SC98412

IN THE SUPREME COURT OF MISSOURI

MISSOURI NATIONAL EDUCATION ASSOCIATION, *et al.*,

Respondents,

v.

MISSOURI DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, *et al.*,

Appellants.

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

BRIEF OF APPELLANTS

ERIC S. SCHMITT
Attorney General

D. John Sauer, Mo. Bar No. 58721
Solicitor General
Alyssa M. Mayer, Mo. Bar No. 64008
Assistant Attorney General
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, Missouri 65102
Phone: 573-751-8870
John.Sauer@ago.mo.gov
Attorneys for Appellants

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JURISDICTIONAL STATEMENT

This appeal concerns the validity of House Bill 1413 (2018) ("HB 1413"), a comprehensive reform bill containing at least seventeen significant provisions relating to public-sector unions. Plaintiffs-Respondents Missouri National Education Association, et al. ("Plaintiffs") brought a facial constitutional challenge to every provision of HB 1413. D2. On January 27, 2020, the trial court granted summary judgment to Plaintiffs on all claims, invalidating and permanently enjoining the enforcement of every provision of the bill. D107, at 33. On February 28, 2020, Defendants-Appellants Missouri Department of Labor and Industrial Relations, et al. ("the State") filed a timely notice of appeal. D108.

This appeal concerns "the validity … of a statute … of this state," and thus it falls within this Court's "exclusive appellate jurisdiction." MO. CONST. art. V, § 3.

INTRODUCTION

"Unquestionably, public employees are differently situated from private employees and are treated differently under the law." *Independence-Nat. Educ. Ass'n v. Independence Sch. Dist.*, 223 S.W.3d 131, 133 (Mo. banc 2007) ("*Independence-NEA*"). There are at least two reasons for this fundamental difference. "The first is that many public employees—especially police and firefighters—are deemed essential to the preservation of public safety, health, and order." *Id.* "The second is that the economic forces of the marketplace—that limit, at least in theory, the extent to which employers can meet employee groups' demands—do not constrain the public sector." *Id.* "In the public sector, meeting the demands of employee groups is thought to infringe on the constitutional prerogative of the public entity's legislative powers by forcing the entity to raise taxes or distribute public services in a manner inconsistent with the best judgment of the entity's governing board." *Id.*

To address these and related concerns, in 2018, the General Assembly enacted House Bill 1413, a comprehensive public-sector union reform bill. HB 1413 contains provisions protecting secrecy and free democratic choice in union elections, preserving legislative prerogatives during public-sector bargaining, promoting the efficiency and effectiveness of the public-sector workplace, protecting public

finances during budgetary shortfalls, and requiring disclosure and transparency in union financial dealings, among other provisions. Like similar reform bills in other States, HB 1413 contained an exemption for public-sector unions that principally or exclusively represent public-safety employees, such as police, firefighters, ambulance drivers, and EMTs.

Plaintiffs, who are all public-sector unions, filed suit, seeking the complete invalidation of every provision in HB 1413 under the Missouri Constitution. Plaintiffs claimed that HB 1413's provisions violate (1) the right to collective bargaining in Article I, § 29; (2) the equal-protection provision of Article I, § 2; and (3) the right to freedom of speech and association in Article I, §§ 8 and 9.

Plaintiffs moved for summary judgment, submitting little or no evidence on questions of validity, but instead asking the trial court to conclude the bill's invalidity as a matter of law. The State opposed summary judgment, filing detailed factual materials, including four expert affidavits that set forth detailed justifications for the bill's various provisions. The trial court categorically refused to consider any of the State's evidence in the summary-judgment record. Instead, the trial court concluded that every provision of HB 1413 is invalid and non-severable, and granted summary judgment invalidating the entire bill. This holding was erroneous for at least six reasons.

First, no provision of HB 1413 violates employees' right to "bargain collectively" with "representatives of their own choosing" under Article I, § 29. Contrary to the Constitution's plain language and this Court's cases, the trial court fundamentally misunderstood Section 29 by interpreting it to guarantee certain *outcomes* of bargaining, instead of the *process* of negotiation. The provisions of HB 1413 do not affect any public employee's ability to engage in collective bargaining, and they affirmatively protect employees' ability to choose their own representatives through meaningful, democratically accountable procedures.

Second, every provision of HB 1413 is valid under the equal-protection clause of Article I, § 2. All provisions of HB 1413 are subject to rational-basis scrutiny because the statute does not implicate a suspect class or burden a fundamental right. "Non-public-safety labor unions" are not a suspect class, and the right to bargain collectively protected by Article I, § 29 is not a "fundamental right" in the sense of one that is "deeply rooted in the nation's history and traditions." Moreover, every provision of HB 1413 satisfies rational-basis review—or any other level of scrutiny—because the State provided a compelling factual justification for every provision in the summary-judgment record.

Third, no provision of HB 1413 violates the rights of free speech and association under Article I, §§ 8 and 9. Imposing differential regulatory burdens on public-safety and non-public-safety unions does not impose any cognizable burden

on employees' or unions' rights of association. Further, HB 1413's transparency and disclosure requirements closely resemble federal requirements that apply to private-sector unions, and they directly advance important informational, accountability, and anti-corruption interests.

Fourth, the trial court erred by categorically disregarding the detailed factual justification for HB 1413 that the State submitted through four expert affidavits filed in opposition to summary judgment. It is well-established that the State may—and in some cases, must—submit factual and expert evidence to defend the constitutional validity of statutory provisions, under any level of scrutiny.

Fifth, the trial court erred by concluding that every provision of HB 1413 was facially invalid. Plaintiffs made no showing, with respect to any provision, that the provision had no constitutionally valid applications, and thus Plaintiffs fell short of meeting the demanding standard for facial invalidity.

Sixth, the trial court erred by holding that no provision of HB 1413 was severable from any other provision. This Court recently held that five words enacted in HB 1413 were severable from the rest of the statute, and this holding accords with the standards for severability set forth in Section 1.140, RSMo. Every provision of HB 1413 is severable from every other provision because each provision is independent and fully capable of being implemented on its own.

STATEMENT OF FACTS

In opposing Plaintiffs' Motion for Summary Judgment, the State submitted affidavits of four experts addressing the factual justifications for the various provisions of HB 1413. *See* D78 (affidavit of Dr. Daniel Shoag); D79 (Affidavit of Dr. Aaron Hedlund); D80 (Affidavit of Dr. Robert Maranto); D81(Affidavit of Dr. Daniel Stangler). The relevant portions of these affidavits and the State's other evidence were "referenced in [the State's] Rule 74.04(c) paragraphs and responses," and thus they were properly made part of "the Rule 74.04(c) record." *Green v. Fotoohighiam*, No. SC98262, -- S.W.3d --, 2020 WL 4592028, at *4 (Mo. banc Aug. 11, 2020); D68, at 24-38, ¶¶ 21-31, 32-42. Plaintiffs submitted no expert or other evidence to refute the State's asserted material facts and evidence on these points, and this failure "resulted in [Plaintiffs'] admission to all of [the State's] uncontroverted material facts." *Id.* at *3; *see also* Mo. Sup. Ct. R. 74.04(c)(3); D95. Thus, all the State's uncontroverted material facts should be "taken as true" for purposes of this appeal. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993).

A. Evidence of Problems Addressed by HB 1413.

Strong evidence demonstrates the problems associated with public-sector unions that the various provisions of HB 1413 address.

1. "Voluntary Recognition" Versus Secret Ballots.

First, the summary-judgment record demonstrates that the process of "voluntary recognition" of unions can be undemocratic, and that secret-ballot elections are strongly preferable.

"Voluntary recognition of a union typically occurs after a significant fraction of the potentially covered employees have indicated that they desire union representation, for example by signing union authorization cards." D78, at 4, ¶ 12. "This expression of preferences, often colloquially called a 'card check' campaign, differs from an election in that one's 'vote' on whether or not to unionize is often not secret." *Id.* In the absence of secret ballots, employees commonly "feel[] pressure from colleagues and union organizers to support unionization in non-secret 'card check' campaigns." *Id.* ¶ 13. "Moreover, a significant fraction of those signing union authorization cards vote against unionization in secret ballots." *Id.*

Most Americans agree that "a secret ballot is the most fair and democratic way for employees to decide whether to join a union." *Id.* at 5, ¶ 14. "[A]n overwhelming majority of both union and non-union households believe secret ballots are the best way to protect the individual rights of workers." *Id.*

Studies demonstrate that "allowing or mandating voluntary recognition" introduces a significant, non-democratic bias in favor of union recognition. *Id.* ¶ 15. "[M]andating secret elections was found to have a statistically meaningful impact on the likelihood a union was certified." *Id.*

Due to such concerns, many States besides Missouri also "require elections to certify a union, rather than permit voluntary recognition." *Id.* ¶ 16. "For example, secret ballot elections are required in Delaware, Georgia, Hawaii, Idaho, Iowa, Maryland, Nebraska, New Hampshire, Oklahoma, South Dakota, Tennessee, Vermont, Virginia, Wisconsin, and Wyoming in some circumstances." *Id.*

Moreover, "voluntary recognition" is particularly problematic in the public sector, because there can be a lack of true adversity between the public-sector employer and the union. "[T]he economic forces of the marketplace—that limit, at least in theory, the extent to which employers can meet employee groups' demands—do not constrain the public sector." *Independence-NEA*, 223 S.W.3d at 133. "In the public sector, meeting the demands of employee groups is thought to infringe on the constitutional prerogatives of the public entity's legislative powers by forcing the entity to raise taxes or distribute public services in a manner inconsistent with the best judgment of the entity's governing board." *Id.*; *see also* D68, at 36, ¶ 36.

2. Employee Turnover and Recertification Elections.

In addition, permitting public-sector unions to go for long periods without recertification undermines democratic choice and accountability. "Designation as exclusive representative … 'results in a tremendous increase in the power' of the union." *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct.

2448, 2467 (2018) (quoting *Am. Commc'ns Ass'n, C.I.O., v. Douds*, 339 U.S. 382, 401 (1950)). Moreover, "[d]esignating a union as the employees' exclusive representative substantially restricts the rights of individual employees." *Id.* at 2460. Without periodic recertification elections, this "tremendous" shift in power from individual employees to the unions can occur with little or no affirmative democratic support for the union.

"Turnover among public employees is significant." D78, at 5, ¶ 18. The turnover rate for public employees in Missouri is approximately 21.8 percent per year. *Id.* at 6, ¶ 18. This means that, on average over a three-year period, "after 3 years only 47.8% percent of the original employees will remain" in the bargaining unit. *Id.* ¶ 19. Thus, three years after a certification election, more than half of the employees will be new workers who never voted in any certification election. *Id.*

Over time, turnover creates situations where very few employees have ever expressed a democratic preference for the union's representation. "[I]n the absence of recertification requirements, it is possible for most workers subject to union representation not to have had an opportunity to vote on representation." *Id.* ¶ 20. "For example, a study by the Commonwealth Foundation in 2016 found that less than 1 percent of Pennsylvania's 100,000+ teachers had a say in selecting or affirming the union representing them." *Id.* Likewise, the legislative record for HB 1413 contains the example of a Missouri teacher's union in a school district that had

been recognized continuously for 50 years, since 1968. D68, at 37, ¶ 39. "Requiring a certification election every three years" thus "further[s] the shared goal of accurately assessing preferences of the current workforce regarding union representation." D78, at ¶ 21.

Moreover, 81 percent of public employees represented by a union are not members of the union. D68, at 20-21, ¶ 6. After a union has been certified as the exclusive representative of the bargaining unit, non-members may not have any say or control over the outcome of bargaining. D68, at 20, ¶ 5. Thus, "the vast majority of state employees represented by unions do not have direct control over how their representation is carried out after a labor organization has been recognized by the employer as the exclusive representative of the bargaining unit." *Id.* at 21, ¶ 7. This results in a lack of democratic input and accountability, not just for union certification decisions, but also for the results of collective-bargaining agreements.

Moreover, in Missouri, it is common for unions to negotiate for provisions requiring ongoing recognition of the union. For example, in this case, "all the [Plaintiffs'] collective-bargaining agreements provide that the unions shall continue to serve as the exclusive representative for the duration of the agreements." D107, at 5, ¶ 10. Plaintiffs in this case have never undergone a recertification election: "The status of Plaintiffs as the recognized exclusive representatives has continued since their original designation and approval by union members." *Id.*

"Missouri is not unique in requiring recertification." D78, ¶ 21. For example, Florida, Iowa, and Wisconsin all have provisions requiring periodic recertification elections. *Id.*

3. True-Majority Voting and Bias Against Short-Term Workers.

The State's evidence demonstrates that union election participation contains an inherent bias in favor of longer-term workers, which results in undemocratic outcomes in union elections and harms the interests of shorter-term workers.

"In the context of union certification, employees who intend to work in a covered position for a longer time face larger consequences from a union victory or loss," and therefore they are "more likely to participate in the elections." *Id.* at 6, ¶ 22. The "significant turnover among public employees means that many employees will expect shorter employment spells under the union's umbrella," and thus have "less incentive to participate in union certification elections." *Id.* at 7, ¶ 23. This dynamic can result in certification of unions where only a small minority of voters actually supported the union in the election. In a recent Missouri election, only 26.5 percent of covered workers voted to certify the union, yet the union was still certified because 65 percent of workers did not vote. *Id.* at 7, ¶ 24.

This creates a bias in favor of longer-term workers, and the union then tends to negotiate provisions that favor them and disfavor shorter-term workers. "Social science literature clearly documents that unions tend to negotiate deals that give

preference to seniority." *Id.* ¶ 25. "Many collective bargaining agreements also award preference to seniority in matters of scheduling," such as job-shift "scheduling, overtime schedules, and leave requests." *Id.* ¶ 26. In this case, many of the Plaintiff unions "included provisions in their collective bargaining agreements that disproportionately favor employees with longer tenure." D68, at 24, ¶ 20.

In addition, empirical literature reflects that "unionized wages [are] indeed steeper than non-unionized wages," and thus "collective bargaining relatively favors longer tenured workers." D78, at 7, ¶ 27. Further, social-science research indicates that "public sector pensions harm short-term employees," and, due to union-negotiated benefits, "short-service workers can leave with no benefits of any kind for their time spent in public employment." *Id.* at 8, ¶ 29.

"The consequence of shorter-term employees being less likely to vote and, at the same time, being less likely to benefit from unionization means that a sizeable group of non-voters may oppose unionization." *Id.* ¶ 30. Moreover, economic analysis provides no evidence that a majority-of-voters regime "is ex-ante better at capturing the preferences of voters." *Id.* ¶ 31. For these reasons, "mandating a majority of covered workers" is required to certify a union can "protect[] the preferences of shorter-term workers," and ensure that election outcomes represent "the true preferences of the relevant unit." *Id.* ¶ 32.

Again, "Missouri is not unique in requiring more than the majority voters in a certification context." *Id.* ¶ 33. Iowa also requires a "majority of eligible voters, not a majority of those voting in the election." *Id.* (citing Iowa Code § 20.15).

4. Promoting the Effectiveness of the Public-Sector Workplace.

In addition, common union-negotiated rules relating to seniority, job tenure, discipline, and stringent work descriptions create major problems for the entire workplace. Management studies demonstrate that such rules undermine workplace efficiency and harm the interests of both employers and employees. The State presented three expert affidavits discussing the problem extensively, and all three agree that common union-negotiated rules such as tenure, seniority rules, cumbersome disciplinary procedures, and detailed work descriptions contradict basic principles of competent and effective management in the workplace. *See* D79 (Hedlund Aff.); D80 (Maranto Aff.); D81 (Stangler Aff.); *see also* D68, at 29-30.

Dr. Hedlund's testimony. Dr. Hedlund attested that granting managers flexibility over hiring, promotion, discipline, firing, and work descriptions benefits both the employer and the employees. Such a policy "benefits employers by affording them greater flexibility to design contracts that fit their needs and facilitate the attainment of organizational objectives." D79, at 8. By contrast, "one-size-fits-all, rigidly imposed restrictions on contract design are prone to result in inferior outcomes and higher costs for employers." *Id.* at 9. Employer should have "the

flexibility to offer contracts that are more appealing to workers, cost efficient, and conducive to achieving organizational goals because of the embedded incentive structure." *Id.* at 10.

"[C]onstraints that artificially ban" certain employment contracts, such as seniority rules, "raise costs for the employer *without delivering higher ex-ante utility to employees.*" *Id.* at 12 (emphasis in original). "[R]estricting the set of permissible contracts that an employer can offer is likely to raise labor costs without delivering gains to prospective employees." *Id.* at 13.

Increased flexibility also provides other benefits to employees. "By reducing uncertainty related to litigation uncertainty and grievance procedures, employment-at-will frees up resources to provide greater training, professional development, and strategic investments to enhance worker productivity." *Id.* at 14. Such policies also "benefit[] employees by allowing them to enter into contracts that better serve their interests." *Id.* at 15. This "need not mean the end to any consideration of seniority or job security. Quite the contrary, circumstances may in fact cause employers to set up such arrangement *when it is in the interests of their employees*." *Id.* at 15-16 (emphasis in original). Such flexibility both promotes productivity and boosts employee morale. "Employment protections that undermine employment-at-will have been shown to reduce productivity and increase absenteeism." *Id.* at 19.

By contrast, common union-negotiated protections such as seniority, tenure, workplace rules, and limitations on discipline and firing, have a disproportionate impact on poorer, less trained, and junior workers. "Employment-at-will restrictions force employees into receiving compensation in the form of job security instead of other dimensions … that they may find more valuable." *Id.* at 20. This creates barriers to entry and disfavors workers who are "young, mobile, and just beginning their careers." *Id.* "Imposing a one-size-fits-all contract on such workers is not in their best interest." *Id.* at 21. Such restrictions "harm employment opportunities, particularly for young, low-skilled, and marginalized workers." *Id.* at 22. "As a result, such restrictions are a force for increasing inequality." *Id.*

Among other things, tenure and seniority rules tend to concentrate discharges among the most recent hires, creating substantial barriers to workplace entry. "[I]f job termination is allowed for only some workers (e.g. those with less seniority in a probationary period), terminations may be *more frequent* for those workers when employment-at-will is restricted." *Id.* at 23 (emphasis in original). Such "regulation reduces aggregate employment, and the greatest adverse impact of regulation is on youth and groups marginal to the work force." *Id.* at 23. "Insiders and entrenched workers gain from regulation, but outsiders suffer." *Id.*

For all these reasons, "job security provisions are an extremely inefficient and inequality-increasing mechanism for providing income security to workers." *Id.* at

24. Flexibility "is likely to enhance Missouri's ability to pay and better attract, retain, and develop talent," and "to increase public sector productivity in Missouri." *Id.* at 26-27.

