SC98412

IN THE SUPREME COURT OF MISSOURI

MISSOURI NATIONAL EDUCATION ASSOCIATION, ET AL.,

Plaintiffs/Respondents,

v.

MISSOURI DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, ET AL.,

Defendants/Appellants.

Appeal from the Circuit Court of St. Louis County, Missouri
The Honorable Joseph Walsh III

CORRECTED BRIEF OF PLAINTIFFS/RESPONDENTS

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INTRODUCTION[1]

This appeal concerns the constitutionality of HB 1413, legislation enacted in 2018 that dramatically curtails public-sector collective bargaining and that restricts the speech and association of unions throughout the state. Not only are HB 1413's burdens severe, they are discriminatory. Unlike any other regulation of public-sector collective bargaining in existence, HB 1413 grants or withholds public employees' bargaining and speech rights based entirely on the identity of the union those employees decide to associate with and select as their bargaining representative. If they select a union that the Legislature sought to favor, HB 1413 imposes no restrictions on their collective bargaining or speech rights. If they select a union the Legislature sought to penalize, HB 1413 renders collective bargaining a farce and saddles them and their union with onerous restrictions on speech and association.

The Circuit Court below correctly recognized that such an arrangement is unconstitutional many times over. The judgment below should therefore be affirmed.

First, the Circuit Court correctly concluded that HB 1413's draconian restrictions on public-sector collective bargaining are incompatible with Article I, Section 29 of the Constitution, which expressly guarantees the right of employees "to organize and bargain collectively" and to do so "through representatives of their own choosing." As the Circuit Court observed, the overall effect of these restrictions would render collective bargaining a "farce" that "does not even give the illusion of collective bargaining." D107, at 18, 20,

[1] The Appellants' jurisdictional statement is accurate.

22. For this Court to accept the State's defense of these restrictions on appeal would represent nothing less than an evisceration of the fundamental rights protected by Article I, Section 29, as well the stealth overruling of this Court's decisions confirming that the constitutional right of collective bargaining both extends to the public sector and imposes on employers an obligation to bargain in good faith with its employees' chosen representative over their terms and conditions of employment. *See Independence-Nat'l Educ. Ass'n v. Independence Sch. Dist.*, 223 S.W.3d 131 (Mo. banc 2007) ("*Independence-NEA*"); *Am. Fed'n of Teachers v. Ledbetter*, 387 S.W.3d 360 (Mo. banc 2012) ("*Ledbetter*"); *E. Mo. Coal. of Police v. City of Chesterfield*, 386 S.W.3d 755, 760 (Mo. banc 2012) ("*City of Chesterfield*").

Second, the Circuit Court correctly concluded that HB 1413's pervasive discrimination that burdens a group of penalized unions—while leaving a group of favored unions unscathed—is incompatible with Article I, Section 2's guarantee of equal protection. This discriminatory classification is a severe impingement on a number of fundamental rights. And, while the State spills a great deal of ink in its lengthy brief attempting to justify the discriminatory treatment, its efforts fall far short of what of the Constitution requires.

Third, the Circuit Court correctly concluded that HB 1413's burdens on speech and association transgress the limits imposed by Article I, Sections 8 and 9. HB 1413 creates substantial limits on political expression and mandatory disclosure obligations applicable to only one group of speakers—the penalized unions disfavored by the Legislature—and to no other entity in the State. This sort of speaker-based chilling of

speech and association is blatantly unconstitutional, and the State makes only the most half-hearted effort to claim otherwise.

Given the seriousness and pervasiveness of these constitutional defects, the Circuit Court concluded that the challenged provisions of HB 1413 are facially invalid and that those provisions are inseparable from the law as a whole. Accordingly, the Circuit Court declared HB 1413 unconstitutional *in toto*, and enjoined its further enforcement. That decision was correct in every particular.

This Court has already had an opportunity to evaluate some of the Legislature's handiwork in passing HB 1413 and has found it constitutionally wanting. *See Karney v. Dep't of Labor & Indus. Relations*, 599 S.W.3d 157 (Mo. banc 2020). This appeal exposes all of HB 1413's interlocking constitutional defects and shows that none of it can be salvaged in a way that is consistent with both the Constitution and the will of the Legislature. The Circuit Court's judgment should therefore be affirmed.

STATEMENT OF FACTS

A. The Parties

The Plaintiffs to this action are seven labor unions that represent public-sector employees in Missouri:

- Plaintiff Missouri National Education Association is an education association representing 35,000 educators, administrators and other persons working in public K-12 education and higher education in Missouri. D53.
- Plaintiff Ferguson-Florissant National Education Association ("Ferguson-Florissant NEA") is the exclusive collective bargaining representative for full-time

certified instructional and educational support personnel at Defendant Ferguson-Florissant School District. Ferguson-Florissant NEA was voluntarily recognized by Defendant Ferguson-Florissant School District and the two were parties to a collective-bargaining agreement in effect from July 1, 2018 to June 30, 2019. D54.

- Plaintiff Hazelwood Association of Support Personnel ("Hazelwood ASP") is the exclusive bargaining representative for a unit of bus drivers employed by Defendant Hazelwood School District. Hazelwood ASP was certified as the bargaining representative by a State Board of Mediation ("SBM") election in 1988, and its collective-bargaining agreement with the Hazelwood School District was in effect from July 1, 2018 to June 30, 2020. D55.
- Plaintiff Laborers' International Union of North America, Local Union No. 42 ("LIUNA Local 42") is the exclusive bargaining representative of a twenty-member police officer unit employed by Defendant City of Bel-Ridge ("Bel-Ridge"). LIUNA Local 42 was voluntarily recognized by Bel-Ridge in May of 2018. The collective-bargaining agreement between LIUNA Local 42 and the City of Bel-Ridge is in effect from April 6, 2018 to April 5, 2021. D56, at 1–2.
- Plaintiffs Miscellaneous Drivers, Helpers, Healthcare and Public Employees Union Local No. 610, International Brotherhood of Teamsters ("Teamsters Local 610") is the exclusive bargaining representative for 36 firefighters employed by Defendant Affton Fire Protection District and 21 police officers employed by Defendant City of Crestwood ("Crestwood"). Teamsters Local 610 was certified as the representative for the firefighters by an SBM election and was certified as

the bargaining representative for Crestwood police officers through an election pursuant to Crestwood ordinances. Teamsters Local 610 has a collective-bargaining agreement with the Affton Fire Protection District that is in effect from January 1, 2016 to December 31, 2020. D57, at 1–2.

- Plaintiff International Union of Operating Engineers, Local 148 ("Operating Engineers Local 148") is the exclusive bargaining representative for 125 physical plant employees at Defendant St. Louis Community College. Operating Engineers Local 148 became the exclusive bargaining representative for these employees when it merged with the Operating Engineers local that had been certified by the SBM as the exclusive bargaining representative following an election. The collective-bargaining agreement between Operating Engineers Local 148 and St. Louis Community College is in effect from July 1, 2017 to June 30, 2022. D58, at 1–2.
- Plaintiff Service Employees International Union Local 1 ("SEIU Local 1") represents a unit of 828 employees of the Department of Corrections and Defendants Department of Mental Health and the Missouri Veterans Commission. SEIU Local 1 was certified by the SBM as the bargaining representative for this multi-employer unit following a merger between it and another SEIU local. Its most recent collective-bargaining agreement with the three employers expired on May 31, 2018. D59, at 1–2.

The Defendants in this action are several public agencies, officials, and employers:

- Defendant Missouri Department of Labor and Industrial Relations ("the Department") is a department of the State of Missouri. The Department is responsible both for enforcing several of the provisions of HB 1413 that are challenged in this action, and for promulgating regulations to implement those provisions. *See*, *e.g.*, Sections 105.540, 105.595, RSMo.[2]
- Defendant State Board of Mediation ("SBM") is the State agency responsible for enforcing several of the provisions of HB 1413 that are challenged in this action and promulgating regulations to implement those provisions. *See, e.g.,* Sections 105.525, 105.575, 105.598, RSMo.
- Defendants Ferguson-Florissant School District, Hazelwood School District, City of Bel-Ridge, Affton Fire Protection District, City of Crestwood, St. Louis Community College, the Missouri Office of Administration, Missouri Department of Mental Health, and the Missouri Veterans Commission are "public bodies" under HB 1413 that employ public workers represented by the Plaintiffs. As public bodies, each of these Defendants plays a central role in implementing and enforcing many of the provisions of HB 1413 that are challenged in this action. *See, e.g.* Sections 105.575.1, 105.580.5, 105.585, 105.595 RSMo.

[2] Unless otherwise specified, all statutory references are to 2018 Revised Statutes of Missouri.

- Defendant Wesley Bell is the Prosecutor for St. Louis County[3] and is responsible for enforcing the criminal penalties for failing to comply with HB 1413's reporting and recordkeeping requirements. *See* Sections 56.060.1, 105.555, RSMo.

B. Public-Sector Labor Relations Prior to HB 1413

Since its adoption in 1945, the Missouri Constitution has explicitly recognized that "employees shall have the right to organize and bargain collectively through representatives of their own choosing." Mo. Const. art. I, § 29. The "goal" of this provision was to preserve these rights "from any future attack by the Legislature." *Ledbetter*, 387 S.W.3d at 364.

The rights secured by Article I, Section 29 extend to all employees, regardless of whether they work in the private or the public sector. *See Independence-NEA*, 223 S.W.3d at 135–39. The Legislature and other public entities may establish procedures for the exercise of employees' collective bargaining rights, *see id.* at 136, but such procedures must "satisfy the constitutional requirements" of Article I, Section 29, *City of Chesterfield*, 386 S.W.3d at 760. Among other requirements, Article I, Section 29 expressly assures employees of the right to select bargaining representation "of their own choosing," and the employer must bargain with the chosen representative in "good faith, with the present intention to reach an agreement" over the subjects of bargaining, and

[3] Wesley Bell was elected to the office of St. Louis County Prosecutor in November, 2018, and assumed office on January 1, 2019, replacing Robert McCullough.

"match their proposals, if unacceptable, with counter-proposals." *Ledbetter*, 387 S.W.3d at 362, 366.

Prior to HB 1413, the State's public-sector labor law, Section 105.500 *et seq.*, RSMo., ensured that covered public employees had the right to form and join unions, to bargain with their employer "relative to salaries and other conditions of employment," and to have the results of that bargaining reduced to a written agreement. Sections 105.510–105.520, RSMo. (2017). Issues "with respect to appropriateness of bargaining units and majority representative status" were resolved by the State Board of Mediation ("SBM"). Section 105.525, RSMo. (2017).

The prior law did not cover certain categories of public-sector employees. *See* Section 105.510, RSMo. (2017) (exempting "police, deputy sheriffs, Missouri state highway patrolmen, Missouri National Guard, all teachers of all Missouri schools, colleges and universities"). Nevertheless, those employees and their chosen union representatives enjoyed all of the rights guaranteed under Article I, Section 29, *see Independence-NEA*, 223 S.W.3d at 136, and they exercised those rights to organize and collectively bargain under local ordinances or policies that satisfied Article I, Section 29.

Prior to HB 1413, different groups of public employees have exercised their Article I, Section 29 rights to select the Plaintiff unions as their recognized exclusive representatives "of their own choosing" either by way of an SBM-conducted election (available only for employees covered by the prior law), an election conducted by another entity, or through the employer's voluntary recognition of the union's representative status based on a credible showing of majority support by the employees. D59, at 1–2;

D57, at 2; D55, at 1; D58, at 1; D54, at 1–2; D56, at 2. Elections and voluntary recognition were the usual means by which employees chose union representation at the time of Article I, Section 29's adoption in 1945. *See*, *e.g.*, *Wallace Corp. v. NLRB*, 323 U.S. 248, 251 & n.1 (1944); *W. Union Tel. Co*., 50 NLRB 729 (1943).

Since those initial elections and recognitions, Plaintiffs' status as recognized exclusive representatives has continued subject to the employees' right to remove that status through a decertification process. Plaintiffs' status as recognized representatives is incorporated in the collective bargaining agreements now in effect between many of the Plaintiffs and the employers whose workplaces they represent. D59, at 2; D57, at 2; D55, at 2; D58, at 2; D54, at 2; D56, at 2.

Prior to HB 1413, Plaintiffs bargained on behalf of the employees they represent to reach agreement on a broad array of workplace terms. As is traditional in both the private and public sectors, Plaintiffs' agreements frequently addressed:

- wages and benefits;
- the deduction of union dues from members' paychecks;
- issues related to employee hiring, promotion, assignment, direction, transfer, scheduling, discipline, and discharge;
- paid release time for union officers and representatives to conduct certain union business, such as participating in collective bargaining negotiations;
- various work rules and operating procedures related to employees' working conditions; and

- how the terms of the agreement should be applied in times of fiscal emergencies.

D59, at 2; D57, at 2; D58, at 2; D54, at 2; D56, at 2.

C. Public-Sector Union Political Activities Prior to HB 1413

Missouri public sector unions, like other membership organizations in the state and elsewhere, engage in political activity, speech, petition, and protest activities to advance the interests of their members. *See, e.g.,* Richard J. Hardy et al., *Missouri Government and Politics* 227–28 (1995 ed.) (describing the political and protest activities of Missouri teacher unions). Although unions may not make political contributions directly to candidates or party committees, *see* Mo. Const. art. VII, § 23.3(3), the law in place prior to HB 1413 allowed unions, including Plaintiffs, to spend general treasury funds to support or oppose ballot measures,[4] to engage in independent speech supporting or opposing candidates for political office,[5] to contribute to political action committees engaged in independent political advocacy,[6] and to transfer dues funds to the union's own connected political action committee.[7] Prior law also allowed unions to advance their

[4] See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784–95 (1978); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295–300 (1981).

[5] *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010).

[6] *See Free & Fair Election Fund v. Mo. Ethics Comm'n*, 252 F. Supp. 3d 723, 748–49 (W.D. Mo. 2017), *aff'd*, 903 F.3d 759 (8th Cir. 2018).

[7] *See* Mo. Const. art. VII, § 23.3(12); Mo. Ethics Comm'n Advisory Op. No. 2017.08.CF.016 (Aug. 25, 2017).

members' interests through traditional protest activity such as demonstrating at a city council or school board meeting.[8]

D. Passage of HB 1413 and its Effect on Plaintiffs

On June 1, 2018, then-Governor Eric Greitens signed HB 1413 into law. This legislation, effective August 28, 2018, enacts a complete overhaul of Missouri public-sector labor relations. For many public-sector unions and the employees they represent, it changes how those unions are selected and retained, it restricts the scope and conduct of collective bargaining, it imposes various restrictions on speech activities, and it creates broad new enforcement mechanisms.

HB 1413's provisions generally apply to "labor organizations," which include any organization "in which public employees participate and that exists for the purpose of . . . dealing with a public body or bodies concerning collective bargaining, grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." Section 105.500(5), RSMo. A "public body," in turn, includes "the state of Missouri, or any officer, agency, department, bureau, division, board or commission of the state, or any other political subdivision or special district of or within the state." Section 105.500(6), RSMo. All of the Plaintiffs fall within the definition of "labor organization" in HB 1413.

[8] *See Heath v. Motion Picture Mach. Operators Union No. 170*, 290 S.W.2d 152, 157–58 (Mo. banc 1956).

HB 1413 does not apply to "[p]ublic safety labor organizations and all employees of a public body who are members of a public safety labor organization." Section 105.503.2(1), RSMo.[9] This carve-out is discussed in greater detail *infra* at 35–38.

