access provided the rival unions constituted impermissible

> content discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. We have rejected this contention when cast as a First Amendment argument, and it fares no better in equal protection garb. As we have explained above, PLEA did not have a First Amendment or other right of access to the inter-school mail system. The grant of such access to PEA, therefore, does not burden a fundamental right of the PLEA. Thus, the decision to grant such privileges to the PEA need not be tested by the strict scrutiny applied when government action impinges upon a fundamental right protected by the Constitution.

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 54 (1983); *see Campbell*, 883 F.2d at 1263 (finding strict scrutiny inappropriate because granting right to one labor organization (SEA), deemed not controversial, and not another (SCEA), deemed more controversial, did not transform a non-fundamental right into a fundamental one); *Brown v. Alexander*, 718 F.2d 1417, 1423 (6th Cir. 1983) (holding same); *Afro-American Police League v. Fraternal Order of Police, Chicago Lodge No. 7*, 553 F.Supp. 664, 670 (N.D. Ill. 1982) (holding same). Even if Plaintiffs were correct that AFSCME alone lost something (and they are not), a non-fundamental right does not somehow become fundamental because others enjoy it. *Id.*

Plaintiffs in their brief vacillate between incongruous claims their constitutional rights have been invaded by intentional targeting, on the one hand, or by "incidental, yet unintended, infringement," on the other. (Plaintiffs' Brief at 52-55.) Concerning the "incidental" infringement argument, Plaintiffs did not raise this argument in the district court, and the district court's ruling obviously does not address it. *See Estate of Gottschalk by Gottschalk v. Pomeroy Dev., Inc.*, 893 N.W.2d 579, 585 (Iowa 2017) (issue must be raised and decided in district court before appellate court may decide it).

In any event, in making these arguments, Plaintiffs' ignore AFSCME is the largest public employee union in the state and, whenever any significant change is made to collective bargaining for public employees, AFSCME unavoidably will be impacted. There is a distinct difference between nearly unavoidable impact, however, and unconstitutional targeting. Plaintiffs in their own petition concede AFSCME represents both Public Safety Employees and other public employees. (Amended Petition ¶ 23.) Employees associated with AFSCME are just as able to bargain with the State

on all the subjects available under the Amendments as employees associated with any other union. Nothing in the Amendments facially disadvantages AFSCME any more or less than any other union. The Iowa State Education Association's lawsuit filed regarding the same amendment belies AFSCME's suggestion that AFSCME has been "red circled" to bear alone the consequences of the Legislature's action.

Plaintiffs' invite the Court to speculate, without citation to any evidence, that the Legislature bore some undisclosed animus toward AFSCME in passing the Amendments. Under rational basis review, however, courts cannot search for the legislature's motive. *Munn v. Indep. Sch. Dist. of Jefferson*, 176 N.W. 811, 817 (Iowa 1920) ("This is a question which in no manner affects the merits of the case. The enactment of the statute was clearly within the power of the General Assembly, and the motives of the legislators and the reasons or arguments leading them to such action are not a matter into which we can properly inquire."); *O'Brien*, 391 U.S. at 383 ("It is a familiar principle of constitutional law that this Court will not

strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.").

Stated differently, even if Plaintiffs had some evidence of animus against them, it would not matter, as "animus only invalidates a law when no rational basis exists." *Wisconsin Educ. Ass'n Council*, 705 F.3d at 654 (citing *Flying J Inc. v. City of New Haven*, 549 F.3d 538, 546 (7th Cir. 2008) (holding "[a]nimus comes into play only when [there is] no rational reason or motive . . . for the injurious action taken by the [legislature]"). The Amendments are not subject to a strict scrutiny test, and Plaintiffs' insinuations about animus by the Legislature have no impact on the validity of the Amendments in this case.

CONCLUSION

The Amendments are presumed constitutional. The Legislature's action does not present the "clearly, palpably, and without a doubt" case of infringement of a constitutional right necessary to strike down a law. Plaintiffs cannot meet their burden to negate every reasonable basis for the challenged classifications. The Leg-

islature 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.

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PROOF OF SERVICE

I hereby certify that on the 22nd day of May, 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.

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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 7,170 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 Times New Roman 14 pt.

Dated: May 22, 2018

Lori McKimpson

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