Dr. Maranto's testimony. Similarly, Dr. Maranto attested that "[o]ver-regulated public personnel systems including employee tenure, seniority systems, and inflexible pay systems have largely outlived their usefulness." D80, at 4-5. "The primary features of merit systems—standardized pay scales, complicated position classification, bumping rights based on seniority rather than performance, detailed rules and regulations surrounding hiring and promotion, and of course tenure—often contribute to rigidity, low morale, inadequate pay, low productivity, and less trust in government." *Id.* at 5.

Such rules regarding employee tenure, seniority, and workplace inflexibility have at least five negative effects. "First, tenure and other restrictive personnel rules make it unduly difficult to improve or terminate poor performers, directly degrading the efficiency and effectiveness of government." *Id.* at 8. "Second and relatedly, this rigidity harms morale among the vast majority of public servants who do their jobs and may in fact have to do more than their jobs to make up for unproductive coworkers." *Id.* Third, such rigidity "almost certainly negatively affect[s] public perceptions of public service." *Id.* Fourth, these restrictions "likely affect the composition of the civil service in ways that weaken organizational performance."

Id. "Fifth and relatedly," such "systems limit the ability of leaders to remake organizations in need of reform." *Id.*

"In Missouri state government … grievances over discipline, arbitration, administrative review, and seniority considerations … impose significant costs to addressing underperforming employees." *Id.* at 9. "[N]arrow bureaucratic position descriptions and work rules limit the ability of managers to transfer such employees to posts matching their skills." *Id.* at 10. Such rules undermine public trust in government, because "[v]ery few taxpayers have tenured positions, so it is difficult for them to understand why their public servants have tenure." *Id.* at 10. Such "regulation and constraint" may thus "undermine the efficiency, effectiveness, self-image, and very legitimacy of public bureaucracies." *Id.* at 17.

Dr. Stangler's testimony. Likewise, Dr. Stangler attested that, based on extensive social-science research, "the flexibility of organizations to promote, dismiss, move, and discipline based on performance … is consistently found to be a cause of organizational effectiveness." D81, at 4. "Adoption of high-quality management practices … can advance the strong public interest in effective delivery of government services." *Id.*

"Scholars working directly with front-line managers in the public and private sectors have reached a broad consensus on what characterizes high-quality or best management practices." *Id.* at 5. "[M]anagerial flexibility is paramount for

effectiveness." *Id.* "The standard for best-in-class incentives management includes the flexibility to promote and retain based on strong performance and address underperformance through retraining or dismissal." *Id.* at 6.

Such practices benefit employees as well as employers. "Better management practice enhances employee well-being," *id.* at 9. Limiting managerial flexibility "exacerbate[s] such negative consequences" as low morale, dispirited staff, and poorly functioning teams. *Id.* "An environment with low-quality management practices is detrimental to employees." *Id.*

Missouri is no exception to these problems. As one study concluded, "[p]ublicly (i.e., government) owned organizations have worse management practices across all sectors…." *Id.* at 10. "They are particularly weak at incentives: promotion is more likely to be based on tenure (rather than performance), and persistent low performers are much less likely to be retrained or moved." *Id.* at 10-11. "One specific practice that is common in the public sector, at issue here—promotion based on tenure not performance—is a leading feature of low-quality management." *Id.* at 11. "The public interest is well-served by an effective and high-performing public sector—adoption of high-quality management practices in the public sector will improve government service delivery." *Id.* at 18.

5. Protecting Economic Flexibility During Budgetary Shortfalls.

There is widespread public concern that union-negotiated benefits can threaten state and local government budgets. "When the City of Detroit filed for bankruptcy in 2013, the $3.5 billion it owed in unfunded pension liabilities topped the list of its largest unsecured claims." D68, at 20, ¶ 1. "At the time, Detroit had $5.7 to $6.4 billion in other post-employment benefit liabilities, mostly unfunded." *Id.* Likewise, "[w]hen the City of San Bernardino, California filed for bankruptcy in 2012, labor costs were the city's largest general fund expenditure." *Id.* ¶ 2.

Similar problems of unfunded liabilities guaranteed by public-sector labor agreements afflict the budgets of state governments as well. *See, e.g.*, *Janus*, 138 S. Ct. at 2474–75 (explaining that paying for "unfunded pension and retiree healthcare liabilities" constitutes a quarter of Illinois's budget and led the State's credit rating to drop to "one step above junk" the "lowest ranking on record for a U.S. state") (citations omitted); *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 320 (2012) ("Public-employee salaries, pensions, and other benefits constitute a substantial percentage of the budgets of many States and their subdivisions.").

Missouri is not exempt from these grave problems. "Revenue collection by state and local governments and public entities can be highly variable and difficult to forecast." D78, at 9, ¶ 34 (Shoag Aff.). "One consequence of the variability and persistence of revenue shocks is that agreements entered into in good faith given projections at the time may become non-viable." *Id.*

Missouri's Constitution and statutes limit the ability of state and local governments to borrow money to make up for budgetary shortfalls. *See id.* ¶¶ 35-36; MO. CONST. art. III, § 37; MO. CONST. art. VI, § 26(b); § 95.115, RSMo. As a result, state and local governments may "find themselves unable to raise sufficient revenue during periods of distress." *Id.* ¶ 38. "For example, during negotiations with creditors, Detroit's emergency manager noted that the city was 'levying all taxes at or near the statutory maximum rates,' and that residents were 'leaving Detroit to escape high taxes.'" *Id.* at 9-10, ¶ 38. "Smaller public employers may be even more constrained in their ability to raise additional revenue due to their generally more limited revenue streams." *Id.* at 10, ¶ 38.

"State and local governments provide vital services whose interruption can be catastrophic." *Id.* ¶ 39. "It is clearly in the general interest of the state to ensure that essential public functions are not interrupted due to budget shortfalls." *Id.* Permitting modifications of the economic terms of collective-bargaining agreements during times of budgetary shortfalls "can serve the public interest" and also serve "the interest of public employees, as absent flexibility, cuts may be carried out in a disorganized and even more burdensome manner." *Id.*

For these reasons, "Missouri is not alone" in providing for the re-negotiation of economic provisions of public-sector union contracts in times of economic crisis. *Id.* ¶ 43. For example, Michigan, Florida, and Washington have all adopted similar

requirements. *Id.* Moreover, even before HB 1413, many collective-bargaining agreements in Missouri already included provisions requiring for modification of economic terms during budgetary shortfalls. "Several of the Plaintiffs in this case have language in their collective bargaining agreements allowing the public employer to unilaterally alter the agreement or suspend the agreement under certain circumstances," such as financial shortfalls or other emergencies. D68, at 23, ¶ 18.

6. Transparency and Disclosure Requirements.

Transparency provisions for unions, such as financial record-keeping and disclosure requirements, promote informed decision-making by employees and serve democratic accountability by providing union members and represented employees with information about union operations. They also deter corrupt and abusive practices, making them more difficult to perform and easier to detect.

The federal government already imposes such record-keeping and reporting requirements on private-sector unions. "Under the federal Labor Management and Reporting Disclosure Act (LMRDA), most labor unions that represent private employees must file financial reports and other disclosures like those required of public employee organizations under HB 1413." D78, ¶ 44.

"The benefits of increased transparency are clear." *Id.* ¶ 45. "The LMRDA was specifically designed to make the internal workings of the labor unions fully transparent to both their members as well as the public in the hopes that such

openness would hinder corruption on the part of union management." *Id.* Such transparency serves to deter and detect instances of union corruption, which remain a significant problem to this day. "From 2008-2018, the Office of Labor Management Standards report[ed] over 1,100 convictions for embezzlement and other violations of the LMRDA and related laws." *Id.* Moreover, in Missouri alone, at least 100 federal criminal enforcement actions were filed against union officials for embezzlement, corruption, and similar practices between 2001 and 2018, including many involving public-sector union officials. *See* U.S. Dep't of Labor, Office of Labor-Management Standards (OLMS), *Criminal and Civil Enforcement Actions*, https://www.dol.gov/olms/regs/compliance/enforcement_1.htm (last visited Aug. 12, 2020) (cited at D78, ¶ 45). "Increased transparency deters corruption, makes it easier to catch the corruption that does occur, and lets members better understand and monitor how their funds are being used." D78, at 11, ¶ 45.

For this reason, record-keeping and reporting requirements are common, and they are already in effect in Missouri for many unions through federal law and internal union requirements. "[S]everal unions already file federal disclosures" under the LMRDA, "and others represent local branches of organizations, like AFSCME, that mandate detailed financial reporting internally." D78, at 11, ¶ 44. "Most unions must file Form 990 with the IRS, which makes some of the requested

information in HB 1413 public." *Id.* "[S]everal states including Massachusetts and Iowa require public employee unions to file financial disclosures with the state." *Id.*

7. Protecting the Voluntary Nature of Union Contributions.

In 2018, the U.S. Supreme Court held that "States and public-sector unions may no longer extract agency fees from nonconsenting employees." *Janus*, 138 S. Ct. at 2486. Automatically deducting union contributions without a clear showing of employee consent "violates the First Amendment and cannot continue." *Id.* "Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." *Id.*

Janus further held that "[b]y agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed." *Id.* (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), and *Knox*, 567 U.S., at 312–13). "Rather, to be effective, the waiver must be freely given and shown by 'clear and compelling' evidence." *Id.* (quoting *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion)); *see also College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680–82 (1999). "Unless employees *clearly and affirmatively consent* before any money is taken from them, this standard cannot be met." *Janus*, 138 S. Ct. at 2486 (emphasis added).

B. Provisions of HB 1413 Addressing These Well-Documented Problems.

HB 1413 was enacted in 2018 to address the well-documented problems with public-sector union representation discussed above. Consistent with this Court's admonition that public-sector unions raise unique problems and concerns, *see Independence-NEA*, 223 S.W.3d at 133, HB 1413 applies only to public-sector unions, not to unions in the private sector. *See* § 105.503.2(4), RSMo ("The provisions of sections 105.500 to 105.598 shall not apply to … [a]ny labor agreement between a labor organization and an employer that is not a public body.").

1. Requiring Secret Ballots for Public-Sector Union Elections.

HB 1413 contains provisions designed to promote democratic accountability and ensure ongoing majority approval of both public-sector unions and the collective-bargaining agreements they negotiated. First, the law prohibits "voluntary recognition" of public-sector unions, which is achieved through informal, undemocratic card-check campaigns, and instead adopts a policy of secret ballots for public-sector union certification elections. § 105.575.1, RSMo. Section 105.575.1 provides that "[v]oluntary recognition by any public body of a labor organization as an exclusive bargaining representative shall be prohibited." *Id.* "Recognition as an exclusive bargaining representative may only be obtained by a labor organization through an election conducted under this section." *Id.*

The union must obtain representation status through a "secret ballot election." § 105.575.2, RSMo. In that election, neither the union nor the employer "shall

attempt to threaten, intimidate, coerce, or otherwise restrain any eligible voter in the free exercise of his or her individual choice to support or oppose the selection of the labor organization in question as the exclusive bargaining representative of the public employees in the bargaining unit." § 105.575.4, RSMo. "Elections shall be conducted by secret ballot, using such procedures as the board shall determine are appropriate for ensuring the privacy and security of each public employee's vote." § 105.575.5, RSMo.

2. Requiring Periodic Recertification Elections.

To ensure that the union retains the ongoing support of a majority of workers in the bargaining unit, the law instructs that every public-sector union must be recertified by August 2020, and must be recertified by election periodically thereafter. § 105.575.12, RSMo. "All subsequent recertification elections shall be held every three years." *Id.* "To meet the recertification requirement, continuation of the labor organization's status as the exclusive bargaining representative shall be favored in a secret ballot election…." *Id.*

3. Requiring True Majority Support in Union Elections.

In addition, under HB 1413, a public-sector union must obtain 50 percent of the votes of all workers in the bargaining unit to prevail in a certification or recertification election. "Any labor organization receiving the votes of more than fifty percent of all public employees in the bargaining unit shall be designated and

recognized by the public body as the exclusive bargaining representative for all public employees in the bargaining unit." § 105.575.8, RSMo. Decertification elections also require a true majority of all "the public employees in the bargaining unit" to support decertification. § 105.575.11, RSMo. Recertification likewise requires the support of "more than fifty percent of the public employees in the bargaining unit." § 105.575.12, RSMo.

The majority-approval requirement extends, not only to union certification, but also to the approval of labor agreements negotiated on behalf of the bargaining unit. "Before any proposed agreement or memorandum of understanding is presented to a public body, the labor organization, as a condition of its presentation, shall establish that it has been ratified by a majority of its members." § 105.580.5, RSMo. "Any tentative agreement reached between the parties' representatives shall not be binding on the public body or labor organization." *Id.*

4. Protecting Workplace Flexibility in Personnel Matters.

HB 1413 contains provisions addressing the well-documented problems associated with common provisions regarding seniority, tenure, discipline and discharge restrictions, and stringent workplace rules. HB 1413 does not interfere with core topics of bargaining such as wages and benefits, providing that "labor agreements negotiated between a public body and a labor organization may cover wages, benefits, and all other terms and conditions of employment." § 105.585,

RSMo. But the statute provides that "[e]very labor agreement shall include a provision reserving to the public body the right to hire, promote, assign, direct, transfer, schedule, discipline, and discharge public employees." § 105.585(1), RSMo. In addition, "[e]very labor agreement shall also include a provision reserving to management the right to make, amend, and rescind reasonable work rules and standard operating procedures." *Id.*

5. Protecting Legislative Prerogatives and the Public Fisc.

HB 1413 also prevents collective bargaining and its outcomes from infringing on core legislative prerogatives. To this end, HB 1413 includes provisions requiring the triennial reconsideration and renegotiation of labor agreements. "The term of any labor agreement, provision of a labor agreement, or extension of a labor agreement entered into after August 28, 2018, shall not exceed a period of three years." § 105.580.8, RSMo. "Economic" provisions of collective bargaining agreements shall be renegotiated every three years: "After the first agreement between the public body and the labor organization is adopted, bargaining for renewal agreements shall take place triennially. . . . The parties may elect to bargain noneconomic terms for longer periods, but all economic provisions of the agreement shall be adopted on a triennial basis only." § 105.580.7, RSMo.

The statute also reaffirms Missouri's longstanding principle that neither the employee nor the union is obligated to accept any substantive proposal during

collective bargaining: "neither side shall be required to offer any particular concession or withdraw any particular proposal." § 105.580.3, RSMo.

Further, the statute prohibits a union's bargaining representative from refusing to meet with, or seeking to remove, the public employer's bargaining representative. "No labor organization may refuse to meet with designated representatives of any public body or engage in conduct intended to cause the removal or replacement of any designated representative by the public body." §105.580.2, RSMo. This provision applies only to the employer's "designated representative" for negotiating with the union—not to any other public official. *Id.*

Consistent with prior law and practice, HB 1413 also prevents the public employer's bargaining representative from binding the employer to an agreement without the full authorization of the public governmental body. The statute provides that, once a proposed agreement is presented to the public body, "[t]he public body may approve the entire agreement or any part thereof. If the public body rejects any portion of the agreement, the public body may 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 the topic in question shall be adopted." § 105.580.5, RSMo. "Any tentative agreement reached between the parties' representatives shall not be binding on the public body or labor organization." § 105.580.5, RSMo. This provision does not permit a public

employer to unilaterally rescind the terms of a binding, fully executed labor agreement, nor does it permit the employer to force an agreement upon the labor organization. Rather, the provision confirms that a negotiated agreement is not and cannot be final until it is ratified by the public body itself. *See id.*

Furthermore, the statute includes provisions that permit renegotiation of economic terms in the event of a budget shortfall. "Every labor agreement shall include a provision stating that in the event of a budget shortfall, the public body shall have the right to require the modification of the economic terms of any labor agreement." § 105.585(6), RSMo. In such an event, the public employer must notify the union and "provide a period of thirty days during which the public body and the labor organization shall bargain over any necessary adjustments to the economic terms of the agreement." *Id.* Even if that 30-day bargaining period fails to yield agreement, the public body may make "necessary adjustments" to the labor agreement only "upon good cause." *Id.*

6. Preventing Taxpayer Funds from Subsidizing Union Activity.

HB 1413 includes provisions prohibiting the use of public funds to subsidize union activities, such as paying state salaries to finance union activity. The statute provides: "The public body shall not pay any labor organization representative or employee for time spent participating in collective bargaining or preparing for collective bargaining on behalf of a labor organization, except to the extent the

person in question is an employee of the public body and elects to use accrued paid time off that was personally accrued by such person to cover the time so spent." § 105.580.4, RSMo. Similarly, Section 105.585(4) provides that "[e]very labor agreement shall expressly prohibit labor organization representatives and public employees from accepting paid time … by a public body for the purposes of conducting labor organization-related activities concerning collective bargaining," but "every labor agreement may allow for paid time off for the purposes of grievance-handling, advisory committees, establishing a work calendar, and internal and external communication." § 105.585(4), RSMo.

For similar reasons, the statute requires public-sector unions to pay modest fees to defray the costs of conducting certification elections. § 105.575.15, RSMo. Such fees are imposed on a sliding scale, with smaller fees for smaller unions, to account for both the size of the elections and the more limited resources of smaller organizations. *See id.* § 105.575.15(1)-(6).

7. Ensuring that Union Support is Knowing and Voluntary.

Consistent with the U.S. Supreme Court's guidance in *Janus*, HB 1413 requires annual certification that employees consent to the withholding of union dues from their wages. "No sum shall be withheld from the earnings of any public employee for the purpose of paying any portion of dues, agency shop fees, or any other fees paid by members of a labor organization or public employees who are

nonmembers except upon the annual written or electronic authorization of the member or nonmember." § 105.505.1, RSMo. The statute also prohibits unions from using members' or non-members' union dues and fees for political contributions or expenditures "except with the informed written or electronic authorization of such member or nonmember received within the previous twelve months." § 105.505.2, RSMo.

8. Promoting Transparency Through Disclosure.

HB 1413 also includes provisions requiring public-sector unions to comply with reasonable record-keeping and reporting requirements, which closely track the record-keeping and reporting requirements of federal law under the LMRDA.

"Every labor organization shall file annually with the department a financial report signed by its president and treasurer or corresponding principal officers containing the following information in such detail as may be necessary to accurately disclose its financial condition and operations for its preceding fiscal year." § 105.533.2, RSMo. Among other items, the financial report must include an "itemization schedule" disclosing the disbursements made for "[p]ublic relations activities," "[p]olitical activities," and lobbying activities. § 105.533.2(6)(d), (e), (f), RSMo. The schedule must also disclose "[a] list of candidates, continuing committees, federal political action committees, nonprofit organizations, and community organizations to which the labor organization contributed financial or

in-kind assistance and the dollar amount of such assistance." § 105.533.2(9), RSMo. "Every labor organization shall submit the report required by subsection 2 of this section in an electronic format that is readily and easily accessible and shall make available the information required to be contained in such report to all of its members." § 105.533.3, RSMo.