1. HB 1413's Severe Restrictions on the Bargaining Rights and Speech Activities of Public Labor Unions and their Members

HB 1413 imposes severe restrictions on the Constitutional rights of covered unions and their members to engage in collective bargaining and free speech and association.

a. HB 1413's substantial burdens on the selection and retention of a labor union as exclusive bargaining representative

HB 1413 significantly alters the way in which covered unions like the Plaintiffs can be selected and retained as a bargaining representative for employees of a public body. To begin with, HB 1413 categorically prohibits public employers from voluntarily recognizing a covered union, irrespective of how strong and undisputed the level of employee support for that union may be. *See* Section 105.575.1, RSMo. Instead, covered unions that were voluntarily and lawfully recognized or selected pursuant to a non-SBM-conducted election pre-HB1413 can only continue to serve as an exclusive bargaining representative following an "initial" election conducted by Defendant SBM, as if they had no prior representative or bargaining relationship with the employees and employer. *See* Section 105.575.1–.8, RSMo.

[9] The provisions of HB 1413 also do not apply to the Department of Corrections or any of its employees. Section 105.503(2), RSMo.

Covered unions are further disadvantaged by the terms that HB 1413 imposes on their elections. Such unions must pay a fee of up to $2000 for the election, and they can only prevail by receiving—not just a majority of the votes actually cast in the election—but a majority of the votes of all employees eligible to vote. *See* Section 105.575.8 & .15, RSMo. In other words, non-votes in the election are treated as "no" votes against the proposed representative. What is more, a covered union that manages to prevail in an initial certification election must still stand for a recertification election every three years under the same standards. *See* Section 105.575.12, RSMo.

b. HB 1413's discriminatory burdens on the ability of covered unions to engage in any meaningful collective bargaining

HB 1413 also significantly alters the way in which covered unions conduct bargaining with a public body by placing drastic limits on the scope of bargaining, creating obstacles on how unions ratify tentative agreements, allowing a public body to rewrite or invalidate any part of an agreement before putting it into effect, and allowing a public body to backtrack on the obligations of finalized agreements.

i. Drastic limits on the scope of bargaining. Any collective-bargaining agreement with a covered union must include clauses reserving to the public body (i) the right to hire, promote, assign, direct, transfer, discipline, and discharge employees and (ii) the right to make, amend, and rescind work rules and standard operating procedures. Section 105.585(1), RSMo. The parties also cannot bargain about "release time" pay for time spent on any "bargaining-related activity." Sections 105.580.4, 105.585(4), RSMo. The effects of these restrictions can be seen on the agreement between Plaintiff Operating

Engineers Local 148 and St. Louis Community College in place at the time of HB 1413's effective date. Red "X's" marked through all of the provisions of the agreement that are no longer subject to bargaining demonstrates the breadth of HB 1413's restrictions on permissible topics of bargaining. D60, at 1–21.

ii. Obstacles to covered union's ability to ratify tentative agreements. Once bargaining results in a tentative agreement between the parties, HB 1413 mandates that the covered union must first ratify the tentative agreement before submitting it to the public body. The ratification vote is taken according to the same standards as votes for a union's certification or retention. *See* Section 105.580.5, RSMo. In other words, non-votes are counted as votes *against* ratification.

iii. Provisions allowing a public body to rewrite or invalidate any part of an agreement before putting it into effect. For covered unions, HB 1413 makes the negotiations over the small number of bargainable subjects largely illusory. If the union is able to ratify a tentative agreement, that agreement is then submitted to the public body, which may then "approve the entire agreement or any part thereof," "return any rejected portion of the agreement to the parties for further bargaining," "adopt a replacement provision of its own design," or "state that no provision covering [a] topic . . . shall be adopted." Section 105.580.5, RSMo. Taken together, these provisions allow a public body to pick-and-choose which provisions of that agreement will be adopted, to rewrite any provision of the agreement before putting it into effect, and to stymie further bargaining altogether by declaring that no provision on a topic can be negotiated.

iv. Provisions allowing a public body to backtrack on the obligations of finalized agreements. Once an agreement between a public body and a covered union has been ratified and put into effect, HB 1413 gives the public body additional significant leeway to alter the agreement's terms. In particular, HB 1413 allows the public body to renegotiate the agreement's economic terms any time that, "upon good cause," it "deems it necessary." Section 105.585(6), RSMo. If the public employer invokes the latter provision, the parties have 30 days in which to bargain, after which the public body may unilaterally change the agreement. *Id.* The conditions that might qualify as "good cause" are not defined by HB 1413.

The result of these multiple and overlapping restrictions on covered unions is to render the bargaining process a nullity—removing most commonplace employment matters from the scope of bargaining, hampering the union's ability to submit an agreement for approval, and reserving to the employer the right to scrap negotiated agreements both before and after implementation.

c. HB 1413 burdens the speech and association of covered unions and their members

HB 1413 also imposes burdensome restrictions on core political activity of covered unions, that apply to no other unions or organizations in the state. HB 1413 also significantly restricts the speech and associational activities of covered unions and their members.

In particular, HB 1413 prohibits Plaintiffs and other covered unions from using any portion of a member's dues to make either a political "contribution" or "expenditure"

without first obtaining that member's "informed, written or electronic authorization," which must be renewed annually. Section 105.505.2, RSMo. This annual advance-authorization requirement may not be waived even by a member who wishes to do so, and no employee's dues may be increased in lieu of payments for contributions or expenditures. *See* Section 105.505.3–.4, RSMo.

Similarly, a member of a covered union can no longer simply authorize the deduction of union dues until he or she revokes the authorization. Instead, the member is paternalistically required to provide written or electronic re-authorization of the deduction each year or have the remittance of his or her dues cease. *See* Section 105.505.1, RSMo.

HB 1413 also prohibits covered unions from taking any action "intended to cause the removal or replacement of any designated representative" of a public employer. Section 105.580.2, RSMo. HB 1413 does not specify exactly the kinds of conduct this restriction covers, and the State Board of Mediation has issued no clarifying regulations. On its face, this restriction would appear to prohibit petitioning by way of a grievance or otherwise for the removal or reassignment of a supervisor for workplace-related reasons, such as harassment of an employee, no matter how inappropriate or unlawful the supervisor's conduct might be. The restriction could even be construed as prohibiting a covered union from advocating for the support or defeat of an elected public employer

representative, such as a school board member, which are core protected rights of speech and petition.[10]

All other entities and organizations in the state are exempt from these restrictions on speech and association. They are not required to obtain advance authorization to engage in political activity, they are not required to obtain annual reauthorization for the collection of members' dues by payroll deduction, and they are not prohibited from taking action to remove or replace a public body's representative in bargaining.

d. HB 1413's burdensome record-keeping and reporting requirements

HB 1413 subjects all covered unions—regardless of their size, available resources, or capacity—to a new regime of intrusive and burdensome record-keeping and reporting requirements. Among these new requirements is an obligation to file a financial report annually disclosing a wide range of financial information, including: all assets and liabilities; receipts of any kind; salaries and disbursements to officers and employees; all direct and indirect loans; as well as an "itemization schedule" detailing the "purpose, date, total amount, and type or classification of each disbursement . . . along with the name and address of the entity receiving the expenditure" in a variety of categories (e.g.,

[10] HB 1413 also requires that any collective bargaining agreement with a covered union must "expressly prohibit . . . picketing of any kind" and must include a provision acknowledging that any public employee "who pickets over any personnel matter . . . shall be subject to immediate termination." Section 105.585(2), RSMo. In *Karney*, this Court declared the restriction on "picketing of any kind" to be unconstitutional and limited the restriction on picketing over "any personnel matter" to those matters that are not of "public concern." 599 S.W.3d at 162–66.

contract negotiation and administration; organizing activities; litigation; public relations activities; training activities; etc.). Section 105.533.2, RSMo.

Along with this annual filing requirement, HB 1413 imposes expansive record-keeping requirements, obligating every covered union, officer and employee (other than clerical and custodial employees) to maintain for at least five years comprehensive and detailed records and underlying documentation (such as receipts) showing "with sufficient detail" the information and data against which the reports can be "verified, explained, or clarified, and checked for accuracy and completeness." Section 105.545, RSMo.

HB 1413's annual disclosure requirements are particularly onerous insofar as they require extensive and intrusive information about a covered union's political activities, including information that the union may not even have in its own possession. For example, the annual financial report must disclose:

- Detailed information regarding all expenditures for: political activities; activities attempting to influence the passage or defeat of federal, state, or local legislation, or the content or enforcement of federal, state, or local regulations or policies; and voter education and issue advocacy activities. Section 105.533.2(6), RSMo.
- The percentage of the reporting union's total expenditures for each category of political activity disclosed in the report. Section 105.533.2(7), RSMo.
- The names, addresses, and activities, of any law firms, public relations firms, or lobbyists whose services the reporting union used for any of the above categories of political activity. Section 105.533.2(8), RSMo.

- The candidates, committees, and organizations to which the reporting union contributed financial or in-kind assistance, as well as the amount provided. Section 105.533.2(9), RSMo.
- Both the committees or political action committees with which the reporting union is affiliated or to which it provides contributions and the amounts that the reporting union contributed to such committees, as well as information about all of *those committees'* activities (i.e., the amounts and recipients of the financial support that each committee provided)—information that is not likely to be in the union's possession. Section 105.533.2(10), RSMo.
- Covered unions must comply with extensive recordkeeping and annual reporting requirements. Section 105.533.2, RSMo. The SBM has promulgated reporting forms and instructions for this requirement that include a financial reporting form with 21 associated schedules and 26 single-spaced pages of instructions. It is a criminal violation to make a false statement or material omission from a report, or to tamper with records supporting the report. Section 105.555, RSMo.

The penalties imposed for even inadvertent non-compliance with these many new and onerous record-keeping and reporting requirements are severe. Any delay in filing these reports is punished with a $100 per day fine. *Id*. HB 1413 also makes it a crime to make a knowingly false statement or material omission from a report. *Id*. It is likewise a crime to make a knowingly false entry in records required to be kept by HB 1413, or to knowingly conceal, withhold, or destroy such records. *Id.* Both offenses can result in fines of up to $10,000, and imprisonment for up to one year. *Id.*

Covered unions will be required to devote considerable time, energy, and financial resources to complying with these new record-keeping and reporting requirements. These demands will be especially burdensome for the smaller unions. For example, Plaintiff Hazelwood ASP, which represents only 60 bus drivers employed by Defendant Hazelwood School District, employs no professional staffers, and relies on elected member leaders for all governance, financial and record-keeping functions. D55, at 2.

e. HB 1413's broad enforcement mechanisms

HB 1413 also includes broad enforcement mechanisms. Many of its core provisions may be enforced—not just by public bodies, the SBM, or local prosecutors—but by virtually any public entity or indeed citizen of the state, all of whom may bring a civil enforcement action in which a court may award damages, injunctive relief, and attorneys fees. Section 105.595, RSMo.

2. HB 1413's Discriminatory Carve-Out for "Public Safety Unions"

As noted above, HB 1413 completely exempts any "public safety labor organization" from all of the foregoing burdens and restrictions. Section 105.503.2(1), RSMo. A "public safety labor organization" is defined as an organization "wholly or primarily representing persons trained or authorized by law or rule to render emergency medical assistance or treatment, including, but not limited to, firefighters, ambulance attendants, attendant drivers, emergency medical technicians, emergency medical technician paramedics, dispatchers, registered nurses and physicians, and persons who are vested with the power of arrest for criminal code violations including, but not limited to police officers, sheriffs, and deputy sheriffs," Section 105.500(8), RSMo. The

discriminatory carve-out for these unions and employees was added to HB 1413 at the very end of the legislative process, as part of the May 16, 2018, Senate Substitute. The State Senate approved the carve out that very same day, and the House of Representatives followed suit the following day resulting in HB 1413's legislative passage.[11]

The result of the carve out is to divide public sector employees into two categories and to accord them dramatically different rights to union representation and association. Critically, the category a group of public employees falls into is determined entirely by how they exercise their constitutionally protected right to select and associate with a union to represent their interests. If a group of public employees—*even one with no public safety-related duties*—chooses to associate with and be represented by a favored union that primarily represents public safety personnel, they will be entirely free of HB 1413's draconian restrictions on covered unions and their members. Conversely, if a group of employees—*even one consisting solely of public safety personnel*—chooses to associate with Plaintiffs or any other union that does *not* primarily represent other public safety personnel (in other words a "penalized" union), those employees and their union are subject to the full force and effect of HB 1413's many burdens and restrictions.

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[11] *See* Missouri House of Representatives, *House and Senate Joint Bill Tracking—HB1413, 2018 Regular Session,* https://house.mo.gov/bill.aspx?bill=HB1413&year=2018&code=R; *see also* David A. Lieb, *Unions Seek to Block New Missouri Labor Group Restrictions*, AP NEWS, Aug. 27, 2018 ("[Representative] Taylor's original version of the legislation didn't include the exemption. He said it was added in the state Senate as the session neared its end to help secure the bill's passage"), https://apnews.com/article/86570e8442e843a49f20a1640752127d.

Consider the example of Plaintiff LIUNA Local 42, which represents a unit of approximately 20 police officers employed by Defendant City of Bel-Ridge. D56, at 2. Because LIUNA Local 42 also represents more than 2,000 additional private- and public-sector employees in Missouri—the majority of whom are *not* employed in public safety positions as defined in Section 105.500(8), RSMo.—it does not qualify as a "public sector labor organization" for purposes of HB 1413. As a result, the City of Bel-Ridge's police personnel are subject to all of HB 1413's restrictions simply because they chose to associate with a penalized union like Plaintiff LIUNA Local 42, rather than a favored union that primarily represents other public safety personnel. The same is true of Plaintiff Teamsters Local 610, which represents Affton firefighters and police officers in the City of Crestwood. D57, at 2. HB 1413 will deprive the firefighters and police officers who have chosen representation by these penalized unions of core bargaining and speech rights. None of the Plaintiffs qualifies as a "public safety labor organization." D57, at 2; D56, at 2. Instead, they are ordinary "labor organizations" subject to all of HB 1413's provisions.

HB 1413's discriminatory carve out means that employees' choices about which unions to associate with—and unions' corresponding choices to associate with particular groups of employees—determines whether they will be forced to sacrifice a broad array of bargaining, speech, and associational rights. A favored union, for example, may gain recognition voluntarily or by a non-SBM election at no cost, and it can prevail in the election by receiving a simple majority of the votes cast, which was the uniform practice for all unions pre-HB 1413 (as well as in our political democracy). In other words, if a

group of employees seeks representation by a favored union, no fee is required, and the results of the election are determined by a tally of the votes actually cast. But if the very same group of employees seeks to be represented by a penalized union, HB 1413 requires that the union pay for the privilege of allowing the employees to vote.

Public safety unions like the International Association of Firefighters or Fraternal Order of Police are not subject to HB 1413's restrictions on the topics or conduct of collective bargaining—no matter what kind of employees they represent. They may negotiate over the full scope of terms and conditions of employment (including personnel matters, work rules, the effect of financial emergencies, and release time), they are not required to ratify a tentative agreement before submitting it to the public body (much less ratify it by an absolute majority of the bargaining unit), they are not subject to requirements that allow the public body to selectively adopt or rewrite a tentative agreement before putting it into effect, and they are not subject to a mandate in their agreement that allows the public employer to change in the agreement due to unspecified "good cause."

HB1413's favored "public safety" unions are exempt from HB 1413's onerous recordkeeping and disclosure requirements. They also remain free of the specter of fines and criminal prosecution for even small or inadvertent missteps in attempting to comply with them. Finally, they are not subject to a civil enforcement action and potential liability for damages, injunctive relief, and attorney fees.

3. The absence of a record to identify or support HB 1413's purpose

Despite its significant effects on the constitutional rights of Plaintiffs and other covered unions, HB 1413 contains no legislative findings articulating its purpose or supporting the need for the burdens it imposes. There is no record, reports, or expert testimony received during the legislative process. Indeed, to the extent there are any legislative statements connected with the law at all, they consist almost entirely of statements by a small number of legislators generically voicing support for transparency, without any attempt to address HB 1413's substantive restrictions on collective bargaining and speech. D76, at 4 (citing to video link at 00:12:29). Another statement claims that HB 1413 was enacted because "no Missourian should be forced to give up their constitutional rights against their will"—yet the speaker makes no attempt to explain whose rights were being given up prior to HB 1413, how that deprivation was supposedly accomplished, and what HB 1413 purportedly does to address the problem. *Id.* (citing to video link at 00:04:16 – 00:05:00). Finally, HB 1413 includes no findings, and the legislative record contains no testimony, explaining the rationale for the carve-out of public safety labor unions which is defined, not in terms of employees' duties, but in terms of the union with which they choose to associate.

E. Procedural History

On August 27, 2018, Plaintiffs brought suit to invalidate and enjoin enforcement of HB 1413. D2. Plaintiffs' Petition asserted claims that the burdensome and discriminatory provisions of HB 1413 described above violate the rights of the Plaintiffs and their members under the Missouri Constitution to organize and bargain collectively (Article I, Section 29); to equal protection (Article I, Section 2); and to free speech and

association (Article I, Sections 8 and 9). D2, at 5. Plaintiffs' Petition requested declaratory relief and both a preliminary and permanent injunction that would prevent the implementation and enforcement of any of HB 1413's provisions. D2, at 44–45.

In both the trial court and now on appeal, the substantive defense of HB 1413 was undertaken entirely by the Attorney General's office on behalf of the various state agencies named as defendants in the case. We refer to them simply as "the State" throughout this brief. While the State claims that HB 1413 protects public employers generally, the municipal Defendants named in this suit did not appeal the Judgment against them, nor have they joined in the State's Appellate Brief.

Plaintiffs filed a Motion for Preliminary Injunction on October 17, 2018. D10. In opposing that motion, the State did not offer any expert evidence and did not articulate many of the justifications that it now offers in defense of HB 1413's constitutionality. After a hearing, the trial court granted a preliminary injunction on March 8, 2019, that prevented the implementation and enforcement of any of HB 1413's provisions. D49.

Plaintiffs moved for summary judgment on August 8, 2019, largely on the ground that the trial court's preliminary injunction order had already resolved both the legal and factual issues necessary to determine HB 1413's constitutionality. D51. In opposition to Plaintiffs' motion, the State submitted the following "expert" affidavits in an effort to justify HB 1413's restrictions:

- *Daniel Shoag:* Dr. Shoag's affidavit consists of extensive speculation about what problems HB 1413 might have been enacted to address and how its provisions might advance an interest in solving those problems. *See infra* note 16. For

example, Dr. Shoag posits that HB 1413's provision treating all non-votes as "no" votes in certification elections for non-public safety unions might have been enacted to protect the interests of younger employees by presuming that they are both less interested in unionization and less inclined to express their preference in a vote. D78, at 8. He also hypothesizes that HB 1413's discrimination against non-public safety unions with respect to the scope of bargaining over working conditions might have been motivated by a belief that models for managing human resources may not exist for public safety employment, but are well settled for all other sectors of public employment. *Id.* at 19. Dr. Shoag's declaration makes clear that his opinion on these issues is offered as a post hoc justification for the challenged provisions of HB 1413. *Id.* at 3. Furthermore, Dr. Shoag makes no attempt to quantify the strength of the State's asserted interests in passing HB 1413.

- *Aaron Hedlund*, *Robert Maranto*, and *Daniel Stangler*: Drs. Hedlund, Maranto, and Stangler all provided declarations that were prepared for a separate lawsuit in which the State is defending recent changes to the state civil service system. All three declarations generally attested to the declarants' belief that at-will employment is superior to arrangements that restrict the flexibility of managers over hiring, promotion, discipline, and termination. D79, at 3-4; D80, at 3; D81, at 2. Dr. Maranto, in particular, asserted that civil service laws and other arrangements that limit management flexibility had "outlived their usefulness." D80, at 5. These declarants made clear that their opinions were being provided as

a post hoc justification for a single challenged provision of HB 1413 – the restriction on subjects of bargaining.

On January 27, 2020, the Circuit Court granted summary judgment in Plaintiffs' favor. D107. As a threshold matter, the Circuit Court rejected the State's claim that Plaintiffs lacked standing. *Id.* at 14. The Circuit Court went on to hold that HB 1413's restrictions on collective bargaining and union recognition violate Article I, Section 29; that HB 1413's speech restrictions and compelled disclosures violate Article I, Sections 8 and 9; and that HB 1413's pervasive discrimination against non-public safety unions violates Article I, Section 2. D107, at 22, 27 & 30. The Circuit Court concluded that HB 1413's unconstitutional provisions could not be severed from the rest of the law, and therefore invalidated the entire law, permanently enjoined its enforcement. D107, at 31. This appeal by the State followed.

STANDARD OF REVIEW

This Court reviews de novo the Circuit Court's ruling that HB 1413 violates the Missouri Constitution. *See Karney*, 599 S.W.3d at 161; *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). In conducting such a review, this Court utilizes the same summary judgment standard applied by the Circuit Court. That is, summary judgment "is appropriate when the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law." *Binkley v. Am. Equity Mortg., Inc.*, 447 S.W.3d 194, 196 (Mo. banc 2014); *see also* Rule 74.04(c).

The right to summary judgment "boils down to certain facts . . . that legally guarantee one party's victory regardless of other facts or factual disputes." *Pemiscot County Port Auth. v. Rail Switching Servs., Inc.*, 523 S.W.3d 530, 533 (Mo. App. S.D. 2017). The facts material for summary judgment purposes are ones that, under the substantive law applicable to the claims, would affect the outcome of the case. *Tonkovich v. Crown Life Ins. Co.*, 165 S.W.3d 210, 214 (Mo. App. E.D. 2005). And a genuine dispute over such facts that would preclude summary judgment "must be a real and substantial one—one consisting not merely of conjecture, theory and possibilities." *ITT Commercial Fin. Corp.,* 854 S.W.2d at 378. "Only evidentiary materials that are admissible or usable at trial can sustain or avoid summary judgment." *L.A.C. ex rel. D.C. v. Ward Parkway Shopping Ctr. Co., L.P.*, 75 S.W.3d 247, 253 n.3 (Mo. banc 2002).

ARGUMENT

HB 1413 1413 represents nothing less than a legislative attempt to overrule this Court's seminal decisions *Independence-NEA*, *Ledbetter*, and *City of Chesterfield*, and to hollow out the Constitution's protections for collective bargaining, equal protection, and free speech and association for public-sector employees and their chosen unions. The Circuit Court was correct in concluding that HB 1413 is invalid and unconstitutional in its entirety. This Court should affirm that result.

By urging this Court to uphold HB 1413's restrictions on collective bargaining, the State asks this Court to leave the penalized unions and the employees they represent with even less of a voice in their working conditions than before *Independence-NEA* recognized that Article I, Section 29's constitutional protections extend to public-sector

employment. The statutory framework that preceded HB 1413 did not require unions to pay for initial and triennial representation elections that required an absolute majority for recognition, did not prohibit bargaining on terms and conditions of employment other than wages and benefits, and did not impose burdens on the speech and political activity of public workers and their unions.

In attempting to justify the imposition of all of these restrictions now, the State ignores *Independence-NEA*'s central teaching: that any concerns about the soundness of a union's bargaining proposals, or about the delegation of governmental authority, are completely addressed by the public employer's ability "reject any and all proposals." 223 S.W.3d at 137. Thus, the parade of horribles that the State presents to justify HB 1413's extreme burdens are nothing more than an illusion. And the State's elaborate attempt to explain the need for each of HB 1413's provisions in isolation misses the forest for the trees. Not only are HB 1413's restrictions unnecessary, but when taken as a whole, they render the dealings between penalized unions and public employers a "farce" that "does not even give the illusion of collective bargaining." D107, at 18, 20, 22.

This unconstitutional result is exacerbated all the more by HB 1413's pervasive discrimination that leaves workers who choose to associate with penalized unions with meaningless collective bargaining and impoverished rights of speech and association compared to their counterparts who choose representation by favored unions. This novel form of discrimination infringes on the fundamental rights of Plaintiffs and their members, and the State's efforts to justify it are clearly inadequate. The Circuit Court was

therefore correct to hold that HB 1413's carveout violates Article I, Section 2's guarantee of equal protection.

HB 1413 also burdens the cherished rights of free speech and association protected by Article I, Sections 8 and 9. Its speaker-based restrictions on political advocacy and compelled disclosure provisions cannot be justified under the applicable standard of scrutiny. The Circuit Court properly declared them unconstitutional.

Because HB 1413's constitutional defects are both serious and pervasive, the Circuit Court properly concluded that the challenged provisions of HB 1413 are facially invalid and that they are inseparable from the law as a whole. All of HB 1413's applications are unconstitutional, and any effort to deal with its unconstitutionality on only as-applied basis will just flood the courts with needless litigation. Likewise, any effort to salvage part of HB 1413—particularly by expanding its draconian burdens to parties that are not before this Court—would be inconsistent with both the Constitution and legislative will.

This Court should therefore affirm the Circuit Court's decision to invalidate HB 1413 in its entirety.

I. HB 1413 Violates Article I, Section 29 of the Constitution. (Responds to State's Points I and IV)

The Circuit Court correctly concluded that HB 1413's restrictions on the collective bargaining process violate Article I, Section 29. To arrive at that result, the Circuit Court determined, first, that employees' rights "to organize and bargain collectively" and to do so "through representatives of their own choosing" is explicitly protected by the Missouri

Constitution and are therefore "fundamental." D49, at 18. It determined, next, that HB 1413 abridged these fundamental rights to such a degree that it would render collective bargaining a "farce" that "does not even give the illusion of collective bargaining." D49, at 18 & 20. Finally, it determined that the State failed to carry its burden of justifying HB 1413's restrictions under the exacting standards applied to abridgements of fundamental rights. D49, at 18. All of these conclusions are correct, and this Court should affirm the Circuit Court's finding of a constitutional violation.

A. Article I, Section 29 establishes rights that are fundamental and entitled to the highest level of constitutional protection.

The rights of employees protected by Article I, Section 29 "to organize and bargain collectively" and to do so "through representatives of their own choosing" are fundamental rights entitled to the highest level of constitutional protection. As this Court has recognized time and again, rights are considered fundamental if—like the rights protected in Article I, Section 29—they are "explicitly . . . guaranteed by the Constitution." *Weinschenk v. State*, 203 S.W.3d 201, 211 (Mo. banc 2006). It is therefore no surprise that the Court of Appeals has already said that the explicit protections of Article I, Section 29 create a "*fundamental* right to collectively bargain." *Kuehner v. Kander*, 442 S.W.3d 224, 230 (Mo. App. W.D. 2014) (emphasis added).

The fundamental status of the rights protected by Article I, Section 29 is further reinforced by their placement in Missouri's Bill of Rights, which enumerates and "proclaim[s] the principles on which our government is founded." Mo. Const. art. I. It is well understood that the "Bill of Rights is generally a list of fundamental rights." *See City*

of Chesterfield, 386 S.W.3d at 761; *see also* BLACK'S LAW DICTIONARY 136 (2d ed. 1910) (defining a "bill of rights" as a "summary of the rights and liberties of the people, or of the principles of constitutional law deemed essential and fundamental, contained in many of the American state constitutions"). That collective bargaining is included in such a list of "venerable, widely understood liberties," *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008), is an especially strong indication that this right is considered fundamental under the Constitution and should therefore receive the highest degree of protection, *see Pointer v. Texas*, 380 U.S. 400, 404 (1965).

This result also comports with the history of Article I, Section 29's enactment. The delegates to Missouri's 1943–1944 Constitutional Convention proposed including protections for collective bargaining in the Bill of Rights with the very goal of securing those rights against "any future attack by the Legislature." *Ledbetter*, 387 S.W.3d at 364. As one of the provision's chief proponents explained, "If [Article I, Section 29] is in our Constitution we will preclude the possibility and the probability as has happened in the past [of], in future sessions of the legislature, many bills being introduced seeking to destroy collective bargaining." 8 DEBATES OF THE 1943–1944 CONSTITUTIONAL CONVENTION OF MISSOURI 2517 (2008) (statement of Hon. R.T. Wood). The electorate that ratified Article I, Section 29 was surely aware that the unambiguous protections for the right of all employees "to organize and to bargain collectively through representatives of their own choosing" would trump any legislation to the contrary. *See Independence-NEA*, 223 S.W.3d at 137 ("The voters voted on the words in the Constitution."); *Barker v. St. Louis County*, 104 S.W.2d 371, 377 (Mo. banc 1937) (explaining that it is the "duty of

any court" to invalidate legislation that conflicts with individual guarantees of rights contained in the predecessor to the 1945 Constitution).

Treating the rights enshrined in Article I, Section 29 as fundamental is also consistent with how the courts of other states have interpreted similar constitutional provisions. This Court often looks to such interpretations as persuasive. *See*, e.g., *Dotson v. Kander*, 464 S.W.3d 190, 197–98 (Mo. banc 2015); *City of Chesterfield*, 386 S.W.3d at 762; Norman Singer, SUTHERLAND STATUTORY CONSTRUCTION § 52:4 (7th ed. 2019). While explicit protections for the right to organize and collectively bargain are quite rare in state constitutions, the courts in virtually every state where they exist have recognized that they create fundamental rights, such that significant burdens on those rights trigger strict scrutiny. *See Hillsborough County Govtl. Emps. Ass'n v. Hillsborough County Aviation Auth.*, 522 So.2d 358, 362 (Fla. 1988) (finding that the protection of the "right of employees, by and through a labor organization, to bargain collectively" in Article I, Section 6 of the Florida Constitution is fundamental and subject to "abridgement only upon a showing of a compelling state interest."). *Hernandez v. State*, 173 A.D.3d 105, 113–15 (N.Y. App. Div. 2019) (holding that Article I, Section 17 of New York Constitution, which is identical to Article I, Section 29 of the Missouri Constitution, creates a fundamental Constitutional right to bargain collectively, restrictions on which are subject to strict scrutiny); *George Harms Const. Co. v. N.J. Tpk. Auth.,* 644 A.2d 76, 87 (N.J. 1994) (holding that the right "to organize and bargain collectively" under Article I, Paragraph 19 of the New Jersey constitution "is not only constitutional in its dimension

but should be accorded the same stature as other fundamental rights") (citations and quotations marks omitted).[12]

These decisions should be considered especially persuasive because the constitutional protections they analyze share many of the same features as Article I, Section 29. For example, in *Hillsborough County Governmental Employees' Association*, the Florida Supreme Court concluded that its constitutional provision protecting collective bargaining established fundamental rights because, like Article I, Section 29, its protections were explicit and unqualified and were located in "the state constitution's declaration of rights." 522 So. 2d at 362. Likewise, in *Hernandez*, the New York Appellate Division Court concluded that a provision identical to Article I, Section 29 protects fundamental rights because its "unqualified" protections for collective bargaining are expressed in "no uncertain terms" and are "enshrined in the . . . Bill of

[12] The only other state to include a right to public-sector collective bargaining in its constitution is Hawaii. *See* Haw. Const. art. XIII, § 2 ("Persons in public employment shall have the right to organize for the purpose of collective bargaining as provided by law."). But in contrast to the provisions in Missouri, New York, New Jersey, and Florida, Hawaii's protections for collective bargaining are neither unqualified nor contained in the state's Bill of Rights. The Hawaii Supreme Court has therefore read this provision—and especially its qualification for collective bargaining "as provided by law"—to mean that the legislature retains broad discretion in setting the parameters for collective bargaining, so long as it does not impinge upon the constitutional rights of public employees to organize for the purpose of collective bargaining and to negotiate the "core subjects" of collective bargaining. *Malahoff v. Saito*, 140 P.3d 401, 416–19 (Hawaii 2006). It is noteworthy that the construction of Article I, Section 29 offered by the State here is much less protective than the standard that applies in Hawaii, despite the fact that the language of Hawaii's constitutional provision is far weaker and more qualified than the language of Article I, Section 29.