In addition, "[e]very person required to file any report under the provisions of sections 105.533 to 105.555 shall maintain records on the matters required to be reported that will provide in sufficient detail the necessary basic information and data from which the documents filed with the department may be verified, explained or clarified, and checked for accuracy and completeness." § 105.545, RSMo.

9. Exempting Public-Safety Unions.

Following the practice of other states, HB 1413 exempts public-safety unions—such as those representing police, firefighters, ambulance drivers, and emergency medical technicians—from its coverage. "The provisions of sections 105.500 to 105.598 shall not apply to . . . public safety labor organizations and all employees of a public body who are members of a public safety labor organization." § 105.503.2(1), RSMo. The statute defines "public safety labor organization" as "a labor 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." § 105.500(8), RSMo. The statute also exempts the employees of the Department of Corrections, who serve similar public-safety functions, from its coverage. *See* §§ 105.500(6), 105.503.2(2), RSMo.[1]

C. Procedural History.

On August 27, 2018, one day before HB 1413 was to go into effect, Plaintiffs filed suit to invalidate and enjoin enforcement of the entire law. D2. Plaintiffs filed a Motion for Preliminary Injunction on October 17, 2018. D10. The trial court granted the Plaintiffs' Motion for Preliminary Injunction on March 8, 2019. D49 (Order Granting Preliminary Injunction).

[1] HB 1413 also included a provision requiring that "[e]very labor agreement shall expressly prohibit all strikes and picketing of any kind," and that required labor agreements to include provisions terminating employees who "picket[] over any personnel matter." § 105.585(2), RSMo. Plaintiffs challenged this provision. While this appeal was pending, this Court addressed the constitutionality of this provision in *Karney v. Dep't of Labor and Indus. Relations*, 599 S.W.3d 157 (Mo. banc 2020). *Karney* held that the prohibition against "picketing of any kind" is unconstitutional, while the prohibition on picketing over "any personnel matter" is valid so long as it is limited to personnel matters that are not of public concern. *Id.* at 165. The Court severed the invalid provision from the statute and reaffirmed the validity of the statute's prohibition against public-employee strikes. *Id.* at 166 & n.10. This decision is binding as precedent on the parties in this appeal, and thus the validity of § 105.585(2) is no longer at issue here.

On August 8, 2019, without conducting any discovery or retaining any experts, Plaintiffs filed a Motion for Summary Judgment on all counts contained in their Petition. D51. Plaintiffs' "Statement of Unconverted Facts" accompanying the motion relied entirely on: (1) affidavits executed by an agent for each Plaintiff almost one year earlier, D53-59; (2) copies of Plaintiffs' labor agreements executed prior to the enactment of HB 1413, *id.*; (3) a marked-up version of an expired labor agreement showing provisions that would no longer be valid under HB 1413 (the chart was presumably created by Plaintiffs), D60; and (4) a chart (also presumably created by Plaintiffs) summarizing the provisions of HB 1413, D61. Plaintiffs' other "Uncontroverted Facts" constituted entirely of legal conclusions regarding the validity of HB 1413's provisions. D52, at 5-10, ¶¶ 12-26.

In responding to summary judgment, the State filed affidavits from four experts, as well as materials from the legislative record and other factual materials, all of which it incorporated in detail in its Statement of Additional Material Facts. *See, e.g.*, D68, at 24-35, ¶¶ 21-31; *see also* D78, D79, D80, D81. In reply, Plaintiffs did not file any evidence to rebut the evidence supporting Defendants' Statement of Additional Facts, or submit any additional evidence. D94, D95. The trial court granted summary judgment to Plaintiffs on January 27, 2020, facially invalidating every provision of HB 1413 and permanently enjoining the enforcement of the entire law. D107.

POINTS RELIED ON

I. The trial court erred in granting summary judgment to Plaintiffs on their claim that provisions of HB 1413 violate public employees' rights under Article I, § 29 of the Constitution, because no provision of HB 1413 infringes on public employees' right to "bargain collectively" or to do so through "representatives of their own choosing," in that the right to bargain collectively entails the right to participate in the process of bargaining, without guaranteeing any particular outcome of bargaining; HB 1413's provisions safeguard and protect public employees' right to choose their representatives by promoting democratic freedom and accountability in union selection processes; and the State's undisputed evidence foreclosed summary judgment on these issues.

- *Independence-Nat. Educ. Ass'n v. Independence Sch. Dist.*, 223 S.W.3d 131 (Mo. banc 2007)
- *Mo. Coal. of Police, Fraternal Order of Police, Lodge 15 v. City of Chesterfield*, 386 S.W.3d 755 (Mo. banc 2012)
- *State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35 (Mo. banc 1969)

- *W. Cent. Mo. Region Lodge #50 of Fraternal Order of Police v. City of Grandview*, 460 S.W.3d 425 (Mo. App. W.D. 2015)

II. The trial court erred in granting summary judgment to Plaintiffs on their claim that the provisions of HB 1413 are invalid under the equal-protection provision of Article I, § 2 of the Missouri Constitution, because all provisions of HB 1413 are subject to and easily satisfy rational-basis review under that provision, in that HB 1413 does not implicate any suspect class or severely burden any fundamental right; each provision is supported by a compelling factual justification sufficient to satisfy rational-basis review or any other level of scrutiny; and the State's undisputed evidence foreclosed summary judgment on these issues.

- *Comm. for Educ. Equal. v. State*, 294 S.W.3d 477 (Mo. banc 2009)
- *Sweeney v. Pence*, 767 F.3d 654 (7th Cir. 2014)
- *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640 (7th Cir. 2013)

III. The trial court erred in granting summary judgment to Plaintiffs on their claim that HB 1413 infringes on the rights of free speech and free association protected by Article I, Sections 8 and 9 of the Constitution, because no provision of HB 1413 violates the freedom of speech or association, in that HB 1413 does not place discriminatory burdens on

speech or association; HB 1413's provisions requiring annual certification for payroll deductions and use of union fees for political expenditures protect public employees' First Amendment freedoms; HB 1413's transparency and disclosure requirements advance the State's important informational, accountability, and anti-corruption interests; and the State's undisputed evidence foreclosed summary judgment on these issues.

- *Geier v. Mo. Ethics Comm'n*, 474 S.W.3d 560 (Mo. banc 2015)
- *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018)
- *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353 (2009)
- *Lyng v. Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW*, 485 U.S. 360 (1988)

IV. The trial court erred in granting summary judgment to Plaintiffs on any disputed issue, because material facts in the summary-judgment record prevented the entry of summary judgment for Plaintiffs on every issue, in that the State filed evidence including four expert affidavits setting forth its detailed factual justification for the challenged provisions of HB 1413 in opposing summary judgment, but

the trial court categorically and erroneously refused to consider the State's evidence.

- *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371 (Mo. banc 1993)

V. The trial court erred in holding that the provisions of HB 1413 were facially invalid, because Plaintiffs' constitutional challenges did not satisfy the demanding standard for facial challenges of showing that there was no set of circumstances in which the law could be validly applied, in that every provision of HB 1413 has at least some valid applications.

- *State v. Perry*, 275 S.W.3d 237, 243 (Mo. banc 2009)

VI. The trial court erred in holding that none of the provisions of HB 1413 were severable, because every provision of HB 1413 is severable from every other provision under the standard for severability applicable to substantive constitutional challenges under Section 1.140, RSMo, in that no provision of HB 1413 is essentially and inseparably connected with any other provision, every provision of HB 1413 is complete and capable of implementation standing alone, and the failure to sever the exemption for public-safety unions improperly abrogated HB 1413's substantive reform provisions in their entirety.

- *Karney v. Dep't of Labor and Indus. Relations*, 599 S.W.3d 157 (Mo. banc 2020)
- *Mo. Roundtable for Life v. State*, 396 S.W.3d 348, 353 (Mo. banc 2013)
- *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017)

STANDARD OF REVIEW

This Court applies *de novo* review to the trial court's order granting summary judgment. *ITT Commercial*, 854 S.W.2d at 376. "The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially." *Id.* "The propriety of summary judgment is purely an issue of law," and "an appellate court need not defer to the trial court's order granting summary judgment." *Id.*

"When considering appeals from summary judgments, the Court will review the record in the light most favorable to the party against whom judgment was entered." *Id.* "Facts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary judgment motion." *Id.* "We accord the non-movant the benefit of all reasonable inferences from the record." *Id.*

In addition, "[a] statute is presumed to be constitutional and will not be invalidated unless it 'clearly and undoubtedly' violates some constitutional provision and 'palpably affronts fundamental law embodied in the constitution.'" *Bd. of Educ. of City of St. Louis v. State*, 47 S.W.3d 366, 368–69 (Mo. banc 2001). "The burden to prove a statute unconstitutional is upon the party bringing the challenge." *Id.* at 369.

Furthermore, "[w]hen disposing of a case on appeal, Rule 84.14 requires this Court to 'give such judgment as the [trial] court ought to give' and 'dispose finally of the case,' unless 'justice otherwise requires.'" *John Patty, D.O., LLC v. Mo. Prof'ls Mut. Physicians Prof'l Indemnity Ass'n*, 572 S.W.3d 581, 594 (Mo. App. E.D. 2019) (citing *Mathes v. Nolan*, 904 S.W.2d 353, 355 (Mo. App. E.D. 1995)). Where the appellate court's holding "establishes the appellant is entitled to judgment as a matter of law, Rule 84.14 requires [the court] to enter judgment in the Appellants' favor, without remanding the case to the trial court." *Id.* at 594. *See also, e.g.*, *Thiemann v. Columbia Pub. Sch. Dist.*, 338 S.W.3d 835, 843 (Mo. App. W.D. 2011).

ARGUMENT

I. The trial court erred in granting summary judgment to Plaintiffs on their claim that provisions of HB 1413 violate public employees' rights under Article I, § 29 of the Constitution, because no provision of HB 1413 infringes on public employees' right to "bargain collectively" or to do so through "representatives of their own choosing," in that the right to bargain collectively entails the right to participate in the process of bargaining, without guaranteeing any particular outcome of bargaining; HB 1413's provisions safeguard and protect public employees' right to choose their representatives by promoting democratic freedom and accountability in union selection processes; and the State's undisputed evidence foreclosed summary judgment on these issues.

Article I, § 29 provides "[t]hat employees shall have the right to organize and to bargain collectively through representatives of their own choosing." MO. CONST. art. I, § 29. The trial court held that several provisions of HB 1413 violate employees' right to "bargain collectively" and to do so through "representatives of their own choosing." *Id.* This holding was in error.

Preservation. The State preserved this issue. D83, at 23-29.

A. No Provision of HB 1413 Violates Public Employees' Right to "Bargain Collectively."

The trial court held that HB 1413 violates employees' right to collective bargaining by regulating the *outcomes* of bargaining, in that it requires public-sector collective bargaining agreements to reflect flexible policies on hiring, promotion, discipline, discharge, and job descriptions. D107, at 19-20, ¶¶ 38-40. This holding contradicts the plain language of the Missouri Constitution and this Court's cases.

1. Article I, § 29 protects the right to participate in the process of collective bargaining, but it does not guarantee any substantive outcome or range of outcomes from bargaining.

First, the plain language of the Missouri Constitution guarantees only the right to "bargain collectively," MO. CONST. art. I, § 29—*i.e.*, it guarantees that employees may participate in a particular *process*, but it does not guarantee that collective bargaining will reach any particular *outcome*. This Court defines terms in the Missouri Constitution according to their "ordinary and usual meaning," which "normally appears in the dictionary." *Akin v. Mo. Gaming Comm'n*, 956 S.W.2d 261, 263 (Mo. banc 1997). Under its ordinary and usual meaning, both in 1945 and today, the verb "bargain" denotes the process of negotiating, not an outcome. *See* WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY 219 (1952) (defining "bargain" as "to negotiate over the terms of an agreement"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 196 (2002) (defining "bargain" as "to negotiate over

the terms of an agreement or contract"). Thus, to guarantee that someone may "bargain" about something indicates that they will be allowed to *negotiate*—it does not guarantee an agreement or any substantive outcomes or range of outcomes in an agreement.

This Court's cases have consistently adopted this limited understanding of the right to "bargain collectively" protected by Article I, § 29. For example, in 1957, this Court "declared … that the purpose of article I, section 29 of the Missouri Constitution 'was to declare that such rights of collective bargaining were established in this state. It means that employees have the right to organize and function for a special purpose: namely, for the purpose of collective bargaining.'" *W. Cent. Mo. Region Lodge #50 of Fraternal Order of Police v. City of Grandview*, 460 S.W.3d 425, 446 (Mo. App. W.D. 2015) (quoting *Quinn v. Buchanan*, 298 S.W.2d 413, 417 (Mo. banc 1957), *overruled in part on other grounds by E. Mo. Coal. of Police, Fraternal Order of Police, Lodge 15 v. City of Chesterfield*, 386 S.W.3d 755,760–62 (Mo. banc 2012)). Under this understanding, Article I, § 29 "*is not a labor relations act*, specifying rights, duties, practices and obligations of employers and labor organizations[.]" *Id.* at 446 (emphasis added) (quoting *Quinn*, 298 S.W.2d at 418). As a result, legislation that regulates the outcomes of collective bargaining on certain topics "do[es] not in any way violate the employees' right to organize and to bargain collectively." *Id.*

Subsequent collective-bargaining cases reaffirm this interpretation of Article I, § 29. In *Independence-NEA*, citing cases from 1969 to 2007, this Court emphasized that Article I, § 29 does not impose any requirement that bargaining reach any substantive outcome. 223 S.W.3d at 136. "There is nothing in the law, as it has developed, that requires a public entity to agree to a proposal by its employee unions or organizations." *Id.* "In fact, this Court has repeatedly recognized that the public sector labor law allows employers to reject all employee proposals, as long as the employer has met and conferred with employee representatives." *Id.* (citing *State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35, 41 (Mo. 1969); *State ex rel. O'Leary v. Mo. State Bd. of Mediation*, 509 S.W.2d 84, 88–89 (Mo. banc 1974); *Curators of Univ. of Mo. v. Pub. Serv. Emps. Local No. 45*, 520 S.W.2d 54, 57 (Mo. banc 1975); and *Reichert v. Bd. of Educ. of City of St. Louis*, 217 S.W.3d 301 (Mo. banc 2007)).

This reasoning was central to the Court's holding in *Independence-NEA* that *Clouse* should be overruled, because *Clouse* rested on the concern that public-sector collective bargaining would infringe on legislative prerogatives to set policies with respect to "qualifications, tenure, compensation and working conditions of public officers[]." *Id.* at 136 (quoting *City of Springfield v. Clouse*, 206 S.W.2d 539, 544–45 (Mo. banc 1947)). Because Article I, § 29 permitted the public employer full discretion to reject any bargaining proposal, *Independence-NEA* concluded that

extending the right of collective bargaining would not infringe legislative prerogatives. *Id.* "If the public employer is free to reject any proposals of employee organizations, and thus to use its governing authority to prescribe wages and working conditions, none of the public entity's legislative or governing authority is being delegated." *Id.*

In *Independence-NEA* and prior cases, this Court emphasized that retaining the public body's authority to accept or reject any proposal was essential to avoid an unconstitutional infringement on legislative prerogatives. In *City of Cabool*, considering a statute that authorized collective bargaining by public employees, this Court held: "The act does not constitute a delegation or bargaining away to the union of the legislative power of the public body … because the prior discretion in the legislative body to adopt, modify or reject outright the results of the discussions is untouched." 441 S.W.2d at 41. "The public employer is not required to agree but is required only to meet, confer and discuss…." *Id.* (quotation omitted). "The act provides only a *procedure for communication* between the organization selected by public employees and their employer without requiring adoption of any agreement reached." *Id.* (emphasis added). *Independence-NEA* cited this specific discussion from *City of Cabool* in holding that public employees have a constitutional right to collective bargaining. *Independence-NEA*, 223 S.W.3d at 136.

Since 2007, moreover, this Court has repeatedly reaffirmed this conclusion. In *City of Chesterfield*, this Court held that "nothing requires a public entity to reach an agreement with its employee unions," and that "the [public] employer remains free to reject any proposal" made in collective bargaining. 386 S.W.3d at 760. Likewise, *Ledbetter* reaffirmed "the employer's freedom to reject any proposal" in collective bargaining with public-sector unions. *Am. Fed'n of Teachers v. Ledbetter*, 387 S.W.3d 360, 367 (Mo. banc 2012). In all of these cases, this Court found that public employees may participate in the "procedure for communication" that is collective bargaining, but it does not "requir[e] adoption of any agreement reached." *City of Cabool*, 441 S.W.2d at 41.

"Beyond the affirmative duties to 'meet and confer' and to do so in good faith as declared by the Missouri Supreme Court in *Ledbetter*, 387 S.W.3d at 367," there is "nothing in article I, section 29 of the Missouri Constitution that prohibits" the State from restricting certain policy outcomes in collective bargaining. *City of Grandview*, 460 S.W.3d at 445. To do so would "ascribe to" Article I, § 29 "a meaning that is contrary to that clearly intended by the drafters." *Id.* (citing *Farmer v. Kinder*, 89 S.W.3d 447, 452 (Mo. banc 2002)). Substantive regulations of the *outcomes* of bargaining "do not in any way violate the employees' right to organize and to bargain collectively." *Id.* at 446.

Despite this consistent authority, the trial court reasoned that, "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." D107, at 19, ¶ 38 (citing *NLRB v. Westinghouse Air Brake Co.*, 120 F.2d 1004, 1006 (3d. Cir. 1941), and *NLRB v. Reed & Prince Mfg. Co.*, 118 F.2d 874, 881 (1st Cir. 1941)). This argument confuses the substantive *topics* of bargaining with the *process* of bargaining, and thus it departs from the "plain meaning" of the word "bargain" in the Constitution. *Independence-NEA*, 223 S.W.3d at 137. That is why this Court has cautioned *against* citing National Labor Relations Act decisions to give meaning to Article I, § 29. *See Ledbetter*, 387 S.W.3d at 367 n.5 (rejecting the argument that Article I, § 29 "evinces an intent to adopt the same duty of good faith in collective bargaining as under settled federal law," because "cases interpreting federal statutes are not binding with regard to this Court's interpretation of Missouri law").

Ledbetter rejected the argument that, because "the National Labor Relations Act predates Missouri's 1945 constitution," Article I, § 29 should be interpreted to incorporate the NLRA. *Id.* Unlike the NLRA, Article I, § 29 "is ***not*** a labor relations act…." *City of Grandview*, 460 S.W.3d at 446 (emphasis added); *Ledbetter*, 387 S.W.3d at 367 n.5. In fact, both NLRA cases cited by the trial court relied entirely on the NLRA's substantive protections in support of their holdings. *See*

Westinghouse, 120 F.2d at 1006; *Reed & Prince*, 118 F.2d at 877. Article I, § 29 contains no such substantive guarantees.

2. HB 1413's provisions reserving the employers' authority over hiring, promotion, discipline, discharge, and work rules do not violate public employees' right to "bargain collectively."

Under this authority, no provision of HB 1413 infringes on the right to collective bargaining protected by Article I, § 29. The trial court confused the *process* of collective bargaining with guaranteeing certain *outcomes* of bargaining—the very mistake rejected in *City of Cabool*, *Independence-NEA*, *City of Chesterfield*, *Ledbetter*, *City of Grandview*, and other cases.

First, the trial court held that HB 1413 violates the right to collective bargaining because "it entirely removes large swaths of basic working conditions—including personnel matters, work rules, and union release time—from the topics that can be negotiated." D107, at 19, ¶ 39(a). Section 105.585(1) reserves the public employers' authority over hiring, promotion, scheduling, discipline, and discharge, as well as "work rules and standard operating procedures." § 105.585(1), RSMo. Other than those exceptions, HB 1413 preserves the union's ability to collectively bargain over all other labor concerns relating to "wages, benefits, and all other terms and conditions of employment," § 105.585, RSMo.

This Court's cases explicitly uphold the Legislature's authority to regulate the outcomes of bargaining as it did in § 105.585(1). Under Article I, § 29, "the public

employer is free to reject any proposals of employee organizations," and is "free … to use its governing authority to prescribe wages and working conditions." *Independence-NEA*, 223 S.W.3d at 136. Section 105.585(1) is a straightforward exercise of the Legislature's "authority to prescribe … working conditions." *Id.*

Notwithstanding this clear authority, the trial court described these requirements for collective-bargaining agreements as "the epitome of ***a farce*** condemned in *Kerkemeyer v. Midkiff*, 299 S.W.2d 409, 414 (Mo. 1957)." D107, at 20, ¶ 40 (emphasis in original). On the contrary, *Kerkemeyer* strongly supports the validity of HB 1413. The quoted language in *Kerkemeyer* did not address substantive regulations of the contents of collective-bargaining agreements. What *Kerkemeyer* described as "a farce" and "a sham" is the situation where one party "sit[s] on both sides of the bargaining table"—*i.e.*, when one party exercises influence or control over its negotiation adversary during collective bargaining. 299 S.W.2d at 414. HB 1413 guards against this very "farce," by prohibiting attempts by the union to cherry-pick their opponents in collective-bargaining negotiations. *See* § 105.580.2, RSMo.

The trial court also cited *National Treasury Employees Union v. Cherthoff*, 452 F.3d 839, 858 (D.C. Cir. 2006). D107, at 22, ¶ 43. In *Cherthoff*, the D.C. Circuit held that DHS regulations that "effectively eliminate[d] all meaningful bargaining over fundamental working conditions" violated a statutory provision mandating that

the agency "'ensure' collective bargaining rights for its employees." 452 F.3d at 844. HB 1413 does not "effectively eliminate all meaningful bargaining over fundamental working conditions." *Id.* On the contrary, it expressly preserves the ability of public-sector unions to negotiate over most conditions of employment, including core topics of bargaining such as "wages, benefits, and all other terms and conditions of employment for public employees." § 105.585, RSMo. HB 1413 is thus a far cry from the regulation invalidated in *Cherthoff*. Moreover, *Cherthoff* was a federal case that interpreted the Department of Homeland Security's implementing statute. *Id.* *Cherthoff* did not consider or address the meaning of Article I, § 29, or address any point of Missouri law, so it has limited persuasive value here.

3. HB 1413's provisions reserving the public employer's authority to accept or reject any negotiated proposal do not infringe on public employees' right to bargain collectively.

Next, the trial court held that HB 1413 "enshrines bad faith bargaining into the law by allowing a public body, following the union's ratification of a tentative agreement, to pick-and-choose which provisions of that agreement will be adopted." D107, at 19, ¶ 39(b). Section 105.580.5 provides that the public body may approve or reject any portion of the agreement reached by its negotiator, and that "[a]ny tentative agreement reached between the parties' representatives shall not be binding on the public body or labor organization." § 105.580.5, RSMo. The trial court's reasoning contradicts the holding of this Court, reaffirmed in *Independence-NEA*

and later cases, that Article I, § 29, does not "requir[e] adoption of any agreement reached." *City of Cabool*, 441 S.W.2d at 41. As this Court reaffirmed in *City of Chesterfield*, "the [public] employer remains free to reject any proposal" made in collective bargaining. *City of Chesterfield*, 386 S.W.3d at 760. Section 105.580.5 is fully consistent with this Court's interpretation of the Constitution. *Id.* (noting that the results of collective bargaining "are reduced to writing, and a proposal is presented to the employer for *adoption, modification, or rejection*") (emphasis added).

4. HB 1413's provisions authorizing public employers to modify and renegotiate economic terms during times of budget shortfall do not violate public employees' right to bargain collectively.

Furthermore, the trial court objected that HB 1413 "allows a public body to unilaterally invalidate key economic provisions of a collective-bargaining agreement any time it 'deems it necessary.'" D107, at 19, ¶ 39(c). In fact, Section 105.585(6) requires all collective-bargaining agreements to contain a provision authorizing the re-negotiation of economic terms in the event of a "budget shortfall." §105.585(6), RSMo. The statute requires "good cause" for modification of such economic terms and provides for a 30-day period for renegotiation of such terms. *Id.* Many public-sector agreements—including many of Plaintiffs' own agreements—already contain such provisions. *See* D70, at 7; D71, at 9; D72, at 9.

In any event, the trial court's holding on this point contradicts this Court's statements that "[t]here is nothing in the law … that requires a public entity to agree to a proposal by its employee unions or organizations." *Independence-NEA*, 223 S.W.3d at 136. "In fact, this Court has repeatedly recognized that the public sector labor law allows employers to reject all employee proposals, as long as the employer has met and conferred with employee representatives." *Id.* *A fortiori*, the public employer may legislate on the substantive contents of collective-bargaining agreements without running afoul of Article I, § 29. Such legislation "do[es] not in any way violate the employees' right to organize and to bargain collectively." *City of Grandview*, 460 S.W.3d at 446. Moreover, as discussed in greater detail below, *infra* Point II, these provisions would satisfy strict scrutiny or any other level of scrutiny because they are narrowly tailored to advance compelling interests.

B. No Provision of HB 1413 Infringes on Public Employees' Right to Bargain Through "Representatives of Their Own Choosing."

Likewise, no provision of HB 1413 infringes on public employees' rights to collectively bargain with "representatives of their own choosing." MO. CONST. art. I, § 29. On the contrary, the State's unrebutted evidence shows that the provisions of HB 1413 protect democratic choice in union elections.

The phrase "representatives of their own choosing" is not defined in the Constitution, and to the State's knowledge, no Missouri case has interpreted it.

Accordingly, this Court should interpret according to the plain and ordinary meaning of the provision at the time it was enacted. *See Independence-NEA*, 223 S.W.3d at 137. In 1945 and now, the word "choose" means "to select; to take by way of preference from two or more objects offered; to elect." WEBSTER'S SECOND, at 475; *see also* WEBSTER'S THIRD, at 397 (defining "choose" as "to select … esp. by free will and by exercise of judgment," or "to decide upon esp. by vote: elect"); (defining "choose" as "to make choice of;"). Here, no provision prevents public employees from freely "select[ing]" their union representatives, or from "elect[ing]" the union of their own choice. Accordingly, each provision of HB 1413 is valid under "the plain meaning of the constitution's words." *Independence-NEA*, 223 S.W.3d at 137.

Both Plaintiffs and the trial court erred by concluding that HB 1413's provisions are invalid because they purportedly make it more difficult for particular *unions* to obtain or maintain certification. But Article I, § 29, by its "plain words," *id.*, confers rights on "employees," not unions. "'Employees' plainly means employees." *Id.* "The meaning of section 29 is clear and there is, accordingly, no authority for this Court to read into the Constitution words that are not there." *Id.*

Unrefuted evidence in the summary-judgment record establishes that every provision of HB 1413 that the trial court invalidated on this ground actually promotes employees' free choice in union elections.

1. Secret-ballot elections protect employees' ability to select representatives of their own choosing.

First, as discussed above, HB 1413 prohibits "voluntary recognition" of unions, § 105.575.1, RSMo, and instead requires union certification to be achieved through a "secret ballot election," § 105.575.2, RSMo. The State's evidence demonstrates that these provisions enhance and protect employees' free choice in union elections. *See supra* Statement of Facts Part A.1. The requirement of ballot secrecy in democratic elections is well-established, and union elections are no exception. On the contrary, the need for ballot secrecy is greater in union elections, which typically involve much smaller numbers of people, and where there is a long history of pressuring voters to influence them to vote a certain way. D78, at 4, ¶ 13. The evidence demonstrates that so-called "voluntary recognition" is achieved through undemocratic "card check" campaigns that do not involve ballot secrecy. *Id.* ¶ 12. It is common for the same voters to vote in favor of unionization during a "card check" campaign but then against unionization during the secret-ballot election. *Id.* ¶ 14. The concept of ballot secrecy is deeply rooted in American democratic traditions—for very good reason—and overwhelming majorities of Americans, including union households, support ballot secrecy in union elections. *Id.* Denying ballot secrecy results in non-democratic outcomes by biasing results in favor of unionization, against the actual preferences of voters. *Id.* ¶ 15. Taken

together, this evidence establishes that Sections 105.575.1 and .2 directly protect the right of "employees" to pick "representatives of their own choosing." MO. CONST. art. I, § 29.

2. Periodic recertification elections protect employees' ability to select representatives of their own choosing.

Periodic recertification elections also enhance and protect employees' ability to exercise free choice in union representation. As noted above, HB 1413 requires periodic recertification elections every three years. § 105.575.12, RSMo. Typically, within three years, over half of the employees in the bargaining unit will be replaced by new employees who never voted in the initial election. D78, at 5, ¶¶ 18-19. Moreover, unions commonly negotiate with employers for ongoing recognition in collective bargaining agreements—including every Plaintiff in this case. *See* D107, at 5, ¶ 10. Frequently, union recognition is retained indefinitely once achieved, without further democratic input from represented employees. *See supra*, Statement of Facts Part A.2; *see also* D78, at ¶¶ 20-21; D68, at 37, ¶ 39. HB 1413 remediates such undemocratic situations where public-sector employees have little, if any, real democratic input on union certification. Periodic elections advance and support the right of employees to select "representatives of their own choosing." MO. CONST. art. I, § 29.

3. True-majority requirements protect employees' ability to select representatives of their own choosing.

HB 1413 requires certification, decertification, and recertification elections to be decided by true majorities—*i.e.*, by a majority of eligible voters, not by a majority of voters participating in the election. §§ 105.575.8, .9, .12, RSMo.

The summary-judgment record demonstrates that these provisions promote and protect employee free choice. *See supra* Statement of Facts Part A.3. Short-term workers have lesser vested interests and thus lesser incentive to participate in union elections, resulting in lower turnout rates. D78, at 6, ¶ 22. This results in certification decisions that are frequently based on minorities of the eligible voters—mostly long-term workers. *Id.* ¶ 24. The unions then tilt heavily toward representing the interests of more senior employees, frequently negotiating seniority and tenure rules that favor longer-term workers. *Id.* ¶ 25. A vicious cycle results, as shorter-term workers become disaffected and have less engagement in the union process, and thus less incentive to vote in union elections. *See id.* In the end, the results of this process are collective-bargaining agreements that favor longer-term workers and are systematically biased against the interests of shorter-term workers, in matters such as discharge protections, *id.* ¶ 25; scheduling, *id.* ¶ 26; wages, *id.* ¶ 27; and retirement benefits, *id.* ¶ 28. Indeed, Plaintiffs here have "included provisions in their collective bargaining agreements that disproportionately favor employees with longer tenure." D68, at 24, ¶ 20.

Given these structural biases, true-majority requirements enhance and promote the employees' true democratic freedom of choice. Moreover, there is no evidence that Plaintiffs' preferred regime (*i.e.* majority of those casting votes) "is ex-ante better at capturing the preferences of voters." *Id.* ¶ 31.

The trial court held that "[t]reating non-votes as 'no' votes is not consistent with free choice." D107, at 18, ¶ 37. But it cited no authority supporting this proposition. *Id.* By contrast, the State's evidence demonstrated that the majority-of-ballots regime undermines democratic choice and introduces structural biases that favor longer-term workers. At very least, the State may reasonably "presume[] that when many employees abstain from a recertification election, those employees are, at best, unenthusiastic about the union's representation." *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 656–57 (7th Cir. 2013) (upholding Wisconsin's similar true-majority requirement).

Plaintiffs and the trial court both contend that true-majority requirements must be invalid because they are not used in statewide elections for public office. *See* D107, at 21, ¶ 42(a) (holding that the State's appeal to democratic accountability "rings hollow" because statewide elections for public office are based on "votes actually cast"). Plaintiffs' reliance on this analogy between union elections and statewide elections for public office is selective, because Plaintiffs vigorously oppose periodic recertification elections and ballot secrecy, both of which are

fundamental in statewide elections. In any event, the analogy does not support Plaintiffs' argument here. With respect to the true-majority requirement, there are at least three significant differences between union-certification elections and elections for statewide officeholders, warranting different treatment.

First, certification elections involve much smaller electorates, making it more feasible to obtain higher rates of voter participation. *See, e.g.*, D78, at 7, ¶ 24 ("In 2018, there were 517 eligible voters across *all elections* and a total of 292 votes cast. … For one bargaining unit that year, 13 out of 49 employees (26.5%) voted in favor of certification, 4 against (8%), and 65% did not participate.") (emphasis added). Second, certification elections more directly impact the voters' personal and financial interests, making it both more feasible and more important to achieve high participation rates. Third, there is a much more recent history of pressure and undue influence on voters in union elections, making higher participation rates more important to ensure democratic elections. D78, at 4, ¶ 13. For all these reasons, true-majority requirements are both more important and more workable in union elections than in statewide elections for public office.

C. The Provisions of HB 1413 Would Satisfy Strict or Intermediate Scrutiny Even If It Were Applicable.

For the reasons discussed above, no provision of HB 1413 infringes on employees' rights to "bargain collectively" or to do so through "representatives of

their own choosing." MO. CONST. art. I, § 29. Accordingly, the provisions are not subject to scrutiny at all under Article I, § 29. But even if they were, they would satisfy any level of scrutiny. No Missouri court has addressed what level of scrutiny applies to statutes that violate Article I, § 29. *Hill v. Ashcroft*, 526 S.W.3d 299, 327 (Mo. App. W.D. 2017). Regardless of whether strict, intermediate, or some other level of scrutiny applies, HB 1413's provisions satisfy scrutiny for the reasons discussed above and below. *See infra*, Point II.E.

II. The trial court erred in granting summary judgment to Plaintiffs on their claim that the provisions of HB 1413 are invalid under the equal-protection provision of Article I, § 2 of the Missouri Constitution, because all provisions of HB 1413 are subject to and easily satisfy rational-basis review under that provision, in that HB 1413 does not implicate any suspect class or severely burden any fundamental right; each provision is supported by a compelling factual justification sufficient to satisfy rational-basis review or any other level of scrutiny; and the State's undisputed evidence foreclosed summary judgment on these issues.

The trial court held that HB 1413 violates the equal-protection provision of Article I, § 2 of the Missouri Constitution because HB 1413 draws a distinction between public-safety unions and non-public safety unions. D107, at 22-27; *see also id.* ¶¶ 15-18, 22-24, 31-33, 37(b)-(c), 44-52, 55-57, 59-61. The trial court described this distinction as involving "pervasive discrimination inextricably entangled throughout HB 1413." *Id.* at 15, ¶ 31. This holding also provided the sole basis for the trial court's holdings on facial invalidity and severability. *Id.* at 30-31.

These holdings were in error. "Non-public safety unions" are not a suspect class, and HB 1413 does not burden any fundamental right. Accordingly, rational-

basis review applies to all provisions of HB 1413 under Article I, § 2, and they easily satisfy that highly deferential standard of review.

Preservation. This issue is fully preserved. D83, at 29-38.

A. "Non-Public-Safety Unions" Are Not a Suspect Class.

Under the equal-protection provision of Article I, § 2, "[c]ourts undertake a two-part analysis to determine the constitutionality of a statute." *Weinschenk v. State*, 203 S.W.3d 201, 210 (Mo. banc 2006). "The first step is to determine whether the statute implicates a suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution." *Id.* "If so, the classification is subject to strict scrutiny." *Id.* at 211 (quotation omitted). "If not, the classification will be subject to rational basis scrutiny." *Id.*

First, HB 1413 does not "implicate[] a suspect class." *Id.* at 210. The only classification in the statute that the trial court found objectionable was the distinction between public-safety unions and non-public-safety unions in § 105.503(2), RSMo.

"Non-public-safety unions" are not a suspect class. "A suspect classification exists where a group of persons is legally categorized and the resulting class is saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *In re Care & Treatment of Norton*, 123 S.W.3d 170, 173 (Mo. banc 2003) (quotation omitted).

"Non-public-safety unions" do not satisfy any element of this standard. First, they are not "persons" at all, but labor organizations. *Id.* Second, they do not bear the sort of personal characteristics that mark suspect classes, such as such as "race, alienage, national origin, gender, and illegitimacy." *In re Marriage of Woodson*, 92 S.W.3d 780, 784 (Mo. banc 2003); *see also San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 61 (1973) (Stewart, J., concurring).

Third, non-public-safety unions have not been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness." *Norton*, 123 S.W.3d at 173. On the contrary, if anything, they have enjoyed favorable treatment and exercised extensive political power in Missouri's history. Certainly, they are far less marginalized and more politically powerful than "sexually violent predators," who "are not members of a suspect class." *Id.* (citing *State ex rel. Nixon v. Askren*, 27 S.W.3d 834, 842 (Mo. App. W.D. 2000)).

Courts have repeatedly held that unions and union members are not suspect classes. *See, e.g., Sweeney v. Pence*, 767 F.3d 654, 669 (7th Cir. 2014) ("[A] union and its members are not suspect classes.") (quotation omitted); *Univ. Prof'ls of Ill., Local 4100, IFT-AFT, AFL-CIO v. Edgar*, 114 F.3d 665, 667 (7th Cir. 1997) (holding that unions "are not suspect classes"); *see also City of Charlotte v. Local 660, Int'l Ass'n of Firefighters*, 426 U.S. 283, 286 (1976) (stating that the Supreme

Court "would reject" any contention that "respondents' status as union members ... is such as to entitle them to special treatment under the Equal Protection Clause").