Rights," which provides "strong evidence that the right was regarded as fundamental." 173 A.D.3d at 113.

Because Article I, Section 29 is modeled word-for-word on the collective-bargaining provision in the New York Constitution, the *Hernandez* Court's reliance on the history of that provision is particularly instructive. *See* SUTHERLAND STATUTORY CONSTRUCTION § 52:4 ("[W]here a constitutional provision is derived from another state, the well-reasoned construction of that provision in the state of origin is highly persuasive."). As the *Hernandez* Court explained, the delegates to the New York Constitutional Convention of 1938 repeatedly described as "fundamental" the right that eventually became enshrined in Article I, Section 17 of New York Constitution, with one such delegate declaring it to be "the most fundamental right of the American worker." 173 A.D.3d at 113 (citation and quotation marks omitted). The delegates further described that its placement in the Constitution was meant to ensure that no "reactionary court or reactionary Legislature [could] deprive the wage earners of [the] State of th[e] fundamental right." *Id*. at 113–14 (citation and quotation marks omitted).

In the face of all of this, the State still contends that Article I, Section 29 does not protect fundamental rights and that infringements on collective-bargaining rights are permissible so long as they satisfy the bare minimum of rational-basis scrutiny. App. Br. at 79. In support of this contention, the State asks this Court to ignore the text and purpose of Article I, Section 29, to ignore the pride of place it enjoys as part of our Bill of Rights, and to ignore the unanimous view of sister state courts construing similar constitutional provisions. Instead, it urges this Court to determine whether collective

bargaining would be considered "fundamental" under the United States Constitution—which has no explicit protections for collective bargaining—and to then blindly engraft that answer onto the Missouri Constitution. *See* App. Br. at 82–85.

This Court should reject the State's invitation to construe the protections of Article I, Section 29 so narrowly. The State's approach is incompatible, not only with this Court's precedent construing the guarantees of the Missouri Bill of Rights, but also with broad principle that "state constitutions may provide more protections than those afforded by the federal constitution." *St. Louis County v. River Bend Estates Homeowners' Ass'n*, 408 S.W.3d 116, 136 n.10 (Mo. banc 2013); *see also California v. Ramos*, 463 U.S. 992, 1013–14 (1983) ("It is elementary that States are free to provide greater protections . . . than the [f]ederal Constitution requires.").

State constitutions are fonts of individual rights, with their "protections often extending beyond those required by the Supreme Court's interpretation of federal law." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977); *see generally* Jeffrey S. Sutton, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018). This is particularly true in Missouri, where the Constitution includes numerous provisions that have no federal counterpart, and where this Court has not hesitated to recognize the independent protections of those provisions. *See*, *e.g.*, *Weinschenk*, 203 S.W.3d at 211–12 (concluding that the "express constitutional protection of the right to vote differentiates the Missouri constitution from its federal counterpart" and, as a result of the "more expansive and concrete protections of the right to vote under the Missouri

Constitution, voting rights are an area where our state constitution provides greater protection than its federal counterpart"); *State ex rel. J.D.S. v. Edwards*, 574 S.W.2d 405, 409 (Mo. banc 1978) (holding that the Missouri Constitution due process and equal protection clauses provide more protection than United States Constitution where United States Supreme Court precedent "dilute[s] these important rights").

Under its established standards for construing the protections of the state constitution, this Court should reject any reading of the Constitution that would provide only for rational-basis scrutiny for infringements of the rights protected by Article I, Section 29. Such an approach does not heed this Court's instruction that "constitutional provisions are given a broader construction due to their more permanent character." *Ledbetter*, 387 S.W.3d at 363. Instead, it ignores the provision's unambiguous terms and fails to implement its "clear constitutional command." *Independence-NEA*, 223 S.W.3d at 137. Worse yet, it commits this Court to a reading of Article I, Section 29 that effectively renders the provision "meaningless," *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 832 (Mo. banc 1990); *see also State ex rel. Moore v. Toberman*, 250 S.W.2d 701, 705 (Mo. banc 1952).

Article I, Section 29 guarantees, without qualification, that all employees in Missouri shall retain the rights "to organize and bargain collectively through representatives of their own choosing." There is no ambiguity in this provision; it "means what it says." *State ex rel. City of Ellisville v. St. Louis County Bd. of Election Comm'rs*, 877 S.W.2d 620, 623 (Mo. banc 1994). And this Court has repeatedly rejected interpretations of Article I, Section 29 that threaten to weaken or nullify its protections.

See, *e.g.*, *Ledbetter*, 387 S.W.3d at 364 (construing Article I, Section 29 to require public employers to "negotiate in good faith" with their employees' chosen union because without such a requirement the "right to bargain collectively would be nullified or redundant"); *City of Chesterfield*, 386 S.W.3d at 760 (reading Article I, Section 29 to impose on public employers "a duty to bargain collectively with [its] employees and, when necessary, adopt procedures to participate in that process" because the "absence of such a duty would render meaningless the rights [the provision] guaranteed to public employees").

The State's interpretation of Article I, Section 29 poses precisely such a threat. The State argues that infringements of the right to collective bargaining are subject to only rational-basis review, meaning that impingements or even outright denials of the rights contained in Article I, Section 29 are permissible so long they are supported by any "conceivable state of facts that . . . provide a rational basis." App. Br. at 90. As this Court has explained, however, "if all that was required to overcome" protections explicitly guaranteed by a provision of the Constitution "was a rational basis, [those protections] would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." *Alpert v. State*, 543 S.W.3d 589, 598 (Mo. banc 2018) (quoting *Heller*, 554 U.S. at 595).

The threat that Article I, Section 29's protections could be rendered meaningless is especially pronounced here. Throughout its brief, the State urges this Court to accept an astonishing proposition: not just that infringements on the right to collective bargaining can be justified with virtually any reason, but that hostility to collective bargaining is

itself a sufficiently legitimate and rational justification for such an infringement. As we detail at greater length below, *infra* at 69–70, most of the State's defense of HB 1413 rests on the claim that collective bargaining is undesirable and inefficient, and that all parties are better served by a system in which public employers contract individually with employees rather than through a collective bargaining agreement. *See* App. Br. at 32–40. In other words, even though this Court has recognized that the "ultimate purpose of bargaining" under Article I, Section 29 is for public employers and union representing public employees to "reach an *agreement*," *Ledbetter*, 387 S.W.3d at 364 (emphasis added), the State seeks to uphold HB 1413 based on a policy view that such agreements are fundamentally flawed and have "outlived their usefulness." App. Br. at 35.

Suffice it to say, if this Court's decision in *Independence-NEA* means anything, it is that the State cannot extinguish public employees' right to collective bargaining simply because it disapproves of the practice—just as the State could not extinguish the fundamental right to vote recognized in *Weinshenk* simply because it believes citizens lack the judgment to exercise the franchise wisely. This Court should reject the State's attempt to edit Article I, Section 29 out of the Constitution. Instead, it should recognize that the collective-bargaining rights enshrined in that provision are fundamental and therefore entitled to the highest degree of constitutional protection.

B. HB 1413 imposes a substantial burden on rights protected by Article I, Section 29

To determine whether HB 1413 is consistent with Article I, Section 29, this Court must begin by recognizing that some reasonable and nondiscriminatory regulation of the

collective bargaining process is generally permissible—just as some "reasonable regulation of the voting process . . . is necessary to protect the right to vote." *Weinschenk*, 203 S.W.3d at 215. As this Court explained in *City of Chesterfield*, state and local governments could, prior to HB 1413, establish procedural frameworks for collective bargaining, so long as they satisfied the constitutional requirements. 386 S.W.3d at 760. However, any regulation creating a "substantial burden" on a fundamental right will trigger strict scrutiny, *Weinschenk*, 203 S.W.3d at 215, meaning that the regulation can only be upheld if it serves "compelling state interests" and is "narrowly tailored to meet those interests," *id*. at 211.

HB 1413 is not a reasonable regulation of the collective bargaining process. Instead, it imposes draconian limitations on every aspect of the labor-management relationship—from the selection and retention of a union as the collective bargaining representative, to the scope of issues that are subject to bargaining, to the process of negotiating, ratifying and enforcing an agreement. The cumulative effect of these restrictions is a significant burden on the fundamental rights protected by Article I, Section 29. Strict scrutiny is therefore appropriate.

1. HB 1413 infringes employees' rights to organize and choose to a representative of their own choosing

The right of employees represented by the Plaintiffs to "organize" and to a "representative[] of their choosing" within the meaning of Article I, Section 29 is significantly burdened by the provisions of HB 1413 that alter the way in which non-public safety unions like the Plaintiffs can be selected and retained. At the time Article I,

Section 29 became part of the Constitution, it was well understood that "[f]reedom of choice" in organizing and selecting a union representative was "the essence of collective bargaining." *Machinists Lodge No. 35 v. NLRB*, 311 U.S. 72, 79 (1940), and that employees are deprived of such freedom if they can be offered rewards for choosing one representative over another, *see Baby Watson Cheesecake, Inc.,* 320 NLRB 779, 785 (1996). In 1945, employees exercised that freedom of choice by acquiring recognition of an exclusive representative through (i) an election under the usual standard of a majority of the votes cast or (ii) the employer's voluntary recognition of the union based on a credible showing of majority support by the employees. *See*, *e.g.*, *Wallace Corp.*, 323 U.S. at 251 & n.1; *W. Union Tel. Co.*, 50 NLRB at 729. And those employees retained the union as exclusive representative unless and until removed by a decertification vote initiated by the represented employees. *See*, *e.g.*, *Union Colonial Life Ins. Co.*, 65 NLRB 58 (1945). HB 1413 burdens Plaintiffs' members' right to "organize" and to a "representative[] of their choosing" in a number of ways.

First, HB 1413 prohibits voluntary recognition and traditional majority-vote elections for selecting a non-public safety union as a representative and instead imposes initial certification elections conducted under a skewed standard that deems all non-votes to be votes against representation. This deprives employees of the methods for acquiring recognition of an exclusive representative at the time Article I, Section 29 became part of the Constitution. *See*, *e.g.*, *Wallace Corp.*, 323 U.S. at 251 & n.1; *W. Union Tel. Co.*, 50 NLRB at 729. Moreover, the absolute-majority requirement contravenes the plain language of Article I, Section 29 because it is the right of "employees" to select a

representative "of their choosing," not for the State to presume that non-voters oppose unionization.

Second, HB 1413 mandates periodic recertification elections not required of public safety unions, and those recertification elections must be conducted under the same skewed standard that deems all non-votes to be votes against representation. Not only does the recertification procedure deny employees a representative of their choosing by treating non-votes as votes against retaining representation by a non-public safety union, it coerces employees to favor representation by a public-safety union whose status is not perennially at risk in a skewed recertification election. *See Baby Watson Cheesecake, Inc.,* 320 NLRB at 785 (noting the coercive effect on employee free choice that comes from offering rewards for choosing one representative over another).

Third, and relatedly, HB 1413 interferes with freedom of choice in the selection of a representative by offering employees a vastly more favorable legal framework for selecting union representation and collective bargaining if they choose to associate with a public-safety union over a non-public safety union. *See id.* In particular, employees selecting a public-safety union as their representative are subject to none of HB 1413's restrictions on the scope or conduct of bargaining (*see infra* at 58–62), nor are they required to submit to HB 1413's significant restrictions on speech and association (*see infra* at 75–79).

Finally, HB 1413 burdens employees' freedom of choice by requiring, for both the initial and recertification elections, that non-public safety unions pay a fee of up to $2000 for the conduct of the election. By making it costlier for some unions, but not others, to

confirm their status as an exclusive representative, HB 1413 effectively discourages employees from seeking representation by particular unions. Taken together, these burdens on employee free choice in the selection of a representative are substantial.

2. HB 1413 infringes on the right of employees to bargain collectively

The right of Plaintiffs and their members to "bargain collectively" within the meaning of Article I, Section 29 is also significantly burdened by the provisions of HB 1413 that restrict the topics of negotiations and alter the manner in which bargaining is conducted. When Article I, Section 29 became part of the Bill of Rights in 1945, the term "bargain collectively" was well understood to require negotiations over working conditions broadly defined—including such issues as promotion, assignment, discharge, schedule, work rules, and other similar topics. *See*, *e.g.*, *NLRB v. Westinghouse Air Brake Co.*, 120 F.2d 1004, 1006 (3d Cir. 1941); *NLRB v. Reed & Prince Mfg. Co.*, 118 F.2d 874, 881 (1st Cir. 1941). Likewise, it was understood that such bargaining must be conducted under an ongoing duty of "good faith" requiring a "present intention to reach an agreement" over the subjects of bargaining and an obligation to "match . . . proposals, if unacceptable, with counter-proposals." *Ledbetter*, 387 S.W.3d at 362, 366. HB 1413 substantially burdens Plaintiffs' members' right to "bargain collectively" in a number of ways.

First, HB 1413 entirely removes large swaths of basic working conditions—including personnel matters, work rules, and union release time—from the topics that can be negotiated by a non-public safety union. These topics are core concerns to employees in terms of the job security, promotion, and the quality of union representation. As such,

they were all traditionally understood to be within the scope of collective bargaining when Article I, Section 29 became part of the Bill of Rights. *See*, *e.g.*, *Westinghouse Air Brake Co.*, 120 F.2d at 1006; *Reed & Prince Mfg. Co.*, 118 F.2d at 881. And they undoubtedly qualify as the kinds of "working conditions" that, under this Court's decisions, must be collectively bargained. *Ledbetter*, 387 S.W.3d at 367 (citing *Independence-NEA*, 223 S.W.3d at 137). HB 1413's complete exclusion of those topics from the scope of negotiations is therefore a significant burden on the rights protected by Article I, Section 29.[13] After all, the "right to negotiate collective bargaining agreements that are equally binding on both parties is of little moment if the parties have virtually nothing to negotiate over*." Nat'l Treasury Employees Union v. Chertoff*, 452 F.3d 839, 860 (D.C. Cir. 2006).

Second, for the small number of issues that may be negotiated by a non-public safety union, HB 1413 burdens the right to collectively bargain by imposing significant barriers on the union's ability to negotiate and ratify an agreement. Traditionally, the ratification of a collective bargaining agreement by a union was considered a purely internal union affair in which the employer would not become involved. *See NLRB v. Wooster Div. of Borg-Warner Corp.,* 356 U.S. 342, 350 (1958); *Shelley v. Am. Postal Workers Union*, 775 F. Supp. 2d 197, 207 (D.D.C. 2011). But under HB 1413, a non-

[13] To make this point plain, Plaintiffs' summary judgment evidence includes an exhibit illustrating the impact HB 1413 has on the agreement between Plaintiff International Union of Operating Engineers, Local 148 and Defendant St. Louis Community College: more than half of the provisions in this agreement concern topics that may no longer be bargained under the statute. D60, at 1–v21.

public safety organization must ratify a tentative agreement as a precondition for submitting it to a public body for approval, and such ratification must occur under the skewed standard of a vote of "a majority of . . . members." Section 105.580.5, RSMo. In other words, non-votes for a ratification vote are treated as "no votes," raising the strong possibility that even an agreement strongly supported by voting members could not be submitted to a public body for approval.