B. Collective Bargaining by Public Employees Does Not Fall Within the Narrow Category of Rights Deemed Fundamental For Equal-Protection Purposes.

The trial court held that HB 1413's provisions are subject to strict scrutiny because HB 1413 supposedly burdens the "fundamental right" to engage in collective bargaining set forth in Article I, § 29 of the Missouri Constitution. This holding was in error for at least two reasons: (1) collective bargaining is not a "fundamental right" for equal-protection purposes; and (2) even if it were, HB 1413 does not impose "severe restrictions"—or any restrictions at all—on that right.

First, collective bargaining by public employees does not fall within the narrow class of rights deemed "fundamental" under the equal-protection provision of Article I, § 2. Though Article I, § 29 protects collective bargaining, not every right separately protected in the Constitution is also a "fundamental right" for equal-protection purposes. Rather, "although Missouri's Constitution may contain additional protections, Missouri courts have followed the general federal approach to defining fundamental rights" under Article I, § 2. *Comm. for Educ. Equal. v. State*, 294 S.W.3d 477, 490 (Mo. banc 2009). Under the federal approach, "[f]undamental rights are those 'deeply rooted in the nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice

would exist if they were sacrificed.'" *Id.* (quoting *State ex rel. Nixon v. Powell*, 167 S.W.3d 702, 705 (Mo. banc 2005)). Thus, even though Article IX, § 1 of the Missouri Constitution protects educational rights, *Committee for Educational Equality* held that "[e]ducation is not a fundamental right" for equal-protection purposes. *Id.* The Court held that education-related claims should not be analyzed under Article I, § 2, but should be analyzed under the Constitution's provisions that address education. *Id.*

So also here. Like education, collective bargaining is not a "fundamental right" for equal-protection purposes. *See id.* Plaintiffs' claims that HB 1413 infringes on the right of collective bargaining should be analyzed under Article I, § 29, which directly addresses collective bargaining, rather under than the more general equal-protection provision of Article I, § 2. *Id.*; *see also supra*, Point I.

Public-sector collective bargaining is not "deeply rooted in the nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Comm. for Educ. Equal.*, 294 S.W.3d at 490. There is no "deeply rooted" history in America of treating collective bargaining as a fundamental liberty. On the contrary, "[t]he idea of public-sector unionization … would astound those who framed and ratified the Bill of Rights." *Janus*, 138 S. Ct. at 2471. "Indeed, under common law, 'collective bargaining was illegal.'" *Id.* at 2471 n.7 (quoting *Teamsters v. Terry*, 494 U.S. 558, 565–66 (1990)

(plurality opinion)). "Before the right to 'bargain collectively' was statutorily authorized, such collective or concerted action would be considered unlawful." *Independence-NEA*, 223 S.W.3d at 139. "[I]nto the 20th century, every individual employee had the 'liberty of contract' to 'sell his labor upon such terms as he deemed proper.'" *Janus*, 138 S. Ct. at 2471 n.7 (quoting *Adair v. United States*, 208 U.S. 161, 174–75 (1908)). Thus, "even the concept of a private third-party entity with the power to bind employees on the terms of their employment likely would have been foreign to the Founders." *Id.*

Many courts have held that collective bargaining is not a fundamental right for equal-protection purposes. *See, e.g., City of Charlotte*, 426 U.S. at 286 (stating that the Supreme Court "would reject" any contention that "respondents' status as union members ... is such as to entitle them to special treatment under the Equal Protection Clause"); *Sweeney*, 767 F.3d at 669 ("Collective bargaining is not a fundamental right…"); *Local 514 Transp. Workers Union of Am. v. Keating*, 358 F.3d 743, 754 (10th Cir. 2004) (holding that "neither union nor non-union status implicates a fundamental right or constitutes a protected class, so that a statute which addresses or favors one group over another need only reflect a rational basis"); *Univ. Prof'ls of Ill.*, 114 F.3d at 667 ("Collective bargaining is not a fundamental right…"). Addressing a Wisconsin statute similar to HB 1413, the Seventh Circuit held that "rational basis review governs the Unions' equal protection claims because [the

statute] neither affects a fundamental right nor proceeds along suspect lines." *Wisc. Educ. Ass'n*, 705 F.3d at 653 (quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993)). No Missouri appellate court has ever held that collective bargaining is a fundamental right that triggers strict scrutiny. *Hill*, 526 S.W.3d at 327 ("[T]here is no published case in which a Missouri court has applied strict scrutiny to a challenge to collective bargaining or a collective bargaining agreement.").

Furthermore, Plaintiffs here do not merely assert a right to collective bargaining—they assert that collective bargaining by *public employees* is supposedly a "fundamental right." *See Powell*, 167 S.W.3d at 705 (holding that "a careful description of the asserted fundamental right is required" before it can be recognized as fundamental) (citing *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)). But collective bargaining by public employees is much less deeply rooted and of much more recent vintage than the general right to collective bargaining. Collective bargaining was first protected in the Missouri Constitution of 1945, and for sixty years, this Court held that this right did not extend to public-sector employees. *Clouse*, 206 S.W.3d at 542. This Court did not extend the constitutional right to collective bargaining to public employees until 2007. *See Independence-NEA*, 223 S.W.3d at 137 ("*Clouse* is overruled."). A right first recognized in 2007 is not "deeply rooted in … history and tradition," or "implicit in the concept of ordered liberty." *Comm. for Educ. Equal.*, 294 S.W.3d at 490.

Notwithstanding this authority, the trial court cited *Kuehner v. Kander*, 442 S.W.3d 224, 230 (Mo. App. W.D. 2014), as supposedly establishing that collective bargaining is a "fundamental right" for equal-protection purposes. But *Hill* correctly rejected that very argument. *Hill*, 526 S.W.3d at 327. *Kuehner* described the right to collective bargaining as "fundamental," but *Kuehner* used the word "fundamental" in the looser sense as equivalent to "constitutional," rather than in the specialized sense of "fundamental right triggering strict scrutiny for equal-protection purposes." *See Kuehner*, 442 S.W.3d at 230 (referring to "the fundamental right to collectively bargain set forth in article I, section 29"). Moreover, *Kuehner* did not involve any equal-protection claim under Article I, § 2 or the Fourteenth Amendment, so it did not address whether collective bargaining is a "fundamental right" for equal-protection purposes. *See id.* Thus, "the language in *Kuehner* is merely dicta," and "there is no published case in which a Missouri court has applied strict scrutiny to a challenge to collective bargaining or a collective bargaining agreement." *Hill*, 526 S.W.3d at 327.

The trial court also relied on *Kerkemeyer v. Midkiff*, 299 S.W.2d at 414, in which this Court stated that "[t]he right of collective bargaining is a 'fundamental or natural right.'" Again, this statement was dicta, as *Kerkemeyer* did consider or address whether collective bargaining is a "fundamental right" for equal-protection purposes, or whether burdens on collective bargaining trigger strict scrutiny under

Article I, § 2. *Id.* As with *Kuehner*, *Hill* recognized that this statement was dicta and that *Kerkemeyer* did not hold that any restriction on collective bargaining triggers strict scrutiny. *Hill*, 526 S.W.3d at 327.

Furthermore, neither *Kuehner* nor *Kerkemeyer* purported to address whether the right of *public employees* to engage in collective bargaining is a fundamental right, which is the right asserted here. *See Powell*, 167 S.W.3d at 705 (requiring "a careful description of the asserted fundamental liberty interest").

Second, even if collective bargaining by public employees were a "fundamental right"—which it is not—HB 1413 would still not be subject to strict scrutiny under equal-protection principles. In order to trigger strict scrutiny under Article I, § 2, the challenged statute must impose "severe restrictions" on the fundamental right at issue. *Weinschenk*, 203 S.W.3d at 216. Here, HB 1413 does not impose severe restrictions on public employees' collective-bargaining rights. On the contrary, HB 1413 does not infringe on those rights at all. *See supra* Point I.A.

C. HB 1413 Does Not "Severely Restrict" the Rights of Free Speech and Association Guaranteed by Article I, Sections 8 and 9.

Plaintiffs contend, and the trial court held, that HB 1413 is subject to strict scrutiny because it supposedly burdens the freedom of association protected by Article I, Sections 8 and 9 of the Missouri Constitution. D107, at 15. The trial court held that, because HB 1413 draws a distinction between public-safety unions and

non-public safety unions, the statute unconstitutionally burdens the freedom of association of potential union members to choose which kind of union with which to associate. D107, at 15, ¶ 32. This argument has no merit.

As an initial matter, this argument proves far too much. *Any* regulation that imposes a burden or restriction of any kind on certain unions—or on any other kind of organization for that matter—would be subject to strict scrutiny under the trial court's reasoning. Any time the General Assembly imposes a regulation or restriction of any kind on an organization, it would be unconstitutionally "burdening" the "fundamental right" of association of persons who might wish to join that organization. Hardly any regulation of organizations could survive this regime of near-universal strict scrutiny.

For this reason, in *Sweeney*, the Seventh Circuit rejected virtually the same argument—*i.e.*, that "the right of union membership … is a fundamental right because it involves the exercise of First Amendment association and assembly rights." *Sweeney*, 767 F.3d at 668. That court correctly held that this argument was an attempt "to cobble a brand new fundamental right to union membership out of the fact that union membership implicates First Amendment rights of freedom of assembly and freedom of association." *Id.* at 669–70. The court described this argument as "intellectually threadbare," because "these same facts could be marshalled to support a fundamental right to Civil War reenactment." *Id.* at 670. So

also here, Plaintiffs attempt to "cobble a brand new fundamental right" out of the fact that "union membership implicates First Amendment rights of freedom of assembly and freedom of association." *Id.* As with the right to collective bargaining, Plaintiffs' asserted rights to freedom of association should be analyzed directly under Article I, Sections 8 and 9, not under the aegis of the equal-protection clause of Article I, § 2. *See infra* Point III.

Moreover, HB 1413 does not impose a "heavy burden" or "severe restriction" on the rights of free speech and free association in any event. *Weinschenk*, 203 S.W.3d at 215–16. On the contrary, for the reasons discussed in detail below, *see infra* Point III, no provision of HB 1413 violates any cognizable interest in free speech or freedom of association in any way, and thus the statute does not impose a "heavy burden" or "severe restriction" that would trigger strict scrutiny under Article I, § 2.

D. Every Provision of HB 1413 Is Subject to Rational-Basis Scrutiny, and They Easily Satisfy That Standard or Any Other Level of Scrutiny.

Because HB 1413 does not impact a suspect class or burden a fundamental right, its provisions are subject to rational-basis scrutiny under Article I, § 2. Each provision easily satisfies that deferential standard of review. In fact, the provisions satisfy any more stringent standard of review, including strict scrutiny, as well.

Under rational basis review, a statute must be upheld if there is any "reasonably conceivable state of facts that ... provide a rational basis for the classification[s]." *Kansas City Premier Apartments, Inc. v. Mo. Real Estate Comm'n*, 344 S.W.3d 160, 170 (Mo. banc 2011) (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)). "Rational basis review is 'highly deferential,' and courts do not question 'the wisdom, social desirability or economic policy underlying a statute.'" *Estate of Overbey v. Chad Franklin Nat'l Auto Sales N., LLC*, 361 S.W.3d 364, 378 (Mo. banc 2012) (quoting *Comm. for Educ. Equal.*, 294 S.W.3d at 491). "Instead, all that is required is that this Court find a plausible reason for the classification in question." *Kansas City Premier Apartments*, 344 S.W.3d at 170.

Where rational basis-review applies, a statutory classification must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach*, 508 U.S. at 313. Where there are "plausible reasons" for the legislative policy, the Court's "inquiry is at an end." *Id.* at 313–14 (quotation omitted).

Under rational-basis review, the statute has "a strong presumption of validity," and "those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it." *Id.* at 314–15 (citation omitted). Rational-basis review does not require the State to produce

evidence to support its justification for the statutory classification. Under rational-basis review, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 315. Further, under rational-basis review, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Id.* at 315. Each provision of HB 1413 satisfies this standard. Moreover, if the Court agrees with the State that rational-basis review applies to the statute's provisions, no further factual development or proceedings in the trial court is necessary. Instead, the Court may resolve the constitutionality of every provision subject to rational-basis review and uphold them. *See, e.g., Am. Motorcyclist Ass'n v. City of St. Louis*, 622 S.W.3d 267, 268-70 (Mo. App. 1981).

E. The Exemption for Public-Safety Unions Satisfies Rational-Basis Scrutiny or Any Higher Level of Scrutiny.

The statute's exemption for public-safety unions satisfies rational-basis scrutiny, or any other standard of review, because compelling justifications in the summary-judgment record support it. Because this evidence demonstrates that public-safety unions are not "similarly situated in all relevant respects" to non-public-safety unions with respect to HB 1413, the exemption for public-safety unions does not raise equal-protection concerns at all. *Coyne v. Edwards*, 395 S.W.3d 509, 519 (Mo. banc 2013) (quotation omitted). "[T]o successfully raise an

equal protection challenge, one first must show that he or she is similarly situated to those who he alleges receive different treatment." *Id.* "The similarly situated standard is a 'rigorous one' requiring proof that the two classes 'were *similarly situated in all relevant aspects*.'" *Id.* (emphasis added) (quoting *Murray v. Sw. Mo. Drug Task Force*, 335 S.W.3d 566, 569 (Mo. App. S.D. 2011)). No such showing is possible here, because the evidence demonstrates numerous relevant differences between the two groups of unions.

The provision of critical, life-saving services. First, public-safety workers provide critical, life-saving services that protect the public safety and public health. One important reason to treat public-safety workers differently from other public-sector workers "is the exigency people attach to the work done by public safety workers." D78, at 12, ¶ 48. "In many states, collective bargaining laws distinguish between public safety and other public employees due to the critical and indispensable nature of their service." *Id.* at 17, ¶ 59. Most states prohibit strikes by public-safety workers, though some permit strikes by other public-sector workers. For example, at least 10 states "allow teachers to strike but not firefighters or police officers." *Id.* The critical nature of their services greatly increases the risks of any disruption or lack of continuity in such services, justifying differential treatment. In fact, public-sector reforms might have a short-term negative impact on the provisions of life-saving services, resulting in potential danger or loss of life to

Missouri citizens. D78, at 17-18, ¶¶ 59-61. And Wisconsin's recent example of widespread protests and resistance to public-sector reforms raises valid concerns that short-term disruption to life-saving services might arise applying such reforms to public-safety unions. *Wisc. Educ. Ass'n*, 705 F.3d at 655. In light of such concerns, the legislature could reasonably decide to delay imposing reforms on public-safety unions until those reforms had been tried and tested in other sectors of public employment.

Greater risk of injury and death. In addition, "public safety workers differ from other categories of workers is wages, roles, risks, physical demands, and more." D78, at 12, ¶ 48. The Bureau of Labor Statistics reports that "state government workers received fatal injuries" on the job "at a rate of 1.4 per 100,000 full time equivalent workers in 2017." D78, at 19, ¶ 65. "The rates of fatal injury were far higher for important categories of public safety workers." *Id.* "Firefighters suffered a rate of 3.6 deaths per 100,000 full time workers, more than twice the state employee average rate." *Id.* "Emergency medical technicians and paramedics had a fatality rate of 4.3 per 100,000," more than three times the state employee average rate. *Id.* "Police deaths per 100,000 full time workers was a staggering 12.9, or more than nine times the state employee rate." *Id.* "Data from Missouri in 2017 shows that police employees also have very high rates of non-fatal injuries." *Id.*

The greater risks of physical injury and death in public-safety professions can justify more expansive bargaining rights not afforded to other sectors. "The risks public bodies ask public safety employees to assume differ greatly from the risks assumed by other public employees." *Id.* ¶ 66. "As a result, it may be in the interest of both state and public employees to allow for negotiation in the scope of employee duties and assignments." *Id.* "The danger and uniqueness of these jobs may mean that private sector models are less appropriate." *Id.*

Lower turnover rates in public-safety professions. There is also strong empirical evidence that the anti-democratic concerns discussed above are significantly lessened for public-safety unions. "In addition to the many differences listed above, public safety workers differ from other employees in their turnover rates." *Id.* at 13, ¶ 49. "The Missouri retirement system for local employees, MOLAGERS, reports that police and fire employees are expected to turnover at lower rates," and "the turnover rate assumed for first year fire workers is roughly half that of the general members of the plan." *Id.* ¶ 50. Based on Current Population Survey data, public-safety workers had lower turnover rates than non-public safety workers by a statistically significant amount in nearly every quarter during the 15-year period from 2003-2018. *Id.* at 13, ¶¶ 52-54 & fig. 1. Thus, "separation rates are significantly lower for public safety public employees." *Id.* at 14, ¶ 54.

"One implication of the longer tenure among public safety workers is that participation rates" in union elections "are likely to be higher in this sector." *Id.* at 15, ¶ 55. Data on union election participation from the Missouri State Board of Mediation from 2013-2018 demonstrates that "annual participation rates are more than 20 percentage points higher" for union elections involving public-safety workers, "and this difference is statistically significant." *Id.* at 16, ¶ 57. Higher election participation in this sector partially allays the "concerns about re-certification and short-term employees" addressed above. *Id.* at 13.

Higher support for unionization. Concerns about anti-democratic outcomes for public-safety unions are also somewhat lessened because support for unionization tends to be much higher in that sector. Empirical data demonstrate that union support and union participation are significantly higher among public-safety employees than among other public-sector workers. *Id.* at 17, ¶ 58. Based on Current Population Survey data for the fifteen-year period from 2003-2018, "membership is indeed higher among covered public safety employees by more than five percentage points." *Id.* This data reflects "a greater baseline of support for unionization among public safety employees, which can imply that different certification procedures may better serve the interest of the state and public safety employees." *Id.*

Lesser need for hiring, promotion, and discharge reforms. "[P]ublic safety employees have unique features and concerns that are relevant" to provisions reserving the right of employers to hire, promote, discipline, and discharge public-sector employees. *Id.* at 18, ¶ 62. While best management practices discussed above are modeled on the best practices of the private sector, "many public safety occupations only occur within the public sector. As a result, collective bargaining over a wider scope of employment conditions may be necessary due to the lack of private sector models." *Id.* at 19, ¶ 63. Many public-safety professions—such as police and firefighters—have workplace organizations and authority structures that are more akin to military chains of command than ordinary private-sector workplaces. "[T]he 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.*

For all these reasons, Missouri is not unique in recognizing that public-safety workers present unique issues and concerns that warrant treating public-safety unions differently than other public-sector unions. "Several states," including Maryland, Georgia, and Texas, "have collective bargaining provisions that treat public safety workers differently from other categories of employees." D78, at 12, ¶ 47. Iowa also "allow[s] a greater scope of bargaining to public safety employee organizations than organizations representing other workers." *Id.*, at 18, ¶ 62.

Every court that has considered such distinctions has subjected them to rational-basis scrutiny and upheld them. For example, in *Wisconsin Education Association*, the Seventh Circuit held that Wisconsin's similar exemption for public-safety workers in a public-sector union reform bill was rational and valid. 705 F.3d at 654–55. The Seventh Circuit "agree[d] that Wisconsin reasonably concluded that the public safety employees filled too critical a role" to risk any disruption in services that might result in the short term from public-sector union reforms. *Id.* at 655. Subsequent events validated the State's concerns about disruption. In the wake of the bill's passage, "thousands descended on the state capital in protest and numerous teachers organized a sick-out through their unions, forcing schools to close," but "the state avoided the large societal cost of immediate labor unrest among public safety employees." *Id.* Having witnessed the disruptions caused by the response to union reforms in Wisconsin, Missouri was likewise not required to gamble with its own public safety without first testing these comprehensive reforms in the non-public-safety sectors.

The Seventh Circuit also observed that "[t]his conclusion is uncontroversial: other courts have upheld distinctions between employee groups with similar classifications." *Id.*; *see also, e.g.*, *Am. Fed'n of Gov't Empls., AFL-CIO v. Loy*, 281 F. Supp. 2d 59, 65–66 (D.D.C. 2003), *aff'd*, 367 F.3d 932 (D.C. Cir. 2004) (applying rational basis and upholding a distinction in collective-bargaining rights between

TSA security screeners and other TSA employees); *Margiotta v. Kaye*, 283 F. Supp. 2d 857, 864–65 (E.D.N.Y. 2003) (applying rational-basis scrutiny and upholding a distinction between court security officers and other public employees with regard to compulsory arbitration). In fact, before HB 1413's enactment in 2018, Missouri's "pre-HB 1413 public-sector labor law did not cover certain categories of public-sector employees," including "police, deputy sheriffs, Missouri state highway patrolmen, [and] Missouri National Guard." D107, at 4, ¶ 8; *see also Independence-NEA*, 233 S.W.3d at 134.

The trial court also held that the distinction between public-safety and non-public-safety unions is constitutionally untenable because it is supposedly "wildly underinclusive." D107, at 24, ¶ 49. This argument lacks merit. As an initial matter, no evidence supports the trial court's description of the exemption as "wildly" underinclusive, because Plaintiffs provided only anecdotal examples of unions that represent a minority of public-safety workers. By drawing a distinction between unions based on whether they "wholly or primarily represent[] persons trained or authorized by law or rule to render emergency medical assistance or treatment," § 105.500(8), RSMo, the General Assembly created an eminently rational classification that directly advances the interests supported by the exemption. The mere fact that there may be *some* public-safety employees who are represented by non-public-safety unions does not render the exemption either "wildly

underinclusive" or invalid. On the contrary, this Court has repeatedly held that some underinclusiveness is inevitable in any legislative classification, and does not thereby render the statute invalid. "[A] legislative classification assailed on equal protection grounds is not rendered arbitrary or invidious merely because it is under-inclusive. Clearly, there is no constitutional requirement that regulation must reach every class to which it might be applied; that the legislature must regulate all or none." *City of St. Louis v. Liberman*, 547 S.W.2d 452, 458 (Mo. banc 1977). On the contrary, "[t]he state … is free to regulate one step at a time, recognizing degrees of harm and addressing itself to phases of a problem which presently seem most acute to the legislative mind." *Id.*; *see also, e.g., Winston v. Reorganized Sch. Dist. R-2, Lawrence Cty., Miller*, 636 S.W.2d 324, 329 (Mo. banc 1982) ("The mere exclusion of persons situated as plaintiff from the classes of victims entitled to recovery (underinclusive) does not alone render the legislative scheme invalid."); *Crane v. Riehn*, 568 S.W.2d 525, 530 (Mo. banc 1978) ("[T]hough the statute may be arguably imperfect or underinclusive, such defects or legislative choices do not constitute an impermissible denial of equal protection of the laws.").

In addition, the Seventh Circuit rejected virtually the same argument in *Wisconsin Education Association*. In that case, the unions challenging a public-sector union reform bill argued that the classification between public-safety and non-public-safety employees should have been drawn more precisely, for example by

including corrections officers and Capitol police in the public-safety group. 705 F.3d at 655. The Seventh Circuit noted that "[t]he Supreme Court has continually rejected this sort of argument, stating 'defining the class of persons subject to a regulatory requirement … requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line … [and this] is a matter for legislative, rather than judicial, consideration." *Id.* (quoting *Beach*, 508 U.S. at 315–16). "[E]very line drawn by a legislature leaves some out that might well have been included." *Id.* (quoting *Village of Belle Terre v. Boras*, 416 U.S. 1, 8 (1974)). Even a law that is "simultaneously overinclusive and underinclusive" should be upheld because "perfection is by no means required" and a "provision does not offend the Constitution simply because the classification is not made with mathematical nicety." *Id.* (quoting *Vance v. Bradley*, 440 U.S. 93, 108 (1979)). "Distinguishing between public safety unions and general employee unions … is not unconstitutional." *Id.* at 656.

F. Every Other Provision of HB 1413 Satisfies Rational-Basis Scrutiny or Any Higher Level of Scrutiny.

Because the public-safety exemption is the only provision of HB 1413 that the trial court found to impose *unequal treatment* of any kind—as opposed to putatively infringing substantive rights—it is the only provision subject to any kind of review under Article I, § 2's equal-protection clause. As discussed above and

below, *see* Points I and III, all the other provisions of HB 1413 should be reviewed under other provisions of the Constitution, if at all. In any event, even if the equal-protection provision of Article I, § 2 were to apply to them, every other provision of HB 1413 satisfies rational-basis scrutiny or any other level of scrutiny. At very least, for the reasons discussed in detail below, the trial court should not have granted judgment to Plaintiffs on the basis of this summary-judgment record on any of these claims.

1. Requiring secret-ballot elections directly advances critical interests in promoting fairness and free democratic choice in union elections.

As discussed above, *supra* Statement of Facts Part A.1 & Point I, HB 1413's provisions that eliminate card-check campaigns in favor of "secret-ballot election[s]" are narrowly tailored to advance critical interests in promoting fundamental fairness, free democratic choice, and democratic accountability in union elections. *See* § 105.575.1-.2, .4-.5, RSMo. The requirement of secret ballots in elections is deeply rooted in Missouri and American traditions, as well as the traditions of all other Western democracies, and it is widely recognized as an essential tool for promoting fairness, free choice, and democratic accountability in such elections. *See, e.g.*, *Ex parte Oppenstein*, 233 S.W. 440, 441–42 (Mo. banc 1921) (recounting that the lack of ballot secrecy in the early nineteenth century "had resulted in coercion, corruption, and intimidation, and was attended by rioting,

violence, and disorder," including "bribe-giv[ing]" and pressure on voters from "[e]mployers, creditors, landlords, organizations of all kinds," thus justifying the adoption of ballot secrecy in Missouri's Constitution of 1875).

Union elections are no exception to this rule. On the contrary, the State's unrebutted evidence in the summary-judgment record demonstrates that concerns about pressure and undue influence of voters are enhanced in the union-election context. *See, e.g.*, D78, ¶¶ 12-14. Accordingly, the provisions requiring secret-ballot elections instead of "voluntary recognition" through card-check campaigns satisfy strict scrutiny or any other level of scrutiny.

2. Periodic recertification elections directly advance critical interests in promoting democratic representation and accountability in union representation.

As discussed above, *supra* Statement of Facts Part A.2 & Point I, HB 1413's provisions requiring periodic recertification elections are precisely tailored to advance the State's critical interests in ensuring democratic representation and accountability in union elections. *See* § 105.575.12, RSMo. The State's unrebutted evidence in the summary-judgment record demonstrates that, on average, more than half of the public employees in the bargaining unit will have turned over every three years. D78, ¶ 18. This turnover, combined with union tactics to avoid recertification elections, results in situations where it common for public-sector unions to go for decades without ever being democratically recertified. *See* D78, ¶¶ 18-21.

Requiring recertification elections within a reasonable period—every three years—ensures democratic representation and democratic accountability in union elections, which are compelling interests.

3. True-majority requirements in union elections directly advance compelling interests in promoting democratic accountability and eliminating structural biases in union representation.

As discussed above, *supra* Statement of Facts Part A.3 & Point I, HB 1413's true-majority requirements for union elections are precisely tailored to advance critical interests in promoting democratic representation and accountability in union elections, and eliminating inherent biases against short-term workers in union elections and outcomes. *See* § 105.575.8, .11-.12, RSMo; § 105.580.5, RSMo. As demonstrated by the State's unrebutted facts, the strong inherent bias in favor of longer-term workers in union-bargained outcomes both results from, and contributes to, the underrepresentation and lower participation of shorter-term voters in union elections. *See* D78, ¶¶ 22-33. True-majority requirements address these problems by requiring the democratic engagement of the full range of eligible voters to achieve democratic outcomes—which will both promote accountability and result in higher levels of democratic engagement across the board. *See id.* These provisions thus satisfy rational-basis scrutiny or any other level of scrutiny, including strict scrutiny.

4. Reserving the public employers' authority and flexibility over hiring, promotion, discipline, discharge, and work rules directly advances many critical interests.

First, as discussed in detail above, *supra* Statement of Facts Part A.4 & Point I, the provision reserving the public employers' authority and flexibility over hiring, promotion, discipline, discharge, and work rules are strongly justified because they are precisely tailored to serve critical government interests. *See* § 105.585(1), RSMo. As set forth in detail above, the summary-judgment record contains uncontradicted evidence establishing that this provision directly advances many critical interests, including (1) providing flexibility in the government workplace; (2) promoting efficiency and accountability in the provision of government services; (3) promoting the interests of both employers and employees in the public sector; (4) eliminating regressive barriers to entry for less privileged workers; (5) avoiding waste of taxpayer resources; (6) improving public-sector workers' morale; (7) promoting public trust in government; and (8) eliminating inefficiencies that harm the interests of public-sector workers themselves. *See supra* Statement of Facts, Part A.4; *see also* D79 (Hedlund Affidavit); D80 (Maranto Affidavit); D81 (Stangler Affidavit). Considered individually and collectively, these interests in promoting efficient and effective government and advancing the interests of employers and employees alike are compelling, and § 105.585(1) is narrowly tailored to advance them, because it eliminates the collective-bargaining provisions that directly undermine these interests.

5. Preserving public employers' economic flexibility in times of budget shortfall directly advances the State's interest in preventing budgetary crises.

As discussed above, *supra* Statement of Facts Part A.5, provisions of union-negotiated collective bargaining agreements have frequently contributed to budgetary crises among public-sector employers across the country, including the outright bankruptcies of major cities like Detroit. D78, ¶¶ 34-43. The State has a critical interest in preserving public budgets and stewarding public resources in a way to avoid such crises. *See, e.g., Independence-NEA*, 223 S.W.3d at 133. HB 1413's provision allowing for the "modification of the economic terms of any labor agreement" during times of "budget shortfall" is precisely tailored to advance this compelling interest. § 105.585(6), RSMo. The provision permits modification only upon "good cause" during a "budget shortfall," and it mandates a 30-day period of bargaining prior to any changes to economic terms. *Id.* Many public-sector agreements in Missouri already include similar provisions.

6. HB 1413 directly advances the State's compelling interest in preventing collective bargaining from infringing on legislative prerogatives.

As this Court acknowledged in *Independence-NEA*, the State has a compelling interest in preventing public-sector collective bargaining from infringing on legislative prerogatives. "In the public sector, meeting the demands of employee groups is thought to infringe on the constitutional prerogative of the public entity's

legislative powers by forcing the entity to raise taxes or distribute public services in a manner inconsistent with the best judgment of the entity's governing board." 223 S.W.3d at 133. Any narrowing of such "legislative powers" through binding agreements encroaches upon authority that the Constitution ultimately vests in Missouri's people, through their elected representatives. *Id.* The State has a compelling interest in preventing the encroachment on such authority by effectively transferring to non-democratically-accountable entities critical authority over taxes, public budgets, and the distribution of public services. *Id.*

Several provisions of HB 1413 work together to advance this interest by preventing such encroachment through the action of unelected public-sector negotiators and public-sector unions. Requiring the triennial reconsideration of collective-bargaining agreements, including their "economic terms," ensures that the public body has the authority to periodically review and reconsider preexisting agreements, including that each new administration of the public body has the chance to review and reconsider preexisting agreements. § 105.580.7-.8, RSMo. To the same end, the statute reaffirms that neither the labor organization nor the public body is required to make or accept any substantive proposal during bargaining, which this Court has often emphasized; and the statute reaffirms that no binding agreement can be reached until the public body *itself*—not just its negotiator—has ratified and accepted the final agreement. § 105.580.3, .5, RSMo.

And the statute prevents a labor organization from refusing to meet with the public employer or seeking to remove or disqualify the public employer's "designated representative," *i.e.*, its negotiator. § 105.580.2, RSMo. As noted above, the latter provision also advances the State's interest in avoiding what *Kerkemeyer* described as a "farce," *i.e.*, a situation where the labor organization has cherry-picked its opponent in negotiations. *See* D68, at 36, ¶ 36 (expressing the legislative concern that politically influential unions have sometimes "picked the folks who are sitting on the other side of the table," leaving "the taxpayer" holding the bag).[2] These provisions are narrowly tailored to advance the State's compelling interest in preventing the process and outcomes of collective bargaining from infringing on legislative prerogatives or encroaching on the authority that Missouri's Constitution ultimately vests in the people.

7. Requiring transparency and disclosure advances the State's compelling informational, accountability, and enforcement interests.

[2] The Missouri House of Representatives recently moved its video footage of debates of the House floor, which the State cited in the summary-judgment record. D68, at 35-38, ¶¶ 32-42; D76, at 2, ¶ 13. The May 17, 2018 floor debate is now available at http://sg001-harmony.sliq.net/00325/Harmony/en/PowerBrowser/PowerBrowserV2/20200820/1875#agenda_, with the discussion of HB 1413 beginning at 4:22:38. The February 12, 2018 floor debate is available at http://sg001-harmony.sliq.net/00325/Harmony/en/PowerBrowser/PowerBrowserV2/20200820/-1/1932#agenda_, with the discussion of HB 1413 beginning at 5:20:52.

As discussed in detail below, *see infra*, Point III.C, HB 1413's transparency and disclosure provisions are narrowly tailored to advance the State's informational, accountability, and enforcement interests regarding the responsible stewardship of union resources and the prevention of corruption and financial abuses. *See* §§ 105.533.2, 105.545, RSMo.

8. Ensuring the voluntary nature of union contributions directly advances the State's interest in protecting the constitutional rights of public employees.

As discussed in detail below, *see infra* Point III.D, the provisions requiring annual written certification of authorization for payroll deductions and the use of union dues and fees for political contributions and expenditures are narrowly tailored to advance the State's compelling interest in ensuring that the use of public employees' financial resources is knowing, voluntary, and in accord with the U.S. Constitution as interpreted by *Janus* and other cases. §§ 105.505.1, .2, RSMo. These provisions impose minimal burdens on public employees while ensuring that there is "clear and compelling" evidence of employees' voluntary consent to subsidizing union activities. *Janus*, 138 S. Ct. at 2486.

9. HB 1413's provisions regarding "release time" and fees to defray the costs of elections advance the State's interest in preventing taxpayer recourses from subsidizing union activities.

Furthermore, HB 1413's provisions preventing public employers from paying to directly subsidize union activities, and requiring modest fees to defray the costs

of union elections, are precisely tailored to advance the State's compelling interest in preventing taxpayer resources from being used to subsidize union activities. *See* § 105.575.15, RSMo (fees for union elections); §§ 105.580(4), 105.585.4, RSMo (release-time provisions). Missouri is not required to use taxpayer funds to finance private activities with which many taxpayers may disagree. "While in some contexts the government must accommodate expression, it is not required to assist others in funding the expression of particular ideas, including political ones." *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 358 (2009). "A legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Id.*; *see also Sweeney v. Pence*, 767 F.3d 654, 669 (7th Cir. 2014).

III. The trial court erred in granting summary judgment to Plaintiffs on their claim that HB 1413 infringes on the rights of free speech and free association protected by Article I, Sections 8 and 9 of the Constitution, because no provision of HB 1413 violates the freedom of speech or association, in that HB 1413 does not place discriminatory burdens on speech or association; HB 1413's provisions requiring annual certification for payroll deductions and use of union fees for political expenditures protect public employees' First Amendment freedoms; HB 1413's transparency and disclosure requirements advance the State's important informational, accountability, and anti-corruption interests; and the State's undisputed evidence foreclosed summary judgment on these issues.

No provision of HB 1413 violates the rights to freedom of speech and association protected by Article I, § 8 or 9 of the Missouri Constitution. The trial court held that these provisions were violated by HB 1413's (1) requirement of annual certification to authorize payroll deductions and use of union fees for political contributions, and (2) HB 1413's disclosure and reporting requirements. D107, at 27-29. These holdings were in error.

Preservation. This issue was fully preserved. D83, at 39-45.

A. HB 1413 Does Not Place "Discriminatory Burdens" on Speech or Association.

First, the trial court erred by holding that HB 1413 imposes "discriminatory burdens on core political speech" because it "singles out non-public-safety labor organizations for disfavored treatment." D107, at 27, ¶ 53. As discussed in detail above, the statute's exemption for public-safety unions is subject to rational-basis scrutiny, which it easily satisfies. *See supra*, Point II.

In addition, the U.S. Supreme Court has rejected this very argument in the context of the First Amendment freedom of association. In *Lyng*, the Supreme Court held that imposing differential regulatory burdens or consequences on different unions does not infringe on the workers' First Amendment freedom of association. *See Lyng v. Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW*, 485 U.S. 360, 366 (1988). *Lyng* upheld a statute that denied food-stamp benefits to households that included union members who were on strike, because the statute did not "order" persons not to associate or "'directly and substantially' interfere with appellees' ability to associate for this purpose." *Id.* (quotation omitted). Even though the statute gave union members who were eligible for food stamps a powerful incentive not to associate with striking unions, the Supreme Court held that the incentives created by differential regulation were not enough to violate freedom of association. *Id.* The Court noted that "the statute at issue does not

'directly and substantially' interfere with appellees' ability to associate," and that "[i]t does not 'order' appellees not to associate together for the purpose of conducting a strike, or for any other purpose, and it does not 'prevent' them from associating together or burden their ability to do so in any significant manner." *Id.* As a result, the statute did not infringe any associational rights. *Id.*; *see also Lincoln Fed. Labor Union No. 19129, A.F. of L. v. Nw. Iron & Metal Co.*, 335 U.S. 525, 530–31 (1949) (holding that a state statute forbidding closed shops did not violate the associational rights of union members).