Third, notwithstanding this Court's decision in *Ledbetter* that recognizes a requirement of "good faith negotiations" under Article I, Section 29, HB 1413 burdens the right to collectively bargain by effectively enshrining bad faith bargaining into the law. That is, following the non-public safety union's ratification of a tentative agreement, HB 1413 allows a public body to pick-and-choose which provisions of that agreement will be adopted, to implement new provisions "of its own design," or to simply declare that no provision on a topic will be negotiated.[14] All of this is in contravention of the

[14] The State claims that this provision does not "permit the employer to force an agreement upon the labor organization" and instead merely "confirms that a negotiated agreement is not and cannot be final until it is ratified by the public body itself." App. Br. at 48. But the plain language in HB 1413 provides no support for that reading. *See Karney*, 599 S.W.3d at 162 ("[T]his Court is bound to give effect to the intent reflected in the statute's plain language and cannot resort to other means of interpretation."). To begin with, the State's interpretation fails to give effect to the relevant portions of Section 105.580.5, given that the last sentence of the subsection already provides that "[a]ny tentative agreement reached between the parties' representatives shall not be binding on the public body or labor organization." *See Hadlock v. Dir. of Rev.*, 860 S.W.2d 335, 337 (1993) ("[E]ach word, clause, sentence and section of a statute should be given meaning."). In the part of the provision that allows a public body to "approve the entire agreement *or any part thereof,*" the use of the same term "approve" as applied to the both the whole agreement or any part plainly allows the public body to pick and choose which aspects of an agreement it will put into effect. *See* BLACK'S LAW DICTIONARY 102 (6th

(*continued . . .*)

basic principles of "good faith" bargaining that prohibit both unilateral imposition of working conditions under negotiation and flat refusals to bargain over working conditions. *See Ledbetter,* 387 S.W.3d at 361–62, 366.

Allowing an employer to pick-and-choose the parts of the tentative agreement that will become final also flies in the face of the most basic principle of contract law that an offeror cannot be bound by an acceptance that changes the terms of the original offer. *See State ex rel. Equitable Life Assur. Soc. of U.S. v. Robertson*, 191 S.W. 989, 991 (Mo. banc 1916) ("It is elementary that in order to make a contract there must be, among other things, a meeting of the minds of the contracting parties regarding the same thing, at the same time."); *accord* 2 *Williston on Contracts* § 6:11 (4th ed. 2020). Likewise, HB 1413's provisions allowing an employer to "adopt a replacement provision of its own design" in an agreement ratified by a covered union defies the basic notion of collective bargaining that an employer violates its duty to negotiate in good faith by implementing its own unilateral change in the conditions of employment under negotiation. *See NLRB v. Katz*, 369 U.S. 736, 743 (1962). And, the provision allowing the employer to "state that

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ed.1990) (defining "approval" as "confirming, ratifying, assenting, sanctioning or consenting"). Next, the provision allowing the public body to "adopt a replacement provision of its own design" plainly uses the term "adopt" in its conventional sense of accepting something and putting it into effect. *See id. at* 49 (defining "adopt" as "to accept . . . and put into effective operation"); *Merriam-Webster Online* (defining "adopt" as "to accept formally and put into effect"), https://www.merriam-webster.com/dictionary/adopt. Moreover, the State's reading of the statute takes no account of the provision that explicitly allows a public body to refuse to bargain by exercising its authority to declare "that no provision covering [a] topic . . . shall be adopted."

no provision covering the topic in question shall be adopted" is no different than the kind of "flat refusal" to bargain that has always constituted bad faith negotiations. *Id*.

Fourth, HB 1413 burdens the right to collectively bargain by allowing a public body to unilaterally invalidate key economic provisions of a collective-bargaining agreement based on a budget shortfall or other "good cause" any time it "deems it necessary." This contravenes one of the most basic tenets of collective bargaining: that an employer may not repudiate the provisions of an existing agreement. *See Independence-NEA*, 223 S.W.3d at 139–41. As the Missouri Supreme Court has explained, it is "axiomatic" that the "right of collective bargaining becomes a farce if the freedom of either party to promote and advance his own interest is subject to the consent and approval of his adversary." *Kerkemeyer v. Midkiff*, 299 S.W.2d 409, 414 (Mo. banc 1957). The parties are always free to *agree* to an escape valve in case of a fiscal crisis; several of the Plaintiff unions and the Defendant employers whose employees they represent have done so. D54, at 7; D55, at 9; D56, at 9; D59, at 8. It is another thing entirely for the State to mandate that public employers always get an escape valve.

In sum, HB 1413 creates a system where "very few conditions of employment are subject to meaningful bargaining, and the few conditions over which the parties can negotiate may be unilaterally abrogated by management." *Nat'l Treasury Employees Union*, 452 F.3d at 858. Such a system "does not even give an illusion of collective bargaining." *Id.* As a result, HB 1413 significantly burdens the fundamental rights protected by Article I, Section 29, and it can only be saved from invalidation if the State can show that it meets the very highest level of constitutional scrutiny.

3. HB 1413 cannot withstand strict scrutiny—or, for that matter, any other meaningful level of constitutional scrutiny

Under strict scrutiny, the challenged provisions of HB 1413 lose any presumption of constitutionality, and the burden of proof shifts from the Plaintiffs to the State to defend their validity. *See Witte v. Dir. of Revenue*, 829 S.W.2d 436, 439 n.2 (Mo. banc 1992). Those provisions can only survive if the State can show both that the burdens on Plaintiffs' constitutional rights serve "compelling state interests" and that those burdens are "narrowly tailored." *See Weinschenk*, 203 S.W.3d at 211. The State cannot meet that burden here—indeed those provisions cannot be defended under any standard of heightened constitutional scrutiny. As a result, this Court should affirm the Circuit Court's decision to award summary judgment to Plaintiffs on their claims under Article I, Section 29, and declare the challenged provision of HB 1413 invalid.

a. Strict scrutiny extends to HB 1413's bargaining restrictions

At the outset, the State contends that many of HB 1413's most intrusive collective bargaining restrictions are not subject to heightened scrutiny because the Legislature may preclude bargaining and directly dictate the terms of public employment throughout the state without implicating Article I, Section 29 at all. *See* App. Br. at 60–71. The State's arguments on this score fundamentally misapprehend the nature of the right to collective bargaining, as well as this Court's precedent.

It is true, as the State points out, that an employer engaged in bargaining is not required to agree to the union's proposals. *See* App. Br. at 63. Indeed, "this Court has repeatedly recognized that the public sector labor law allows employers to reject all

employee proposals." *Independence-NEA*, 223 S.W.3d at 136. But, that does not mean that an employer can therefore dispense with bargaining altogether and, instead, mandate the terms of public employees' working conditions unilaterally. On the contrary, even though a unionized public employer "remains free to reject any proposal, the right to bargain collectively still requires negotiations between an employer and the representatives of organized employees to determine the conditions of employment." *Ledbetter*, 387 S.W.3d at 363 (citations and quotation marks omitted). Accordingly, a law like HB 1413 that categorically forbids negotiation over a broad set of workplace conditions is no different than impermissibly disclaiming a duty to bargain, *see City of Chesterfield*, 386 S.W.3d at 762, or engaging in the kind of flat refusal to bargain that exemplifies bad faith negotiations, *see Katz*, 369 U.S. at 743.

The Court of Appeals decision in *Western Central Missouri Regional Lodge #50 v. City of Grandview*, 460 S.W.3d 425 (Mo. App. W.D. 2015) is not to the contrary and, in fact, exemplifies this point. There, the city's restrictions on the scope of bargaining were allowed—not because such restrictions were generally permissible—but because the union was negotiating with the very entity that put the restrictions in place and could therefore remove them through negotiations with the union. *See* 460 S.W.3d at 444 ("The mere fact that some issue is initially addressed in an ordinance providing a framework for negotiations does not mean that the City would be unwilling to negotiate over a change to that ordinance."). HB 1413's restrictions, by contrast, are imposed by fiat on every public employer from large state agencies to the smallest municipalities, none of which have the

authority to change the law that restricts the scope of bargaining.[15] HB 1413's restrictions therefore infringe on the right to collective bargaining and are presumptively invalid.

b. The State failed to establish a compelling interest to justify HB 1413's infringement on rights protected by Article I, Section 29

HB 1413 cannot be shown to serve a compelling state interest. Legislation that satisfies strict or heightened scrutiny must genuinely serve an interest of "highest order." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). Moreover, the State must show that any asserted objective of HB 1413 was the legislature's "actual purpose" and that this purpose has "a strong basis in evidence." *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) (emphases added); *see also United States v. Virginia*, 518 U.S. 515, 533 (1996) (any justification offered to satisfy the strict- or intermediate-scrutiny analysis "must be genuine" and should be rejected out of hand if it is "hypothesized or invented post hoc in response to litigation"). To satisfy this requirement, the Legislature certainly could have incorporated into HB 1413 a set of legislative findings, a statement of purpose, or any other provision that purports to identify the governmental interest it serves. *Cf. Ocello v. Koster,* 354 S.W.3d 187, 200 (Mo. banc 2011) (finding statute constitutional based upon an extensive description of its actual purpose in its preamble and an extensive legislative record filed with the State's answer to the lawsuit). But neither the statute itself nor its legislative history contains any of these things. The absence of such a record therefore

[15] Of course, to the extent *Western Central Missouri Regional Lodge #50* authorizes the kinds of restrictions contained in HB 1413, it should be abrogated as incompatible with the plain terms of Article I, Section 29, and in conflict this Court's controlling decisions in *Ledbetter*, *City of Chesterfield*, and *Independence-NEA*.

makes it "virtually impossible" for the State to justify HB 1413's restrictions under the standards applicable to heightened constitutional scrutiny. *See Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 689 (8th Cir. 1992).

The State makes a half-hearted effort to claim that snippets of contemporaneous comments from legislators are sufficient to establish the actual purposes of HB 1413, but those efforts fail. *See* App. Br. at 127–28, 143–44. The use of isolated statements by a single legislator to show a bill's actual purpose is, even under the best conditions, "not impressive legislative history." *Garcia v. United States*, 469 U.S. 70, 78 (1984). But the particular statements relied on by the State in the summary judgement record are even less impressive. For example, many of the statements speak only about generalized support for transparency, without any attempt to address HB 1413's substantive restrictions on collective bargaining and speech. D76, at 4 (citing to video link at 00:12:29). Another statement claims that HB 1413 was enacted because "no Missourian should be forced to give up their constitutional rights against their will"—yet the State does not attempt to explain whose rights were being given up prior to HB 1413, how that deprivation was supposedly accomplished, and what HB 1413 purportedly does to address the problem. *Id.* (citing to video link at 00:04:16 – 00:05:00).

Likewise, the belated justifications the State now gives for HB 1413's infringements on Article I, Section 29 rights are neither compelling nor persuasive. To begin with, the assorted experts on which the State relies consistently acknowledge that they are engaged in post-hoc speculation both as to the perceived problems HB 1413 might be addressing and as to how effective HB 1413's actual provisions might be in

addressing those problems.[16] Their affidavits are therefore irrelevant and inadmissible under the applicable standard of scrutiny. *See Tonkovich*, 165 S.W.3d at 214. Under strict scrutiny, the State "must do more than simply posit the existence of the disease sought to be cured." *United States v. Nat'l Treasury Employees Unio*n, 513 U.S. 454, 475 (1995). It must instead "demonstrate that the recited harms are real, not merely conjectural, and that [HB 1413] will in fact alleviate these harms in a direct and material way." *Id*. The evidence from the State's experts is self-evidently not up to that task, and the Circuit

[16] *See*, *e.g.*, D78 at ¶ 17 (claiming that "HB 1413's provision banning voluntary recognition without a secret ballot *can* benefit both the state and its public employees"); id. at ¶ 21 ("a certification election every three . . . *can* further the shared goal of accurately assessing preferences of the current workforce regarding union representation"); *id*. at ¶ 30 ("it is *possible* that the preferences of a majority of voters will not reflect the preferences of the majority of workers"); *id*. at ¶ 32 ("mandating a majority of covered workers *may* be a way of protecting the preferences of shorter-term workers," "[t]his majority definition *can* represent a method of measuring the true preferences of the relevant unit"); *id*. at ¶ 45 ("It *may* be in the interest of the state and its public employees to make the finances and working of many of these organizations clearer and easier to access."); *id*. at ¶ 59 ("the public interest *may* be served by preserving labor agreements made with public safety organizations"); *id*. at ¶ 61 ("This research *opens the possibility* that it *may* run counter to the general interest of the state to modify public safety labor agreements in the same subset of situations that warrant renegotiation for other classes of workers."); *id*. at ¶64 ("the relative concentration of many public safety occupations within the public sector *may* generate a need to bargain over a broader range of employment details due to fewer private sector models"); *id*. at ¶66 ("it *may* be in the interest of both the state and public employees to allow for negotiation in the scope of employee duties and assignments"); *id*. at ¶ 67 ("*it is possible* that this litigious and complaint prone aspect of public safety roles *may* raise the costs of not negotiating over assignments and other aspects of the job"); *id*. at ¶ 68 ("There are several features of public safety employees and their organizations that *might* make additional disclosure generate higher costs and fewer benefits than these disclosures would generate for public employees in general."); *id*. at ¶ 69 ("public safety employees . . . *may not* require additional disclosure to monitor union activities") (emphases added).

Court was correct to declare it irrelevant. *See L.A.C. ex rel. D.C.*, 75 S.W.3d at 253 n.3 ("Only evidentiary materials that are admissible or usable at trial can sustain or avoid summary judgment.").

Moreover, many of these State's asserted justifications for HB 1413's restrictions are grounded in basic misunderstandings of labor relations and the collective-bargaining process. For example, the State argues that several of HB 1413's provisions are needed to prevent "public-sector collective bargaining from infringing on legislative prerogatives," App. Br. at 105, yet this argument is directly foreclosed by this Court's decision in *Independence-NEA*, which recognizes that, because collective bargaining does *not* require a public employer to agree to any specific proposal by a union, the amount of legislative prerogative that is delegated by allowing negotiations on any particular topic is "of course, . . . none." 223 S.W.3d at 136. Thus, to the extent any public body is concerned about maintaining flexibility in managing the workforce, or about adjusting to budgetary shortfalls, that body retains the authority to reject a union's proposals that are inconsistent with the body's priorities, without the need for contract terms that are dictated by the Legislature through HB 1413.[17]

[17] The State suggests that HB 1413's provisions that allow the renegotiation of an agreement's economic terms are needed to prevent the kinds of pension-related budget crises that have occurred in some states and localities outside of Missouri. App. Br. at 38. It appears that State may be unaware that that public pensions are generally *not* collectively bargained in Missouri; they are, instead, determined legislatively and administered by statutorily-created retirement boards. *See* Sections 104.310 *et seq*., RSMo. (establishing the Missouri State Employees' Retirement System for employees of the state); Sections 169.010 *et seq*., RSMo. (establishing the Public School Retirement System and Public Education Employee Retirement System for employees of public

(*continued . . .*)

This same misunderstanding about the nature of collective bargaining undermines the State's claims about the need to impose draconian requirements for union elections. For example, to justify HB 1413's requirement that union elections and contract-ratification votes must be conducted according to standards in which non-votes are counted as "no" votes, the State constructs a Rube Goldberg-worthy explanation that such a requirement is necessary to ensure that collective bargaining agreements do not disadvantage younger or short-term workers. App. Br. at 30–34. What the State apparently fails to realize is that public bodies can address these concerns directly—and without a severe infringement on public employees' right under Article I, Section 29 to choose a representative—by simply refusing to enter contracts that disfavor those younger workers.[18] Likewise, public bodies that are concerned about the possibility of coercion in a request for voluntary recognition can simply decline the union's request and insist on an election.

But there is an even more fundamental problem with the State's justifications for HB 1413's bargaining restrictions: they are nothing more than undisguised hostility to the constitutionally guaranteed right of collective bargaining itself. For example, the State's

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schools); Sections 70.600 *et seq*., RSMo. (establishing the Missouri Local Government Employees' Retirement System to provide retirement benefits "any political subdivision of the state"); Sections 104.020 *et seq*., RSMo. (establishing the Missouri Department of Transportation and Highway Patrol Employees' Retirement System for employees of the highways and transportation commission, uniformed members of the highway patrol, and civilian or nonuniformed employees of the highway patrol).

[18] A public body may, however, have good reasons for accepting such proposals because employers often benefit from longevity and stability in their workforces.

experts opined that collective bargaining over workplace rules is incompatible with "efficiency and accountability in the provision of government services," "promoting the interests of both employers and employees," "eliminating regressive barriers to entry for less privileged workers," "avoiding waste of taxpayer resources," "improving public-sector workers' morale," "promoting public trust in government," and "eliminating inefficiencies that harm the interests of public-sector workers themselves." App. Br. at 104. One of the State's experts asserts that collective bargaining over employee transfer, promotion, discipline, discharge, and other work rules is unnecessary because there are already non-union models of human resource management available. *Id.* at 32–34. And another of the State's experts goes so far as to assert that collective bargaining and other restrictions on the exercise of managerial flexibility have "outlived their usefulness." *Id.* at 35.

But as long as collective bargaining remains enshrined in the Bill of Rights, the State cannot elevate a policy disagreement over the desirability of collective bargaining into a set of "compelling interests" that would override the will of the electorate that ratified Article I, Section 29. Simply put, these policy concerns—and the State's candid hostility to collective bargaining—can "play no part" in justifying HB 1413's constitutionality. *Rathjen v. Reorganized Sch. Dist. R-II*, 284 S.W.2d 516, 527 (Mo. banc 1955).

The State's remaining attempts to justify HB 1413's restrictions are equally unavailing. For example, to the extent the State contends HB 1413's elections are justified by concerns about transparency and democracy, *see* App. Br. at 26–32, 43–45,

those concerns ring entirely hollow. To begin with, the State has no legitimate interest in assigning a "no" vote to non-voters in elections for initial certification, recertification, or contract ratification. The fact that a bargaining-unit member "decides to abstain—i.e., not exercise [her] right—hardly suggests that [she] was deprived of [her] right." *Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd.*, 663 F.3d 476, 481 (D.C. Cir. 2011). On the contrary, that "is how voting rights work." *Id.* And, in the labor context, abstainers who are "unhappy with the outcome of a labor election can simply call for a new election and, by exercising its right through actually voting, produce a different result." *Id.* Such a result can be obtained without HB 1413's intrusive and un-democratic provision assigning votes to bargaining-unit members based on some supposition about their likely preferences.

Furthermore, as this Court recognized in *Weinschenk*, concerns about the integrity of voting cannot be used to justify burdensome restrictions that ultimately frustrate the ability to meaningfully participate in a selection process. *See* 293 S.W.3d at 217–18. Yet, that is precisely what HB 1413 does here. If similar procedures were applied to the state at large, our government would not become more accountable or transparent—it would grind to a halt. An election in which abstainers were treated as votes against a candidate or measure would make it virtually impossible to elect representatives in all but the least competitive districts, and the state's citizens would be effectively foreclosed from

legislating by ballot measure or amending the constitution.[19] This is why Missouri's Constitution—which exists "for the better government of the state," Mo. Const. Preamble—bases the exercise of democratic will on votes actually cast. *See*, *e.g.*, *id.*, art. IV, § 18 (providing that, in elections for statewide offices, the candidates with the "highest number of votes for the respective offices shall be declared elected"); *id*., art. XII, § 2(b) (providing for the amendment of the state constitution with the support of a "majority of the votes cast"); *id.,* art. III, § 52(b) (same with regard to legislative referenda).

The State also seeks to justify HB 1413's election and bargaining constraints by reference to laws and restrictions in jurisdictions without constitutional protections for collective bargaining. In particular, the State places heavy reliance on the Seventh Circuit's decision in *Wisconsin Education Association Council v. Walker*, 705 F.3d 640 (7th Cir. 2013). *See* App. Br. at 84–85, 97, 99–100. Not only is this reliance misplaced, but the case in question shows why HB 1413's provisions do not survive scrutiny. In that case—which arose in Wisconsin, a state with no constitutional protection for collective bargaining—the court upheld election and recertification procedures that are essentially the same as those mandated by HB 1413. However, the court determined that such procedures were permissible precisely *because* nothing stood in the way of the state

[19] Voter turnout in Missouri elections only sometimes exceeds half of registered voters and is frequently much lower than that. *See*, e.g., Sec'y of State, 2018 Voter Turnout Report (listing voter turnout in the 2018 election as only 58.23% of registered voters), https://www.sos.mo.gov/CMSImages/ElectionResultsStatistics/2018GeneralElectionTurnout.pdf.

pursuing a policy that disapproved of public-sector collective bargaining and aimed to make unionization as difficult as possible. *See* 705 F.3d at 656 (explaining that the state could determine bargaining is "too costly for the state" and therefore use "arcane" election procedures as an alternative to "the outright elimination" of bargaining). In Missouri, by contrast, public-sector collective bargaining enjoys explicit constitutional protection, and the State cannot attempt to disfavor or disable the exercise of that right through a "procedural device [that would] necessarily produce a result which the State could not command directly." *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

In all events, HB 1413's discriminatory carve-out favoring "public safety" unions dooms any claim it might otherwise have to being "narrowly tailored" for purposes of strict scrutiny. *Weinschenk*, 203 S.W.3d at 211. Whatever governmental interest might justify the kinds of restrictions HB 1413 applies to collective bargaining, we show *infra* 81–84 that those same interests extend to the conduct of favored "public safety" unions. HB 1413 is therefore "wildly underinclusive" when judged against any justification that might be asserted to support it. *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 802 (2011). The challenged provisions of HB 1413 therefore violate Article I, Section 29 and must be declared invalid.

II. HB 1413 Violates Article I, Section 2 of the Constitution. (Responds to State's Points II and IV)

The Circuit Court correctly concluded that HB 1413's pervasive discrimination that favors public safety unions over non-public unions violates Article I, Section 2, which ensures "that all persons are created equal and are entitled to equal rights and

opportunity under the law." This provision of the Constitution is meant to guard the state's citizenry against governmental action that results in invidious discrimination, particularly with respect to the exercise of their constitutional rights. *See Weinschenk*, 203 S.W.3d at 210–11; *State v. Ewing*, 518 S.W.2d 643, 646 (Mo. banc 1975). Protecting against such discriminatory treatment "is the principal office of government," and "when government does not confer this security, it fails in its chief design." Mo. Const. art. I, § 2.

HB 1413 violates Article I, Section 2 because its discriminatory classification "impinges upon a fundamental right explicitly or implicitly protected by the Constitution," and it does not survive the "strict scrutiny" that applies to such discriminatory classifications. *Weinschenk*, 203 S.W.3d at 210–11.

A. HB 1413's discriminatory classification impinges on fundamental constitutional rights

In addition to burdening the fundamental right of collective bargaining (*see supra* at 55–62), HB 1413 restricts the fundamental rights of speech and association protected by Article I, Sections 8 and 9 of Missouri Constitution. *See In re Marriage of Woodson*, 92 S.W.3d 780, 784 (Mo. banc 2003) (recognizing that the constitutional rights of speech, association, and political participation are among the "fundamental rights" that require strict scrutiny); *accord Labrayere v. Bohr Farms LLC,* 458 S.W.3d 319, 331–32 (Mo. banc 2015). The robust protections for speech and association under the Missouri Constitution include "rights of freedom of expression and association" with regard to employment, including associating with and joining unions for purposes of pursuing

collective bargaining. *See Parkway Sch. Dist. v. Parkway Ass'n of Educ. Support Pers.*, 807 S.W.2d 63, 66–67 (Mo. banc 1991); *see also Serv. Employees Int'l Union Local 2000 v. State*, 214 S.W.3d 368, 372–73 (Mo. App. W.D. 2007) (Article I, Sections 8 and 9 protect the right of public employees "to engage in union activities"). These protections also ensure the right of unions and employees "to express their views on political and social issues without government interference." *Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 321–22 (2012).[20] HB 1413's discriminatory classification burdens these rights in several respects.

First, HB 1413's discriminatory classification impinges on the rights protected by Article I, Sections 8 and 9 by conditioning the bargaining and speech rights of a group of employees on the identity of the union they seek to associate with. In other words, the classification that divides public-sector unions between a favored group of public-safety union and a group of penalized non-public safety unions is itself based on the exercise of core associational rights. HB 1413 grants or withholds rights for employees and unions solely because of the associational choices they make.

HB 1413 is therefore akin to the discriminatory restriction struck down in *Brown v. Alexander*, 718 F.2d 1417 (6th Cir. 1983). That case involved a constitutional challenge to a statute granting public employees the option of payroll deductions for dues to "independent" unions but prohibiting deductions for any union that was affiliated with

[20] When analyzing claims under Article I, Sections 8 and 9, Missouri courts follow First Amendment precedent. *See State v. Vaughn*, 366 S.W.3d 513, 517 n.3 (Mo. banc 2012).

other unions. *Id*. at 1419. The court recognized that such a discriminatory restriction "directly limits freedom of association between labor organizations, and their members or members of other such organizations, and thus it could restrain or restrict freedom of association, a fundamental . . . right." *Id.* at 1425. As a result, the court concluded that the classification was subject to strict scrutiny that it could not survive. *Id.* at 1425–26. HB 1413's discrimination against non-public safety unions affects a far broader set of workplace rights that "strike[] at the heart of freedom of association" protected by Article I, Sections 8 and 9, and cannot be sustained. 718 F.2d at 1426; *see also Int'l Ass'n of Firefighters, Local No. 3808 v. City of Kansas City*, 220 F.3d 969, 974–75 (8th Cir. 2000) (striking down a Kansas City ordinance that prohibited a public-employee supervisor from joining or engaging in activities on behalf of a union that either represented or was "affiliated directly or indirectly" with a union that represented employees under the direction of that supervisor because the restriction burdened the plaintiff's "constitutionally protected right" to organize and associate with a union and therefore triggered elevated constitutional scrutiny, which it could not survive); *Missey v. City of Cabool*, 441 S.W.2d 35, 42 (Mo. banc 1969) (holding that it was "clearly a violation" of Article I, Sections 8 and 9 for state or local governments to discriminate against public employees with respect to their working conditions solely because they have exercised their constitutional right to associate with a particular union).

Second, HB 1413 places discriminatory burdens on core political speech protected by Article I, Sections 8 and 9. *See Ryan v. Kirkpatrick*, 669 S.W.2d 215, 218 (Mo. banc 1984) (there can be "no doubt that freedom of speech has expansive and comprehensive

scope," and that this "is particularly so as it pertains to political association and advocation"). Most notably, HB 1413 prohibits non-public safety unions—but not favored public-safety unions, corporations, other membership associations, or any other entity—from using any portion of a member's dues to make either a political "contribution" or "expenditure" without first obtaining the member's "informed, written or electronic authorization," which must be renewed annually. Section 105.505.2, RSMo.

This requirement not only singles out non-public safety unions, it "reaches deep into the mechanics of [their] own self-governance" and "dictate[s] the terms and circumstances under which [they are] permitted to express political opinion." *Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 12 (1st Cir. 2012).

As the United States Supreme Court has explained, there is no constitutional support for "the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers." *Citizens United*, 558 U.S. at 340. On the contrary, government commits a "constitutional wrong when by law it identifies certain preferred speakers." *Id.* Such discriminatory restrictions "are all too often simply a means to control content." *Id.* They deprive a disfavored speaker of "the right to use speech to strive to establish worth, standing, and respect for the speaker's voice," *id*. at 340–41, while leaving "unburdened those speakers whose messages are in accord with [the State's] own views," *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2378 (2018) ("*NIFLA*").

This flat prohibition on speaker-based discrimination is illustrated by *Iowa Right To Life Committee, Inc. v. Tooker*, 717 F.3d 576 (8th Cir. 2013). There, the court upheld

an even-handed provision of an Iowa law that required any entity to obtain the approval of its board before expending funds for certain kinds of political advertisements. *Id*. at 605. However, the court struck down a provision that imposed an additional, speaker-based requirement that corporations, but no other entities, submit a certification that its board authorized the political expenditure. *Id*. at 605–06. The court recognized that the discriminatory feature of the Iowa law—which is far less burdensome than the speaker-based requirements that HB 1413 imposes on penalized unions—"impinge[d] upon the exercise of a fundamental right" and was "presumptively invidious." *Id.* at 606.

Third, HB 1413 places discriminatory burdens on penalized non-public safety unions by requiring them to record and disclose extensive information about their finances, activities, and associations. "[C]ompelled disclosure, in itself, can seriously infringe on privacy of association and belief" protected by the Constitution. *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam). That is particularly true of HB 1413's filing and record-keeping requirements. In order to comply with constitutional principles of free speech, disclosure requirements cannot be "unjustified or unduly burdensome," "broader than reasonably necessary," or address an asserted harm that is "purely hypothetical." *NIFLA*, 138 S. Ct. at 2377. HB 1413, by contrast, appears designed to inflict on penalized unions the most time-consuming and onerous compliance obligations imaginable, especially for smaller unions like Plaintiff Hazelwood ASP that employ no professional

staff.[21] *See Federal Elec. Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 254–55 (1986) ("Detailed recordkeeping and disclosure obligations. . . impose administrative costs that many small entities may be unable to bear" because "such duties require a far more complex and formalized organization than many small groups could manage"). Worse yet, HB 1413 makes these mandatory disclosure requirements applicable only to non-public safety unions, but leaves favored public safety unions off scot-free. As the U.S. Supreme Court decided recently in *NIFLA*, laws that impose disclosure requirements that "distinguis[h] among different speakers" are particularly suspect and demand elevated constitutional scrutiny. 138 S. Ct. at 2378; *see also Tooker*, 717 F.3d at 605–06 (striking down disclosure requirements for political advertisements that discriminated against certain speakers).

B. HB 1413's discriminatory classification does not survive strict scrutiny

[21] To be sure, federal law imposes certain recordkeeping and reporting obligations on unions that represent employees in the private sector. *See* Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. §§ 401–531. But the LMRDA is distinguishable in several crucial respects. First, while the Missouri legislature appears to have marshalled little or no evidence to support the need for HB 1413's far-reaching disclosure burdens, the Congressional hearings that led to the LMRDA were extensive and generated more than 46,000 pages of testimony from over 1,500 witnesses. *See generally* Clyde W. Summers, *American Legislation for Union Democracy*, 25 Mod. L. Rev. 11, 11 n.1 (1962). Second, HB 1413 takes no account of the burdens imposed on smaller unions. The LMRDA, in contrast, allows smaller unions to file highly simplified reports. *See* U.S. Dep't of Labor Forms LM-3 & LM-4. Finally, HB 1413's reporting requirements go far beyond what is required for even the largest and most sophisticated unions that file reports under the LMRDA. *Compare* Section 105.533, RSMo., *with* U.S. Dep't of Labor Instructions for Form LM-2, https://www.dol.gov/olms/regs/compliance/GPEA_Forms/2016/efile/LM-2_Instructions_Revised2016.pdf .

The undisputed facts show that the State fails to meet their burden of showing that these significant infringements of Plaintiffs' equal protection rights survive strict scrutiny. Again, the legislature made no record or findings setting forth the actual purpose for the discrimination against non-public safety unions and their members. As a result, the State cannot create a triable issue of fact by proffering justifications for HB 1413's discriminatory justification that are invented solely for litigation. *See Shaw*, 517 U.S. at 908 n.4; *Video Software Dealers Ass'n*, 968 F.2d at 689.

At any rate, the justifications for the discrimination that the State has proffered are all unpersuasive. The State's primary defense is that HB 1413's pervasive discrimination against non-public safety unions is indistinguishable from provisions that exist in many jurisdictions that created different collective-bargaining regimes for different classes of public employees. *See* App. Br. at 96. The problem with this argument is that HB 1413 does not, in fact, operate in the same way as any of these laws. For each and every one of the cases cited by the State, the law in question categorized employee's bargaining rights according to their job duties—not according to the identity of the employee's union. *See* App. Br. at 97–98. In other words, these cases all describe a situation where a group of employees' bargaining rights will remain the same no matter which union they choose for representation. *See id.* HB 1413, by contrast, does the opposite: a group of employees' bargaining rights will change dramatically based *solely* on their constitutionally protected right to associate with one over another.