B. Requiring Annual Certification to Authorize Payroll Deductions and Political Expenditures Protects Employees' First Amendment Rights.

HB 1413 requires annual written authorization for payroll deductions of agency fees: "No sum shall be withheld from the earnings of any public employee for the purpose of paying any portion of dues, agency shop fees, or any other fees paid by members of a labor organization or public employees who are nonmembers except upon the annual written or electronic authorization of the member or nonmember." § 105.505.1, RSMo. In addition, HB 1413 requires annual written authorization to permit expenditure of employees' agency fees on political contributions and expenditures: "No labor organization shall use or obtain any portion of dues, agency shop fees, or any other fees paid by members of the labor organization or public employees who are nonmembers to make contributions, as

defined in section 130.011, or expenditures, as defined in section 130.011, except with the informed written or electronic authorization of such member or nonmember received within the previous twelve months." § 105.505.2, RSMo.

These provisions do not offend the First Amendment. On the contrary, they safeguard employees' First Amendment rights. As noted above, in *Janus*, the Supreme Court held that "[b]y agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed." *Janus*, 138 S. Ct. at 2486. "Rather, to be effective, the waiver must be freely given and shown by 'clear and compelling' evidence." *Id.* "Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met." *Id.* This requirement applies to agency fees and "any other payment to the union": "Neither an agency fee *nor any other payment to the union* may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." *Id.* (emphasis added).

Just as is required for non-members agency fees in *Janus*, Sections 105.505.1 and 105.505.2 protect and preserve the employees' First Amendment rights to avoid personally subsidizing union activities without their consent. *See* § 105.505.1, .2, RSMo. As *Janus* held, "the compelled subsidization of private speech seriously impinges on First Amendment rights," and so it "cannot be casually allowed." *Janus*, 138 S. Ct. at 2464. Instead, the First Amendment requires "clear and

compelling evidence" that the employees "clearly and affirmatively consent" to the use of their personal funds for union and political activities. *Id.* at 2486. Annual written or electronic authorization is one clear, straightforward, and non-burdensome method of obtaining such "clear and compelling evidence." *Id.* The statute permits "electronic" authorization, which is as simple as sending an email, so the burdens on employees are minimal to non-existent. Accordingly, these provisions promote and protect First Amendment rights; they do not burden them.

Notably, neither Plaintiffs nor the trial court contended that requiring annual written or electronic authorization burdens the First Amendment rights of *individual employees*. Instead, the trial court held that the provision requiring annual authorization to use members' and non-members' dues for political contributions or expenditures, § 105.505.2, burdens *unions'* associational rights by "reach[ing] deep into the mechanics of their own self-governance" and "dictat[ing] the terms and circumstances under which [they are] permitted to express political opinion [*sic*]." D107, at 27, ¶ 54 (quoting *Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 12 (1st Cir. 2012)).

This holding has no merit. Contrary to the trial court's reasoning, the First Amendment "does not confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression." *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 355 (2009). In *Ysursa*, the Supreme Court upheld under

the First Amendment a state statute that prohibited payroll deductions from being used to fund political activities at all. *Id.* at 354. The Supreme Court held that the "law does not restrict political speech, but rather declines to promote that speech by allowing public employee checkoffs for political activities." *Id.* Thus, "the State is not constitutionally obligated to provide payroll deductions at all." *Id.* at 359. "While in some contexts the government must accommodate expression, it is not required to assist others in funding the expression of particular ideas, including political ones." *Id.* at 358. *See also, e.g.*, *Brown v. Alexander*, 718 F.2d 1417, 1423 (6th Cir. 1983) (holding that "[p]laintiffs have no fundamental right to a dues checkoff") (alteration in original).

Similarly, in *Sweeney*, the Seventh Circuit rejected a First Amendment challenge to a statute that prevented anyone from "requir[ing] an individual to … [p]ay dues, fees, assessments, or other charges of any kind or amount to a labor organization." 767 F.3d at 657. The statute in *Sweeney* thus went further than § 105.505.2, which merely requires an annual expression of consent from an employee before engaging in payroll deductions or spending his or her union dues on political contributions and expenditures. *Id.* Yet the Seventh Circuit rejected the argument that this statute "infringes on the Union's First Amendment free speech rights," because "unions have no constitutional entitlement to the fees of non-member employees," and the First Amendment does not "require the government to

assist others in funding the expression of political ideas." *Id.* at 668 (quotations omitted). As in *Sweeney*, "[v]iewed in the best possible light, [Plaintiffs'] argument is that [Missouri] has made it more difficult for the Union to collect as many funds as it is used to collecting," but Missouri "is under no obligation to aid the unions in their political activities. And the State's decision not to do so is not an abridgment of the union's free speech; they are free to engage in such speech as they see fit." *Id.* at 669 (quoting *Ysursa*, 555 U.S. at 359).

Thus, on one side of the ledger, the employees have a strong First Amendment interest under *Janus* in avoiding subsidizing the union and/or spending their money on political activities without their consent, which must be shown by "clear and compelling" evidence. *Janus*, 138 S. Ct. at 2486. On the other side of the ledger, the union has no cognizable interest in spending the employees' money on political contributions without their consent, and in fact the union has no constitutional entitlement to obtain money by payroll deductions at all. *Ysursa*, 555 U.S. at 358–59; *Sweeney*, 767 F.3d at 669.

In holding to the contrary, the trial court relied exclusively on *Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d at 12, but that case is plainly off-point. *Fortuno* involved a challenge by unions to a campaign-speech regulation that prevented unions "from spending *any* money on political campaigns" or engaging in "core political speech" without first obtaining pre-approval through

"onerous governance procedures." *Id.* at 6, 12. Those "onerous governance procedures" imposed by the state "reache[d] deep into the mechanics of an organization's own self-governance and impose[d] numerous requirements on the organization's internal processes," as pre-conditions to engaging in "core First Amendment rights." *Id.* at 12. Section 105.505.2 bears no resemblance to the complex scheme of pre-authorization for political speech addressed in *Fortuno*. It merely adopts a straightforward process for obtaining consent to ensure that labor organizations are not violating the First Amendment rights of third-parties—*i.e.*, public employees—by taking their money and spending it on political contributions and expenditures without their consent. § 105.505.2, RSMo.

C. HB 1413's Disclosure and Reporting Requirements Do Not Infringe on Freedom of Speech or Association.

As discussed above, HB 1413 imposes disclosure and reporting requirements on public-sector unions that resemble the requirements for private-sector unions under federal law. Section 105.533.2 provides that public-sector labor organizations "shall file annually with the department a financial report" containing eleven specific categories of information. § 105.533.2(1)-(11), RSMo.

These disclosures track the same disclosures required of private-sector unions under the LMRDA. *See* 29 U.S.C. § 431(b)(1)-(6). Section 105.533.2(1) through (5) parallels 29 U.S.C. § 431(b)(1) through (5). Section 105.533.2(11) is virtually

identical to 29 U.S.C. § 431(b)(6). Section 105.533.2(6) through (10) provide for reporting information concerning collective bargaining, administrative, and training-related expenses of labor organizations, as well as political activity, and political expenditures and contributions.

Section 105.533 also requires labor organizations to submit the annual report in a "readily and easily accessible" electronic format, and to make available the information "required to be contained in such report to all of its members." § 105.533.3, RSMo. Section 105.535.1 requires officers and employees of public-sector unions to file annual financial conflict-of-interest disclosures with the department. § 105.535.1, RSMo. And Section 105.545 requires that public-sector unions "maintain records on the matters required to be reported that will provide in sufficient detail the necessary basic information and data from which the documents filed with the department may be verified…." § 105.545, RSMo.

These requirements place public-sector unions on a similar footing to their private-sector counterparts when it comes to reporting and disclosure. Labor organizations whose members consist of employees of states and political subdivisions, including counties and municipalities, and local unions that are composed entirely of government employees, are not subject to the reporting requirements of the LMRDA, 29 U.S.C. § 401 et seq., including 29 U.S.C. § 431(b). 29 C.F.R. § 451.3(a)(4); 29 U.S.C. § 402(e). Before HB 1413 became law, state

employees and employees of political subdivisions lacked a statutory right to that information.

The annual financial reporting requirements do not limit labor organizations' speech or association. Instead, they provide public employees, including members of labor organizations, access to information concerning labor organizations' finances and use of dues paid by members, and thus require labor organizations to account for their stewardship of public employees' money. Sections 105.533.2 and 105.533.3 give public employees free access to information that will help them to assess whether, and how well or poorly, labor organizations are advocating for their interests. The reporting requirements, like those of the federal LMRDA, "provide union members with the vital information necessary for them to take effective action in regulating affairs of their organization," which requires "detailed essential information about the union" and its financial affairs. *Gabauer v. Woodcock*, 594 F.2d 662, 665 (8th Cir. 1979).

The reporting requirements of HB 1413 are also a deterrent to corruption, embezzlement, and other financial abuses. D78, at 11-12, ¶ 45. They make such abuses easier to detect and, as a result, they discourage people from committing such abuses in the first place. *Id.* Notably, Missouri had seen over 100 federal criminal enforcement actions for union corruption and embezzlement in years prior to HB 1413's enactment. *Id.* Like the LMRDA's parallel reporting requirements, the

information made available through Sections 105.533.2, 105.533.3, and 105.535 serves as "a deterrent to the abuse of union funds by union officials" and empowers public employees to rid labor organizations of "untrustworthy or corrupt officers." *Antal v. Dist. 5, United Mine Workers of Am.*, 451 F.2d 1187, 1189 (3d Cir. 1971) (quoting H.R. REP. NO. 86-741, at 2430, 2431 (1959)). "In addition, the exposure to public scrutiny of all vital information concerning the operation of [public-sector] unions will deter repetition of [such] financial abuses…." *Id.*

Furthermore, the reporting requirements of HB 1413 advance the associational interests of public employees by giving them information necessary to make well-informed decisions about matters such as whether or not to vote for a particular labor organization seeking exclusive bargaining representative status, whether or not to associate with or participate in a specific labor organization's activities, and whether to seek decertification of a labor organization. D78, ¶ 45.

In holding these reporting requirements invalid, the trial court relied heavily on its holding that the exemption for public-safety unions triggers strict scrutiny. D107, at 30, ¶ 57. For the reasons discussed in detail above, it does not. In fact, to the State's knowledge, no case has subjected such reporting and disclosure requirements to strict scrutiny under the First Amendment.

The trial court reasoned that the reporting requirements are subject to strict scrutiny under *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct.

2361 (2018). D107, at 29, ¶ 56. This is incorrect. *Becerra* addressed a California statute that compelled crisis pregnancy centers to provide women with information about state-sponsored abortion services. 138 S. Ct. at 2368–69, 2371. In *Becerra*, a compelled commercial speech case, the Supreme Court found that plaintiffs were likely to succeed on their First Amendment challenge to "a government-scripted, speaker based disclosure requirement that is wholly disconnected from California's informational interest." *Id.* at 2367. *Becerra* bears no resemblance to this case.

Even in the campaign-speech context—where the asserted First Amendment interests are stronger than those asserted here—this Court has not applied strict scrutiny to financial disclosure and reporting requirements. In *Geier v. Missouri Ethics Commission*, this Court held that "[d]isclosure and reporting requirements" for political action committees "are subject to 'exacting scrutiny,'" which is "a lesser standard, requiring that the government establish a 'substantial relation' between the regulation and a 'sufficiently important interest.'" *Geier v. Mo. Ethics Comm'n*, 474 S.W.3d 560, 565 (Mo. banc 2015) (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366 (2010)). "To withstand exacting scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Id.* (quotation omitted).

Even assuming that exacting scrutiny applies here—instead of more deferential rational-basis scrutiny, which is what the Court should apply—HB

1413's reporting requirements easily satisfy it. As this Court emphasized in *Geier*, "disclosure and reporting requirements directly serve substantial government interests." *Id.* These include (1) the "informational" interest in "provid[ing] the electorate with information about the sources of election-related spending," *id.*; (2) the intent to "deter actual corruption and avoid the appearance of corruption," *id.*; and (3) the interest in "gathering of data necessary to detect violations" of the law, *id.* *Geier* also held that requiring the filing of detailed financial reports—four times more often than is required here—was "substantially related to those interests," because they promote the State's interest in "providing information and accountability to the public." *Id.* at 567–68. "[T]he reporting statutes are substantially related to the State's sufficiently important informational, accountability, and enforcement interests." *Id.* at 569. The Court also held that such "reporting and disclosure requirements were not overly burdensome." *Id.* at 568.

So also here. As discussed above, HB 1413's reporting requirements serve the same "informational, accountability, and enforcement interests," *id.* at 569—as attested by both the State's summary-judgment evidence and the federal cases discussing the LMRDA. These requirements "do not prevent anyone from speaking" and "impose[] no more than a minimal burden on [the unions'] First Amendment rights." *Id.* In short, these requirements satisfy *Geier*'s exacting scrutiny and any other level of scrutiny that might apply.

Finally, the trial court speculated that the reporting requirements might turn out to be "onerous" for "smaller unions." D107, at 29, ¶ 56. The trial court cited no evidence from the summary-judgment record to support this speculation. In any event, any claim that the reporting requirements are unduly burdensome for "smaller unions" would be properly raised in an as-applied challenge, not a facial challenge. *See infra* Point V. And *Geier*, which rejected a very similar argument by inactive political-action committees, casts grave doubt on the validity of such an as-applied challenge in any event, even if it had been properly raised here. *Geier*, 474 S.W.3d at 568–69.

IV. The trial court erred in granting summary judgment to Plaintiffs on any disputed issue, because material facts in the summary-judgment record prevented the entry of summary judgment for Plaintiffs on every issue, in that the State filed evidence including four expert affidavits setting forth its detailed factual justification for the challenged provisions of HB 1413 in opposing summary judgment, but the trial court categorically and erroneously refused to consider the State's evidence.

In its Judgment, the trial court categorically disregarded the expert testimony the State submitted in the summary-judgment record, and refused to consider any of that evidence in concluding that every provision of HB 1413 is constitutionally invalid as a matter of law. D107, at 25-26, ¶¶ 50-51; *see also id.* at 21, ¶ 41. This holding disregarded well-settled law, and the error infected the trial court's entire analysis of the validity of HB 1413.

Preservation. This issue was fully preserved. D83, at 18-23.

A. Empirical Evidence, Including Expert Testimony, May Be Submitted to Justify a Law Under Any Level of Constitutional Scrutiny.

The State may—and, in some circumstances, must—provide empirical evidence to support its justifications for constitutionally challenged statutory

provisions. This is true regardless of whether strict scrutiny, intermediate scrutiny, or rational-basis scrutiny applies.

Rational-basis scrutiny. First, as discussed above, every provision of HB 1413 is subject to rational-basis scrutiny. Under rational-basis scrutiny, the State is not required to submit expert or other empirical evidence to support its justification for a law, because the law must be upheld if there is any "reasonably conceivable state of facts" that provide a rational basis for it, or any "plausible reason" for the policy. *Kansas City Premier Apartments*, 344 S.W.3d at 170 (quoting *Beach Commc'ns*, 508 U.S. at 313). The State may supply such a "plausible reason" through "rational speculation unsupported by evidence or empirical data." *Beach Commc'ns*, 508 U.S. at 313, 315. But nothing *prevents* the State from submitting empirical evidence to support its "plausible reason" in favor of a law. *Id.* at 313. On the contrary, empirical evidence greatly strengthens the State's justification under rational-basis scrutiny. For this reason, it is common for the government to provide, and for the courts to consider, empirical evidence in reviewing laws subject to this level of scrutiny.

Intermediate scrutiny. Similarly, the State frequently submits expert and empirical evidence to support its laws under intermediate scrutiny. *See, e.g.*, *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 378 (2000) ("The quantum of *empirical evidence* needed to satisfy heightened judicial scrutiny of legislative judgments will

vary up or down with the novelty and plausibility of the justification raised.") (emphasis added); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 626 (1995) (relying on a "106–page summary of [a] 2–year study of lawyer advertising and solicitation" that "contain[ed] data—both statistical and anecdotal—supporting the Bar's contentions" to uphold a restriction on attorney advertising under intermediate scrutiny, and stating that a case "in which the State offered *no* evidence or anecdotes in support of its restriction" would not satisfy intermediate scrutiny) (emphasis in original).

Strict scrutiny. Likewise, strict scrutiny permits—and may sometimes require—the State to submit empirical evidence to support its justifications for challenged laws. *See, e.g.*, *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 312–13 (2013) (holding that "strict scrutiny" of race-based admissions requires "giving close analysis to the *evidence* of how the process works in practice") (emphasis added); *Shaw v. Hunt*, 517 U.S. 899, 910 (1996) (holding that, under strict scrutiny, the government must have a "strong basis *in evidence*" for a racial classification) (emphasis added) (quotation omitted); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 430 (2002) (plurality opinion) (relying on "a comprehensive study of adult establishments [that] concluded that concentrations of adult businesses are associated with higher rates of prostitution, robbery, assaults, and thefts in surrounding communities" to justify an adult-business ordinance).

In fact, the trial court in this case held that, under strict scrutiny, the State must provide a "strong basis in evidence" for its policies. D107, at 21, ¶ 41. But then, the Court categorically disregarded the State's "evidence," *id.*, and refused to consider it at all. *See* D107, at 25-26, ¶¶ 50-51. Thus, the trial court invalidated HB 1413 because its policies supposedly lacked a "strong basis in evidence," while simultaneously refusing to consider the State's "evidence."

B. The Trial Court's Rationales for Refusing to Consider the State's Evidence Were Meritless.

The rationales that the trial court provided for refusing to consider the State's summary-judgment evidence have no merit.

First, relying solely on cases involving suspect classifications, the trial court held that, under strict scrutiny, the State must show that its asserted purpose was legislature's "actual purpose" and that this purpose must have "a strong basis in evidence." D107, at 21, ¶ 41 (quoting *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996)). But there is no "magic words" requirement holding that the "actual purpose" must be stated in a formal legislative findings or a formal statement of purpose. Where the purpose of the bill is evident from the bill itself, a formal statement of purpose is unnecessary. *See, e.g., Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528–29 (1959) (holding that, under the Equal Protection Clause, "a state legislature need not explicitly declare its purpose" in enacting a statute, especially where "the purpose

and policy of the State Legislature" is "obvious" from the bill's objective provisions). In fact, it is "usually the case" in Missouri that "there is no legislative history available setting forth the reasons why the General Assembly saw fit to … enact" any particular statute. *Ross v. Kansas City Gen. Hosp. & Med. Ctr.*, 608 S.W.2d 397, 399 (Mo. banc 1980). If a formal statement of purpose or "magic words" were required to uphold a statute, many other Missouri statutes besides HB 1413 would have to be invalidated. Moreover, a formal statement of purpose is entirely unnecessary in this case, where HB 1413's reform provisions address problems and issues that were widely known and subjected to widespread public debate, both in Missouri and elsewhere, in the years prior to HB 1413's passage.