This pervasively discriminatory feature of HB 1413 sets it apart—not only from the examples the State relies on—but from seemingly *any other regulation of public-*

sector collective bargaining anywhere. After extensive research, Plaintiffs can locate no other federal, state, or local collective bargaining law that conditions the organizing, bargaining, and speech rights of a group of employees entirely on the identity of the union they select as their bargaining representative. The complete absence of such an analog or precedent in all of public-sector collective bargaining law is "[p]erhaps the most telling indication of [a] severe constitutional problem." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2201 (2020).

These problems only become more apparent in light of the State's elaborate efforts to justify HB 1413's novel carve-out. Although the discriminatory carve-out became part of HB 1413 as a hastily added amendment, approved with no supporting analysis or substantive debate, the State urges this Court to accept a post-hoc defense of the provision that relies on extensive speculation and no fewer than nine different and internally contradictory rationales. *See* App. Br. at 91–96; D78 at 11–19. All of these attempts at justification only show just how poorly HB 1413's carve-out accomplishes the purposes the State has put forth.

One of the most glaring examples is the State's claim that a broader scope of bargaining for the favored public-safety unions is justified because public-safety jobs lack counterparts in the private sector that would provide a model of "best practices" for human resource management. App. Br. at 96. At the outset, this supposed absence of private-sector models does not explain why HB 1413 would allocate bargaining rights based on the identity of the union, rather than on the duties of the employees in the workplace. In addition, the factual claim itself is highly dubious—after all, there are all

nurses, doctors, and security guards who work in the private sector. But even more fundamentally, this attempt to justify broader bargaining rights for public-safety unions is directly and irreconcilably at war with the State's claim elsewhere that complete managerial discretion, and not collective bargaining, is most effective for workforce management. *See* App. Br. at 32–37, 103–04. This would seem to be even *more*—not *less*—true of public-safety employment, given the State's assertion that jobs in that sector have "workplace organizations and authority structures that are more akin to military chains of command," *id.* at 96, which are famously *not* amenable to bargaining or negotiation.[22]

Despite the length and elaborateness of the State's explanations for HB 1413's discriminatory carve-out, its efforts are also ultimately incomplete, raising even further "doubts about whether the government is in fact pursuing the interest it invokes." *Brown*, 564 U.S. at 802. For example, the State claims that the provision of HB 1413 that allows renegotiation of agreements in the event of a budget shortfall or other "good cause" are needed to protect the public treasury, *see* App. Br. 46–48, yet it makes no effort to

[22] The same is true of the State's claim that HB 1413's discriminatory bargaining provisions can be justified by the notion that public-safety personnel "face greater risks of injury and death on the job." App. Br. at 93–94. Setting aside highly dubious claim that *all* public-safety personnel (including dispatchers and nurses) face a greater risk of injury or death than *all* non-public safety personnel (including construction workers and garbage collectors), the State makes no effort to explain why that risk would justify more expansive bargaining rights only for those public-safety employees who select favored public-safety unions as their representatives. Nor does it explain why that risk would justify negotiation over a broad array of workplace terms and conditions—particularly given the State's adamant insistence that collective bargaining hampers public employers' ability to best manage their affairs and protect the interests of all employees. *See* App. Br. at App. Br. at 32–37, 103–04.

explain why those concerns are absent when a favored public-safety unions is at the bargaining table. Likewise, the State claims that HB 1413's reporting and disclosure provisions are needed to ferret out corruption and keep the public informed of public-sector unions' political influence, *see* App. Br. at 40–42, 117–123, yet the State makes no effort to explain why these same concerns have no application to favored public-safety unions.

As a result, the State's efforts to justify HB 1413's discriminatory carveout are all for naught. *See* App. Br. at 91–96. The State is forced to concede that carveout can and does result in situations where public safety employees are subjected to all of the law's most draconian burdens and restrictions. App. Br. at 98–100. Because the exemption is based, not on the occupation or job classification of employees but on the identity of the union they seek to associate with, it is "wildly underinclusive" and therefore fails the constitutional requirement of narrow tailoring. *Brown*, 564 U.S. at 802.

Indeed, HB 1413's discriminatory public-safety carveout is poorly tailored for *any* conceivable purpose, save one: rewarding a select group of unions by sparing them a large-scale attack on collective-bargaining rights and restrictions on speech and association. The fact that the spared unions are more likely to support the political party that currently controls the Legislature can hardly be seen as an accident. On the contrary, labor law experts have long suspected that similar carveouts have been used for this purpose. *See* William E. Forbath, *The Distributive Constitution and Workers' Rights*, 72 Ohio St. L.J. 1115, 1140, 1157 n. 98 (2011). But only HB 1413 dared to make it so

explicit. This Court should affirm the judgment in Plaintiffs' favor on their claims under Article I, Section 2.

III. Plaintiffs are Entitled to Summary Judgment on their Claims that HB 1413 Violates Article I, Sections 8 and 9 of the Constitution. (Responds to the State's Points III and IV)

The Circuit Court correctly awarded judgment to the Plaintiffs on their claim that HB 1413 violates the protections of Article I, Sections 8 and 9 for the rights of speech and association. These constitutional provisions safeguard speech and association in connection with both political and employment matters. *See Knox*, 567 U.S. at 321–22; *Parkway Sch. Dist.*, 807 S.W.2d at 66–67. HB 1413 significantly burdens the exercise of those rights by Plaintiffs and their members in several respects.

First, as noted above already, HB 1413 requires non-public safety unions—and no other entity in the state—to obtain advance authorization from members before spending their funds on political activities. *See* Section 105.505.2, RSMo. In so doing, HB 1413 violates the basic proposition that, "in the context of political speech," the government may not "impose restrictions on certain disfavored speakers." *Citizens United*, 558 U.S. at 340*; see also Tooker*, 717 F.3d at 605–06 (striking down legislation that imposed speaker-based requirement that corporations, but no other entities, submit a certification that its board authorized the political expenditure because it "impinge[d] upon the exercise of a fundamental right" and was "presumptively invidious").

Second, HB 1413 requires non-public safety unions—but not similarly situated public safety unions—to submit to extensive mandatory recordkeeping and disclosure requirements, violations of which may result in criminal penalties. *See* Sections 105.533–

105.555, RSMo. As a result, HB 1413 conflicts with the settled free-speech principle that even otherwise-permissible mandatory disclosure requirements are presumptively invalid if they "distinguis[h] among different speakers." *NIFLA*, 138 S. Ct. at 2378 (2018); *see also Tooker*, 717 F.3d at 605–06 (striking down disclosure requirements for political advertisements that discriminated against certain speakers).

The State has not carried its burden of showing that these significant infringements of the rights of Plaintiffs and their members under Article I, Sections 8 and 9 survive scrutiny. Yet again, the Legislature made no record or findings setting forth the actual purpose for the discrimination against non-public safety unions and their members. *See Shaw*, 517 U.S. at 908 n.4; *Video Software Dealers Ass'n*, 968 F.2d at 689. In any event, the justifications the State have proffered for these restrictions are all unpersuasive.

At the outset, any justification offered by the State must be viewed with deep skepticism, given its "obvious self-interest in muting public employee unions." *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 325 (6th Cir. 1998). Moreover, whatever justifications might be offered to support *evenhanded* restrictions on speech and association, they cannot support the *discriminatory* ones found in HB 1413. The notion that some employees' representation by a non-public safety union calls for extensive restrictions on core political speech and expressive association—while representation of the very same employees by a favored public safety union does not—defies basic common sense and negates any suggestion that HB 1413 serves a compelling governmental interest. *See City of Ladue v. Gilleo*, 512 U.S. 42, 52 (1994) (significant

exemptions from even an otherwise legitimate regulation "diminish the credibility of the government's rationale" for the restriction).

This Court should also reject the State's claims that some of HB 1413's speech restrictions are justified under the U.S. Supreme Court's decision in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), which recently declared that so-called "agency fee" arrangements violate the First Amendment in public employment. According to the State, HB 1413's requirements for advanced authorization for political activity and for annual reauthorization of dues deductions are both necessary to prevent employees from forfeiting their First Amendment rights. App. Br. at 42, 113–14. But the Court in *Janus* was concerned only with money that might be collected from *nonmembers*. *See* 138 S. Ct. at 2486 ("Neither an agency fee nor any other payment to the union may be deducted from a *nonmember's* wages . . . unless the employee affirmatively consents to pay") (emphasis added). It was not concerned with dues-paying *members* who, after Court's decision in *Janus*, are now all strictly voluntary in the public sector. Thus, when these members make dues payments to their unions—including money that might be used for political activities—they are not *waiving* their rights of speech and association, they are *exercising* them. *See Smith v. Ark. State Highway Employees*, 441 U.S. 463, 465 (1979) (explaining that the First Amendment protects the rights of employees to associate and participate in labor unions). Simply put, "*Janus* does not extend a First Amendment right to avoid paying union dues," and there is now a "swelling chorus of courts" that recognized this. *Belgau v. Inslee*, 975 F.3d 940, 951 & n.5 (9th Cir. 2020) (collecting cases), *reh'g en banc denied* (Oct. 26, 2020).

Even taken at face value, the State's attempt to protect union members from their own decision to join the union is still incompatible with basic principles of free speech and association. Union members have their own rights of free speech and association, which are at their apex in the governance of the organization's own affairs. *See State ex rel. Tompras v. Bd. of Election Comm'rs of St. Louis County*, 136 S.W.3d 65, 67 (Mo. banc 2004) (per curiam). They are therefore entitled to establish and maintain criteria that forbid voluntary members from opting out of financial support for union political activities. *See Kidwell v. Transportation Commc'ns Int'l Union*, 946 F.2d 283, 301 (4th Cir. 1991). Moreover, as the U.S. Supreme Court explained in *Citizens United*, the "First Amendment protects . . . speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas." 558 U.S. at 351. And, here, the State has marshalled no evidence of a meaningful concern about union political spending that "cannot be corrected" on an institutional level by a union's own internal democratic procedures, *id.* at 361–62, or on an individual level by an employee's right to forgo membership in the first place, *see Belgau*, 975 F.3d at 952. This Court should therefore affirm the Circuit Court's judgment that HB 1413's restrictions on speech and association violate Article I, Sections 8 and 9 of the Constitution and must be declared invalid.

IV. The Trial Court Correctly Considered the State's Expert Testimony and Found it Insufficient as a Matter of Law. (Responds to the State's Point IV)

Contrary to the State's assertion in Point IV, the Trial Court did not "categorically disregard" the State's expert evidence. In paragraph 50 of its Judgment, the Trial Court enumerated the "broad array of topics" addressed by the State's experts: "the most

effective ways to manage a public-sector workforce . . . , the unstated concerns that might have motivated passage of HB 1413 . . . , and the perceived likely interests and preferences of public- sector employees . . . .” D107, at 25-26. In paragraph 51 of the Judgment, the Court reviewed the State’s purported rationales justifying a carve-out for public safety labor organizations: the “greater risks of injury and death [in public safety] job[s],” the “importance of public trust in policing and medicine,” and the lack of “private sector counterparts” for public safety personnel “for which there might be ‘widely accepted best practices’ for human resource management that do not involve collective bargaining.” D107, at 26. Plainly, the Court considered the State’s evidence, but found it insufficient to justify burdens on constitutional rights imposed by HB 1413.

Nor did the Trial Court hold that empirical evidence is never admissible in a strict scrutiny analysis, as suggested by the State in Point IV(A). The Court simply found that the legislature had not considered empirical evidence when it enacted HB 1413. D107, at 26 (holding that the State’s expert evidence constituted an “immaterial post hoc rationalization in response to litigation”). The State’s own cases support the Trial Court’s conclusion. In *Shaw*, 517 U.S. at 910, the state presented two expert reports prepared for litigation, containing historical and social science authorities, to try to demonstrate a compelling interest for redrawing legislative boundaries to include two new African-American majority districts. The Supreme Court affirmed the rejection of such evidence because it post-dated the redistricting decision and therefore did not actually motivate the legislature. *Id.*

In three other cases cited by the State, legislation was upheld under heightened scrutiny, based on evidence that, unlike here, the legislature relied on during the legislative process. *See, City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425 (2002) (upholding ordinance restricting density of adult businesses, where ordinance was enacted in response to a prior study by the city linking adult businesses with increased crime); *Fla. Bar v. Went For It, Inc.,* 515 U.S. 618 (1995) (upholding Florida Supreme Court's rule restricting attorney solicitations, where rule was supported by a 106-page summary of a two year study); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000) (upholding a restriction on campaign contributions that was supported by an affidavit of a legislator involved in its enactment, contemporaneous news articles, and evidence from an Eighth Circuit case striking down a prior campaign finance law).[23] A similar Missouri case is *Ocello,* 354 S.W.3d at 196, where this Court upheld a statute regulating sexually oriented businesses, finding that the legislature had assembled, and the Attorney General had filed with the Court, an extensive record of expert and lay testimony from proponents and opponents, and reviewed dozens of court opinions. When it passed HB 1413, in contrast, the General Assembly assembled no empirical record.

The State's criticisms in Point IV(B) of the Court's reasons for rejecting its evidence are also without merit. The State first claims that there is no requirement in a strict scrutiny analysis that the legislature have declared its intent in a statement of

[23] The other case cited by the State in the strict scrutiny portion of its Point IV(A) is inapposite to the question of legislative intent, because it involved a challenge to race-conscious college admission decisions, rather than a facial challenge to a statute. *Fisher v. Univ. of Texas at Austin,* 570 U.S. 297 (2013).

findings or purpose—and then it cites two cases that applied rational basis review, where the court is free to speculate about any plausible legislative intent. *See Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522, 528–29 (1995); *Ross v. Kan. City Gen. Hosp. & Med. Ctr.,* 608 S.W.2d 397, 399 (Mo. banc 1980). In the absence of an empirically grounded legislative record like that in *Ocello,* the only way the legislature could have articulated a genuine, compelling interest surviving strict scrutiny would have been to set forth its findings or purpose in the statute.[24] As shown by the *Shaw v. Hunt* case, it is not enough for the legislature to have "addressed problems and issues that were widely known and subjected to widespread public debate, both in Missouri and elsewhere," prior to passage of HB 1413 (App. Br. at 128). *See* 517 U.S. at 910.

The meager legislative record offered by the State does not reflect any kind of coherent rationale for draconian restraints on collective bargaining for most public workers. Several of the debate comments the State has cited have nothing to do with HB 1413's purpose.[25] Most of the other comments focused on only one aspect of the many

[24] The State criticizes Plaintiffs' reliance on *Video Software Dealers' Ass'n,* 968 F.2d at 687, for the proposition that without legislative history or a statement of purpose, it may be impossible to satisfy strict scrutiny. It makes no difference that this case involved a void for vagueness claim, because strict scrutiny applied there as it does here.

[25] One legislator said, without context or explanation, that "no Missourian should be forced to give up their constitutional rights against their will." D76, at 4, linking to House Debate of 2/12/18. Another one claimed, erroneously, that the provision banning picketing over a personnel matter tracked current Missouri law, and was only added as a clarification. *Id.* Another was an isolated statement from an opponent of the bill stating that her union had gone through the process of being recognized many years ago. *Id.*

components HB 1413—financial transparency.[26] Two remaining comments focused on whether new public workers benefit from longstanding union recognition.[27] The committee bill summary of HB 1413 summarized the testimony of proponents in two sentences: "[T]he bill increases transparency within public sector unions by holding them to private union disclosure standards. This bill also protects the political viewpoints of public sector union members who may disagree with union leadership, and may accordingly wish to not have their dues or membership pay for the union's political activities." D76, at 4, and 330–31.