In this case, moreover, the legislative record actually does contain many statements by legislators identifying the same concerns that the State raises in defending the statute in this Court, which the State introduced into the summary-judgment record. *See* D68, at 35-38, ¶¶ 35-42. Plaintiffs, by contrast, cited no evidence to suggest that these statements were somehow disingenuous or did not reflect the legislature's actual purposes. Thus, even if there were any mystery about the purpose of HB 1413's comprehensive public-sector union reform provisions (which there is not), the legislative record would confirm that the State's justification in court is fully consistent with the actual motivations of the Legislature. Both the objective content of HB 1413 and these legislative statements directly contradict the

trial court's suggestion that the State's justifications are not "genuine" but were "hypothesized or invented post hoc in response to litigation." D107, at 26, ¶ 50 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)). Moreover, the State's justification here absolutely has a "strong basis in evidence," *Shaw*, 517 U.S. at 908 n.4, as evidenced by the detailed factual justifications discussed above. *See, e.g.*, D78, D79, D80, D81.

The trial court also cited *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 687 (8th Cir. 1992), but that case provides no support for its decision. In *Video Software Dealers*, the Eighth Circuit noted that there was no legislative history or statement of purpose to elucidate the vague statutory phrase, "morbid interest in violence," and thus it was impossible to determine whether the statute was narrowly drawn to survive strict scrutiny in light of the statute's vagueness. *Id.* at 687, 689, 690. Here, Plaintiffs do not contend that any provision of HB 1413 is unconstitutionally vague, so the case is off-point.

In the alternative, the trial court held that the State's expert affidavits "largely contain conjecture, rather than facts." D107, at 25, ¶ 50. But this characterization of the State's affidavits is simply incorrect. The affidavits contain detailed, specific, factual claims that are heavily documented with social-science research and other factual sources. *See, e.g.*, D78, at 3-20 (containing 68 footnotes with factual citations).

Finally, the Court held that the "after-the-fact opinions of economics professor Daniel Shoag, encroach on the duty of the Court to interpret this law and the Missouri Constitution." D107, at 25, ¶ 50. The two cases the trial court cited for this proposition, however, provide no support for it. Instead, they merely reaffirm the well-known rule that expert evidence is inadmissible on questions of *law*, such as the textual interpretation of the Constitution and statutes. In *Howard v. City of Kansas City*, this Court held that "the opinion of an expert on *issues of law* is not admissible," because it "encroaches upon the duty of the court to instruct on *the law*." 332 S.W.3d 772, 785 (Mo. banc 2011) (emphasis added) (quotation omitted). Likewise, *J.J.'s Bar & Grill* held that "opinions about the meaning of statutes or regulations, about whether those statutes or regulations impose legal duties on public utilities or contractors, and about the legal effect of those duties," were not admissible because "those opinions involved pure issues of law." *J.J.'s Bar & Grill, Inc. v. Time Warner Cable Midwest, LLC*, 539 S.W.3d 849, 874 (Mo. App. W.D. 2017). Here, the State's experts did not opine on any "pure issues of law," *id.*—their opinions addressed questions of fact. *See* D78, D79, D80, D81.

C. Material Facts Prevented the Entry of Summary Judgment.

Because the trial court erred in categorically refusing to consider the State's evidence, it also erred in granting summary judgment to Plaintiffs. This error infected its entire decision, as it presumed throughout that the State had no valid

justification for HB 1413's provisions. Instead, the trial court should have accepted the State's evidence and applied the well-established summary-judgment standards to it. Under those standards, "[f]acts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary judgment motion." *ITT Commercial*, 854 S.W.2d at 376. Here, Plaintiffs presented no expert evidence of their own to contradict or refute the State's expert affidavits, and so the trial court should have "taken as true" every factual allegation in the State's evidence that was made part of the Rule 74.04 record for purposes of summary judgment. *Id.* In addition, the trial court should have "review[ed] the record in the light most favorable to" the State as the non-moving party, and it should have "accord[ed] the non-movant the benefit of all reasonable inferences from the record." *Id.* Instead, the trial court did the opposite, and this error infected every aspect of its analysis.

V. The trial court erred in holding that the provisions of HB 1413 were facially invalid, because Plaintiffs' constitutional challenges did not satisfy the demanding standard for facial challenges of showing that there was no set of circumstances in which the law could be validly applied, in that every provision of HB 1413 has at least some valid applications.

The trial court granted facial invalidation of every provision of HB 1413. D107, at 33. For the reasons discussed above in Points I-IV, this ruling was incorrect because none of those provisions is unconstitutional. But even if there were constitutional problems with applications of some provisions, no provision of HB 1413 meets the demanding standards for a facial challenge.

Preservation. The State preserved this issue. D83, at 47-48.

"A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that *no set of circumstances exists under which the Act would be valid*." *State v. Perry*, 275 S.W.3d 237, 243 (Mo. banc 2009) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)) (emphasis added). So long as there are any "circumstances in which [the statute] can be applied constitutionally, it is not facially invalid." *Id.*

Here, even if any of the constitutional challenges had any merit—which they do not—there are innumerable circumstances in which each of the challenged provisions of HB 1413 can still be validly applied. For example, even if one were to assume that the reporting requirements in § 105.533 imposed an unconstitutional burden on "smaller unions" with limited resources, D107, at 29, such requirements impose no significant burden on larger unions that also represent private-sector workers, and thus already have to comply with the similar LMRDA reporting requirements. Likewise, even if HB 1413's provision requiring the renegotiation of economic terms in times of budgetary shortfalls were invalid in some circumstances, it would impose no constitutional injury to unions that already include such requirements in their bargained-for agreements. Again, even if the prohibition against voluntary recognition were invalid in some circumstances—which it is not—requiring a secret-ballot election presents no conceivable constitutional problem in the case of a union whose organizers engage in coercive pressure during a card-check campaign. Even if the true-majority requirement were unconstitutional in some circumstances, it would be plainly valid in the case of a small union that readily achieves near-complete voter turnout in an election. The same reasoning holds true for every substantive provision of HB 1413. Every challenged provision of HB 1413 could be validly applied in some circumstances, and thus none of its provisions is facially invalid. *Perry*, 275 S.W.3d at 243.

Because they are rooted in separation of powers, both the standards for facial challenges and the doctrine of severability require reviewing courts to use "a scalpel rather than a blunderbuss." *Heckler v. Chaney*, 470 U.S. 821, 852 (1985) (Marshall, J., concurring in the judgment). The opposite occurred here. The trial court invalidated at least seventeen provisions in a major piece of reform legislation without even conducting a provision-by-provision review to consider whether any provision might be valid under some circumstances. *Perry*, 275 S.W.3d at 243. In its 33-page judgment, the trial court provided less than three lines of analysis to justify its sweeping holding of facial invalidity: "At the very least, HB 1413's discriminatory carve-out affects every application of the statute in a manner that harms non-public safety unions. As a result, the offending provisions of the law should be declared facially invalid." D107, at 30, ¶ 59.

This cursory analysis suffers from three fatal errors. *First*, as discussed in detail above, the supposedly "discriminatory carve-out" for public-safety unions is subject to rational-basis scrutiny, and it is plainly valid under that deferential standard. *See supra* Point II. Because that exemption raises no constitutional problems, the entire basis for the trial court's decision on facial invalidity was erroneous. D107, at 30, ¶ 59.

Second, the trial court's analysis confuses the standard for severability with the standard for facial challenges. The court's reasoning addresses whether the

exemption for public-safety unions is severable, not whether each challenged provision of HB 1413 is such that there is "no set of circumstances exists under which the [provision] would be valid." *Perry*, 275 S.W.3d at 243. Tellingly, the trial court never stated the correct standard for facial challenges in its order, reflecting its misapprehension of the governing standard.

Third, even if the public-safety exemption were invalid, the trial court would still have been required to conduct a provision-by-provision analysis of each challenged provision to determine whether each provision was capable of valid application in at least some circumstances. *Id.* The trial court did not undertake this effort, and as a result, its holding regarding facial invalidation was erroneous.

VI. The trial court erred in holding that none of the provisions of HB 1413 were severable, because every provision of HB 1413 is severable from every other provision under the standard for severability applicable to substantive constitutional challenges under Section 1.140, RSMo, in that no provision of HB 1413 is essentially and inseparably connected with any other provision, every provision of HB 1413 is complete and capable of implementation standing alone, and the failure to sever the exemption for public-safety unions improperly abrogated HB 1413's substantive reform provisions in their entirety.

The trial court held that no provision of HB 1413 was severable from any other provision, so that the invalidity of any individual provision would require the invalidation of the entire statute. D107, at 30-31, ¶¶ 60-61. In so holding, the trial court again relied exclusively on its conclusion that the exemption for public-safety unions vitiated the entire statute. *Id.* This holding was plainly in error.

Preservation. The State preserved this issue. D83, at 45-47.

"The statutory severability section, section 1.140, RSMo, applies when a provision is unconstitutional in substance." *Mo. Roundtable for Life v. State*, 396 S.W.3d 348, 353 (Mo. banc 2013). Under Section 1.140, "[t]he provisions of every statute are severable." § 1.140, RSMo. There are only two narrow exceptions

to this rule. "If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid," unless either: [1] "the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one," or [2] "the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent." *Id.*

Under Section 1.140, the Court must "uphold valid portions of the statute despite the invalidity of other portions" when "(1) after separating the invalid portions, the remaining portions are in all respects complete and susceptible of constitutional enforcement," and "(2) the remaining statute is one that the legislature would have enacted if it had known that the rescinded portion was invalid." *Karney*, 599 S.W.3d at 166 (quoting *Dodson v. Ferrara*, 491 S.W.3d 542, 558 (Mo. banc 2016)).

As an initial matter, this Court has already held that provisions of HB 1413 are severable. In *Karney*, this Court considered a multi-pronged constitutional challenge to Section 105.585, which "was enacted in 2018 via House Bill No. 1413." 599 S.W.2d at 160. *Karney* held that the phrase "and picketing of any kind" in § 105.585(2) was invalid, and it carefully excised those five words from the rest of

Section 105.585(2), leaving all other provisions of that section (and the rest of HB 1413) in place. *Id.* at 166. In so holding, this Court concluded that this "severance leaves the remaining statute intact, complete, and constitutional," and that there was "no question the remaining statute is one the legislature would have enacted had it known the rescinded portion was invalid." *Id.* This Court's use of a "scalpel" to excise five words from HB 1413 in *Karney*, contrasts starkly with the trial court's use of a "blunderbuss" in this case. *Heckler*, 470 U.S. at 852.

Here, the provisions of HB 1413 do not satisfy either of the exceptions to severability set forth in Section 1.140, and thus they all are severable from each other. First, it is simply not the case that any challenged provision of HB 1413 is "so essentially and inseparably connected with, and so dependent upon, [any other] provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one." § 1.140, RSMo. Each provision of HB 1413 is independent and perfectly capable of implementation without the others. For example, the requirement of secret-ballot elections could easily be implemented without imposing true-majority requirements on those elections, and either or both of those requirements could easily be implemented with or without the requirement of triennial recertification elections. Similarly, the requirement that collective-bargaining agreements preserve the public employers' authority over hiring, promotion, discipline, and discharge could be implemented with or without the

provision preserving public employers' authority over work rules, and each of these could be easily implemented with or without the provision requiring renegotiation of economic terms during times of economic crisis. Likewise, the provisions requiring annual certification of consent to payroll deductions and political expenditures could easily be implemented with or without the record-keeping and reporting provisions. § 105.505.1, .3-.4; § 105.533.1, RSMo. The same logic applies to each and every substantive provision of HB 1413. Every challenged provision is "complete and susceptible of constitutional enforcement" without the others, and even if any individual provision or provisions were invalid, the others would be "intact, complete, and constitutional." *Karney*, 599 S.W.3d at 166.

The trial court did not dispute any of this, and it did not conduct any provision-by-provision severability analysis of HB 1413. In fact, the Court did not identify any substantive provision of HB 1413 that is supposedly "so essentially and inseparably connected with, and so dependent upon," any other provision that the one cannot be implemented without the other. § 1.140, RSMo. Instead, the court relied exclusively on the exemption for public-safety unions, holding that "the discriminatory carve-out in favor of public safety labor organizations" is not severable from any other provision of HB 1413, rendering the entire statute invalid. D107, at 31, ¶ 61. This analysis of severability suffers from at least five fatal errors.

First, as discussed above, the exemption for public-sector unions is plainly valid, and thus it provides no basis to invalidate any other provision of HB 1413. *See supra* Point II. Because the trial court's severability analysis rested entirely on its incorrect conclusion that this exemption is invalid, D107, at 30-31, ¶¶ 60-61, its entire holding on severability was erroneous.

Second, the trial court's analysis misapprehends the governing standard for severability in Section 1.140. That standard requires Plaintiffs to show that the other provisions of HB 1413 are "so essentially and inseparably connected with, and so dependent upon," the public-safety exemption that they could not have been enacted without it—which is plainly not the case. § 1.140, RSMo. The other provisions of HB 1413 are all perfectly capable of being implemented regardless of whether public-safety unions are exempted from them. With or without the exemption, the substantive provisions are "intact, complete, and constitutional." *Karney*, 599 S.W.3d at 166. Likewise, even without the public-safety exception, none of the statute's other provisions would be "incomplete and incapable of being executed in accordance with the legislative intent." § 1.140, RSMo. The trial court's contrary holding, that the public-safety exemption is "so inextricably linked to the statutory scheme" that HB 1413 could not function without it, D107, at 31, ¶ 60, is unsupported by any reasoning, evidence, or statutory language.

Third, the trial court erred in relying on *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017). D107, at 31, ¶ 61. That case strongly supports the conclusion that the public-safety exemption is severable here. In *Morales-Santana*, the Supreme Court held that it "cannot convert" a statutory exception granting more favorable citizenship treatment to children of unwed mothers born abroad into "the main rule" for all children of unwed parents. 137 S. Ct. at. 1686. In other words, when confronted with an exception providing *favorable* treatment for a particular group from a "main rule" imposing less favorable treatment on everyone else, the Supreme Court *severed the exception*—it did not invalidate the "main rule." *Id.* So also here—if this Court concludes that the exception for public-safety unions is invalid (which it should not), the Court should sever the exception and extend the "main rule" of HB 1413's reform provisions to all public-sector unions, both public-safety and non-public-safety alike. *See id.*

Both the holding and the reasoning of *Morales-Santana* strongly support this conclusion. *Morales-Santana* reaffirmed that, where the unequal treatment consists of denying a benefit to a *disfavored* group, the appropriate remedy for an equal-protection violation is to extend the same benefit to the disfavored group. *Id.* at 1699. By contrast, where "the discriminatory exception consists of *favorable* treatment for a discrete group" (here, public-safety unions), a different analysis applies. *Id.* (emphasis added). In such cases, "in considering whether the legislature

would have struck an exception and applied the general rule equally to all, or instead, would have broadened the exception to cure the equal protection violation," the Court should "measure the intensity of commitment to the residual policy—*the main rule, not the exception*—and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation." *Id.* at 1700 (emphasis added) (quotation marks omitted) (quoting *Heckler v. Mathews*, 465 U.S. 728, 739 n.5 (1984)).

Here, "the intensity of commitment to the residual policy" and to the "main rule" of public-sector union reform is very great, as reflected in HB 1413's many reform provisions. *Id.* Moreover, "the degree of potential disruption of the statutory scheme" that results from "extension as opposed to abrogation," *id.*, of the public-safety exemption is the greatest possible disruption—complete abrogation of the legislative policies reflected in HB 1413. "Put to the choice," the General Assembly "would have abrogated [the public-safety] exception" and "prefer[red] preservation of the general rule." *Id.* "Extension here would render the special treatment" provided in the public-safety exception into "the general rule, no longer an exception." *Id.* at 1701. In these circumstances, the "general rule," not the exception, "must hold sway." *Id.*

Fourth, the trial court erred in relying on counterfactual speculation about legislative intent. The trial court reasoned that "the [public-safety exemption] was

added late in the legislative process in a manner that suggests it was necessary to secure passage of the entire law." D107, at 31, ¶ 61. But this conclusion rests entirely on speculation. In any event, under Section 1.140, the relevant inquiry is not whether one can tell whether the bill would have passed by engaging in hypothetical speculation about whether enough legislators would have voted for a differently constituted bill. The relevant inquiry is whether "it cannot be presumed the legislature would have enacted the valid provisions without the void one" *because* the valid provisions are "so essentially and inseparably connected with, and so dependent upon, the void provision." § 1.140, RSMo. Again, the severability statute directs the Court to consider whether "the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent." *Id.* In other words, in ascertaining whether "the legislature would have enacted the valid provisions without the void one," the statute's plain language instructs the Court to consider the logical interrelation of the bill's objective provisions—not to engage in speculation about the subjective intent of legislators and how they might have voted on a hypothetically constituted bill. *Id.*

Fifth, even if Section 1.140 had instructed this Court to engage in the metaphysical task of parsing the legislative record to determine whether HB 1413 would have passed without the public-safety exemption, the relevant evidence in the legislative record supports severance and contradicts the trial court's holding. In the

summary-judgment record, the State cited numerous statements in the legislative record indicating that the overarching concerns about the problems and abuses of public-sector unions were the dominant focus of the legislative debates on HB 1413. By contrast, Plaintiffs and the trial court cited no statements in the record or other evidence of legislative intent supporting the conclusion that the public-safety exception was the General Assembly's dominant concern, while the comprehensive reform provisions for public-sector unions were merely secondary. The conclusion that the exemption was added late in the legislative process indicates, if anything, that it was a secondary consideration, not the legislature's main policy concern.

CONCLUSION

For the reasons stated, the trial court's judgment granting summary judgment to Plaintiffs should be reversed. In addition, because all provisions of HB 1413 are valid as a matter of law for the reasons discussed herein, the Court should enter an opinion upholding the validity of the statute in its entirety and remand to the trial court with instructions to enter judgment in favor of the State on all counts.

Dated: August 24, 2020

ERIC S. SCHMITT
Attorney General

/s/ D. John Sauer
D. John Sauer, #58721
Solicitor General
Alyssa M. Mayer, #64008
Assistant Attorney General
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, Missouri 65102
Phone: 573-751-8870
John.Sauer@ago.mo.gov
Attorneys for Appellant

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 August 24, 2020, on all counsel of record.

/s/ D. John Sauer

CERTIFICATE OF COMPLIANCE

The undersigned also certifies that the foregoing brief complies with the limitations in Missouri Supreme Court Rule 84.06(b) and 84.06(c)(1)-(4), and that the brief contains 30,833 words, excluding the portions exempted from the word count under Supreme Court Rule 84.06(b).

/s/ D. John Sauer