Taken at face value, the State's legislative history does nothing to justify the severe burdens HB 1413 imposes on Plaintiffs and their members. It offers no rationales for, and no attempt to quantify the importance of, the ban on voluntary recognition, the requirement of recertification elections, the onerous requirement of an absolute majority of the bargaining unit to sustain a certification or recertification vote, the requirement that unions pay for government-run elections, the strict constraints on topics of bargaining,

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[26] One representative called HB 1413 the "labor organization financial transparency bill" because it allows workers to search a union's records electronically to see where the money is going. D76, at 4, linking to House Debate of 5/17/18. Another said his wife was a member of the MNEA and had never been given its financial statements. *Id.* Another said HB 1413 would "make the collective bargaining process more open and transparent." *Id.* Another who is a member of a teachers association that opposes collective bargaining said it was wrong to lump all teachers together and his association had members sign up each year. *Id.* Another said that government unions get to pick the people they are bargaining with, and the taxpayer is left out and that HB 1413 would rebalance that relationship through recertifications and financial transparency. *Id.*

[27] One claimed that only 3 percent of state workers had ever voted to be part of a bargaining unit, but another responded that new workers benefited from what the union had negotiated in the past. D76, at 4, linking to House Debate of 5/17/18.

the provision allowing a public employer to unilaterally change provisions of a ratified agreement, the mandated escape clause for economic terms in the event of a budget crisis or other "good cause," unilaterally determined, or the requirements of annual authorization for dues and political contributions. The legislative history provides only the flimsiest rationale for the extensive reporting requirements, but no attempt to quantify the importance of that interest. The legislative record offers no rationale for the carve-out of public safety labor organizations and their members—a classification based not on employees' job duties, but on the union with which they choose to affiliate. Finally, the legislative history makes no pretense of justifying HB 1413's many provisions as "narrowly tailored" to accomplish compelling state interests. It was not necessary for Plaintiffs to show that the State's legislative history was "somehow disingenuous or did not reflect the legislature's actual purposes," App. Br. at 128, because the history on its face is insufficient as a matter of law.[28]

The same is true of the expert evidence offered by Professor Shoag, Hedlund, Maranto, and Stangler. Professor Shoag did no more than speculate about what rationales the legislature might have had for different provisions of HB 1413. *See supra* at footnote16. He made no attempt to quantify the importance of these rationales or defend HB 1413 as a narrowly tailored solution.[29] Professors Hedlund, Maranto, and Stangler

[28] Plaintiffs did, however, point out numerous legally erroneous statements made by the sponsor of HB 1413; and noted those provisions of HB 1413 which were never addressed in the State's legislative history. D95, at 56-64.

[29] The State criticizes Plaintiffs' reliance on *Howard v. City of Kansas City,* 332 S.W.3d 772, 785 (Mo. banc 2011), and *J.J.'s Bar & Grill, Inc. v. Time-Warner Cable*

(*continued . . .*)

made clear that they were offering post hoc rationalizations supporting a different statute, SB 1007 (rescinding most of the State's merit system), and they thought similar rationales supported HB 1413's limits on the scope of bargaining, Section105.585(1), RSMo. D79, at 3; D80, at 3; D81, at 2. Drs. Maranto and Hedlund were not even retained in this case, but were merely available if discovery proceeded. D79, at 2; D80, at 3. On its face, the State's expert evidence comes nowhere near establishing a "strong basis in evidence," which the State admits is required under strict scrutiny. App. Br. at 129 (citing *Shaw*, 517 U.S. at 908 n.4).

The Trial Court correctly accepted the State's evidence at face value, and determined that it was insufficient as a matter of law to preclude summary judgment for Plaintiffs. Plaintiffs have already addressed the inadequacy of the State's evidence on each of these claims *supra* in Points I, II, and III.

V. The Challenged Provisions of HB 1413 Are Facially Invalid. (Responds to the State's Point V)

The State argues against facial invalidation of the challenged provisions of HB 1413 because there may be some application of the law that would be constitutionally permissible. App. Br. at 132. That is not the case. At the very least, HB 1413's

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Midwest, LLC, 539 S.W.3d 849, 874 (Mo. App. W.D. 2017), because those cases excluded expert testimony on questions of law, while the State's experts opined on questions of fact. App. Br. at 130. It is for the Court, however, to determine whether the *facts* offered by the State's experts establish that HB 1413 is narrowly drawn to achieve a compelling state interest.

discriminatory carve-out affects every application of the statute in a manner that harms non-public safety unions. As a result, facial invalidation is appropriate.

The State fails in its attempts to identify a situation in which a challenged provision might still be enforceable. To begin with, the State presupposes in all its examples that HB 1413's discriminatory carve-out is constitutionally permissible. *See* App. Br. at 133. But because that provision is instead unconstitutional and unenforceable, each of the State's examples simply proves the point that the statute cannot be enforced in any circumstance.

The state also posits examples where one of HB 1413's restrictions might be enforceable in situations where a union is already willing to abide by it voluntarily. App. Br. at 133. This is not a proper consideration for determining whether a law is vulnerable to a facial attack.

This Court's decision *Weinschenk* proves the point. There, the challenged photo ID requirement affected between "3 and 4 percent of Missouri citizens" who lacked the requisite photo ID and "would, thus, need to obtain a driver's or non-driver's license or a passport in order to vote." 203 S.W.3d at 206. In concluding that the requirement should be facially invalidated, this Court focused—not on the 96 to 97 percent of citizens who had the required photo ID and could therefore comply with the law—but on those the law severely burdened. *Id*. at 212–19. Here, HB 1413's burdens will be felt by a far greater percentage of public employees and unions throughout the state, and any instance of enforcement of the law will transgress on their fundamental rights.

The same was true in *Citizens United*, where the U.S. Supreme Court facially invalidated the federal statute that criminalized corporate "independent expenditures" in connection with federal elections. *See* 558 U.S. at 329–36. The Court took this step even though the vast majority of corporations are content not to engage in paid political advertising of any kind. That is because the operative question for a statute's facial validity is whether there are sets of circumstances in which the law can be validly *enforced*. And for HB 1413, the answer is no.

This Court should also, in the "exercise of its judicial responsibility," facially invalidate HB 1413' challenged provisions because an as-applied ruling would generate "uncertainty" for the exercise of important constitutional rights, and "substantial time would be required to bring clarity to the application of the [challenged] provision[s]." *Citizens United*, 558 U.S. at 333–34. Indeed, the State's suggestion to limit the Circuit Court's ruling to an as-applied challenge would flood this Court with endlessly duplicative litigation. Each and every instance of a union's ongoing recognition by a public body, its negotiation and execution of a collective bargaining agreement with a public body, its collection of dues from its members, and its expenditure of funds for a political purpose would furnish an occasion for an as-applied constitutional challenge falling within this Court's original appellate jurisdiction under Article V, Section 3. *See Stemley v. Downtown Med. Bldg., Inc.*, 762 S.W.2d 43, 46 (Mo. banc 1988) (recognizing that Article V, Section 3 extends to as-applied constitutional challenges). And that prospect is heightened further by the fact that HB 1413's restrictions may be enforced—not only by public bodies that might otherwise acknowledge that the law would be

unconstitutional in a particular situation—but by any citizen of the State. *See* Section 105.595, RSMo. This Court should therefore affirm the Circuit Court's conclusion that all of the challenged provisions in HB 1413 are facially invalid.

VI. The Challenged Provisions of HB 1413 Are Not Severable. (Responds to the State's Point VI)

As the foregoing demonstrates, the Circuit Court correctly held that multiple provisions throughout HB 1413 are facially unconstitutional. Ordinarily the unconstitutional provisions of a piece of legislation are severable. *See* Section 1.140, RSMo. However, legislation must be voided in its entirety if the unconstitutional provisions are "essentially and inseparably connected" to the rest of the legislation or if the legislation is "incapable of being executed in accordance with the legislative intent" without the offending provisions. *Id*. "Ultimately, though, the issue is simply whether the legislature would have enacted the valid provisions [of a law] without enacting [the invalid ones]." *Trout v. State*, 231 S.W.3d 140, 147 (Mo. banc 2007). "Ideally, the resolution of this and other severance issues, consistent with section 1.140, and true to legislative intent, is by reference to the substantive legislative history, or drafting history, of the bill." *Id.*

These standards require that HB 1413 be invalidated *in toto*. Not only are most of the legislation's substantive provisions unconstitutional, but the unconstitutional classification that discriminates against non-public safety unions and advantages favored public safety unions is one that permeates each and every provision of the legislation. As

a result, none of the law's provisions can be "executed in accordance with the legislative intent." Section 1.140, RSMo. Facial invalidation is this Court's only recourse.

The State suggests that this Court could simply sever HB 1413's discriminatory carve-out provision and leave the remainder of the statute intact. App. Br. at 141. Of course, the State's argument on this score ignores the many *other* constitutional defects in HB 1413. Once those are taken into account, all that is left of HB 1413 is, at best, a Swiss cheese of labor-management regulation that would not be capable of accomplishing its original legislative purposes.

But even on the generous assumption that HB 1413's discriminatory carve-out is its *only* constitutional flaw, the proper remedial action for this court would still be to strike down the entire law. That is consistent with the general rule that, "[w]here an exception clause is unconstitutional, the substantive provision it qualifies cannot stand." SUTHERLAND STATUTORY CONSTRUCTION § 47:11. It is also consistent with the basic principle of equal protection that evenhandedly extending rights—rather than burdening them more broadly—is "customary," "typical," the "preferred rule," and generally the "proper course." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1699–1701 (2017); *see also United Food & Commercial Workers Local 99 v. Brewer*, 817 F. Supp. 2d 1118, 1127 (D. Ariz. 2011) (declining to sever an unconstitutional exception to a restriction on union speech because severance would result in "a much broader regulation" that would, "in effect, cause the court to legislate a blanket [regulation] that the [legislature] did not itself enact") (citation and quotation marks omitted).

In the rare circumstances where Courts have remedied an equal-protection violation by extending that challenged law's *burdens*—rather than equalizing its benefits or invalidating the law in its entirety—they have done so based on two factors: (i) the intensity of the Legislature's commitment to the main rule in the absence of the unconstitutional exception and (ii) the degree of potential disruption that would occur from extension as opposed to abrogation. *Morales-Santana*, 137 S. Ct. at 1700. Neither of those factors counsels in favor of severance here. On the contrary, they confirm that this Court should hew to the "preferred rule," *id*. at 1701, and declare HB 1413 void in its entirety.

First, the State can point to no evidence showing that the Legislature was so committed to enacting HB 1413's restrictions that it would have done so without the discriminatory and unconstitutional carve-out for public safety unions. In the absence of such evidence, this Court is not situated to decide "how the law's substantive provisions might otherwise have been modified had the legislature known the exceptions would be found unconstitutional." SUTHERLAND STATUTORY CONSTRUCTION § 47:11. As a result, this Court cannot simply "assume a legislature would have enacted a statute without the exceptions." *Id.*

That is particularly true here because the legislative history that does exist provides strong evidence that severance is inappropriate. *See Trout*, 231 S.W.3d at 147–48 (examining the sequence of legislative amendments to determine severance of an unconstitutional provision was improper). That history makes clear that the carve-out was added late in the legislative process to secure passage of the entire law. The two are

therefore "inseparably connected and dependent upon each other," *id.* at 148, such that voiding the entire act is the only outcome that is consistent with the what the Legislature would have enacted but for the inclusion of HB 1413's pervasive discrimination favoring public safety unions.

This Court's recent decision in *Karney* does not require a different result. There, the only provision of HB 1413 before the Court was its restriction on "picketing of any kind," Section 105.585(2), RSMo., and the only challenge to that provision under consideration was whether its restriction violated Article I, Section 8's protections for free speech. *See* 599 S.W.3d at 162–65. Thus, in determining that the words "picketing of any kind" could be excised from the rest of Section 105.585, this Court had no occasion to mention, much less analyze in depth, the effect that HB 1413's many *other constitutional* defects—and, especially, its pervasive discrimination based on constitutionally protected association—would have on the overall validity of the law. Now that this issue is squarely before this Court, the inseparability of HB 1413's discriminatory carve-out is clear.

Second, adopting the State's position on severance would cause significant disruption, whereas invalidating all of HB 1413 would not. *See Morales-Santana*, 137 S. Ct. at 1700. Severing the discriminatory carve-out, while leaving the rest of HB 1413 intact, raises unavoidable reliance and constitutional concerns for parties who are not even before this Court—namely, the public safety unions that would suddenly find themselves subject to a raft of severe restrictions that infringe on core constitutional rights. *See Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2354 (2020)

(explaining that a court must consider "due process, fair notice, or other independent constitutional barriers" in deciding "whether it is appropriate to extend benefits or burdens, rather than nullifying the benefits or burdens").

This brief has already detailed the many burdens that HB 1413 places both on collective bargaining rights to and on rights of free speech and association. *See supra* at 55-62 and 74-79. If this Court severs the discriminatory carve-out and leaves the law otherwise intact, all of these burdens would immediately fall on dozens of unions and thousands of employees who were previously assured by the text of the law they would not be affected.

Further disruptions and constitutional issues will follow from the fact severance would make it immediately unlawful for a previously-excluded public safety union to seek to be recognized as a bargaining representative because it was not certified in compliance with HB 1413's procedures. *See* Section 105.575, RSMo. Not only will this cast longstanding bargaining relationships into disarray, but it will effectively nullify existing collective bargaining agreements in contravention of Article I, Section 13's guarantee against laws "impairing the obligation of contacts." *See*, *e.g.*, *Michigan State AFL-CIO v. Schuette*, 847 F.3d 800, 803–04 (6th Cir. 2017) (holding that new law invalidating provisions of existing public-sector collective bargaining agreements unconstitutionally impairs the obligations of contracts); *Toledo Area AFL-CIO Council*, 154 F.3d at 326–27 (same).

Constitutional concerns raised by severance are heightened all the more because HB 1413's provision include criminal penalties, which would become immediately

applicable to parties that the Legislature expressly meant to exclude. "Severance does not authorize—and cannot justify—an intrusion by this Court into the legislative prerogative to determine what is (and is not) a crime under Missouri law. . . ." *State v. Hart,* 404 S.W.3d 232, 245 (Mo. banc 2013); *see also Tatro v. State*, 372 So. 2d 283, 284–85 (Miss. 1979) (explaining that courts should not excise language from a statute in a way that would "destroy[] the clear legislative intention to limit application of the statute" and thereby "judicially creat[e] a crime without legislative sanction"). Taken together, the disruptions and constitutional problems caused by severance are too high a price for saving some part of a deeply flawed law.

In contrast, curing HB 1413's pervasive discrimination by striking down the entire law would not result in similar disruption, nor would it implicate any important fair notice or contractual reliance concerns. HB 1413 never went into effect in any meaningful way before it was enjoined by the Circuit Court. While that injunction has remained in place, the State has not identified any harm caused by injunction. Affirming the Circuit Court would therefore maintain the state of affairs that has existed from the time of this Court's decision in *Independence-NEA* to the present.

HB 1413 cannot be salvaged. The proper remedy for its many constitutional defects is to invalidate the law in its entirety.

VII. If this Court reverses the Circuit Court's ruling, a remand is the appropriate disposition

The State suggests that, if this Court reverses the Circuit Court's ruling on summary judgment, the appropriate course is to end the case by ordering judgment in the

State's favor. App. Br. at 144. This would not be a proper disposition of the appeal. The State did not move for summary judgment before the Circuit Court. Instead, it has argued consistently—including before this Court, *see* App. Br. at 124–31—that disputed facts precluded summary judgment. Accordingly, if this Court determines that the Circuit Court's ruling was in error, the appropriate course is to remand for further proceedings.

CONCLUSION

For the reasons stated above, the Plaintiffs respectfully request that this Court affirm the judgment of the Circuit Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above was filed electronically and served by operation of the electronic filing system through Missouri CaseNet on October 29, 2020, on all counsel of record.

/s/ Sally E. Barker

CERTIFICATE OF COMPLIANCE

The Undersigned also certifies that the foregoing brief complies with the limitations in Missouri Supreme Court Rule 84.04(b) and 84.06(c)(1)-(4), and that the brief contains 26,434 words, excluding the portions exempted from the word count under Supreme Court Rule 84.06(b).

/s/ Sally E. Barker