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

REPLY BRIEF

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Plaintiffs-Respondents ("Plaintiffs") fail to provide a convincing defense of the trial court's judgment. Plaintiffs' main argument is that the exemption for public-safety unions constitutes "pervasive discrimination" that undermines the validity of every provision of HB 1413. But the General Assembly had compelling reasons to avoid any risk of labor unrest and work stoppages in the public-safety sector, which could have dire consequences. Every court to consider a similar distinction between public-safety and non-public-safety employees has upheld it.

Plaintiffs' other arguments lack merit as well. Article I, § 29 does not include the provisions of the federal NLRA, and it did not purport to incorporate the substantive provisions of federal labor law as it existed in 1945. The right to engage in public-sector collective bargaining is not a fundamental right deeply rooted in Missouri's history and tradition, since it was first recognized in 2007. Differential regulations of different types of public-sector unions impose no direct restriction on freedom of speech or association, and so they are subject to rational-basis scrutiny. The State's empirical justifications for HB 1413 are not "post-hoc rationalizations" because they mirror the concerns that are evident on the bill's face and were widely debated both in public and in the Legislature before the bill's passage. No provision of HB 1413 is facially invalid, and every substantive provision is severable. The Court should reverse the judgment below.

ARGUMENT

A. HB 1413's Exemption for Public-Safety Unions Is Constitutional (Supports Points I, II, III, V, and VI).

The dominant theme of Plaintiffs' argument is that HB 1413 is supposedly "discriminatory" because it exempts public-safety unions. *See* § 105.503.2(1)-(2), RSMo. Plaintiffs describe this exemption as "pervasive discrimination," "invidious discrimination," and a "discriminatory carve-out." *See, e.g.,* Resp. Br. 16, 35-38, 44, 73, 74, 80, 84, 94. This argument is central to their equal-protection claim, their freedom-of-association claim, their facial-challenge argument, and their severability argument. *See id.* at 73-84, 84-85, 93-94, 96-101. They also cite it to support their claim under Article I, § 29. *Id.* at 73. The argument is meritless.

As noted in the State's opening brief, App. Br. 91-94, the General Assembly had clear and compelling reasons to include the exemption for public-safety unions. Public-safety workers provide critical, life-saving services to the public, often risking their own lives in the process. *See, e.g.,* D78, at 12, ¶ 48; *id.* at 17-18, ¶¶ 59-61; *id.* at 19, ¶ 65. Missouri enacted HB 1413 only a few years after Wisconsin adopted similar public-sector union reform legislation. *Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 655 (7th Cir. 2013). After passage of its bill, Act 10, Wisconsin experienced "widespread labor unrest." *Id.* "[I]n the wake of Act 10's proposal and passage, thousands descended on the state capital in protest and numerous teachers organized a sick-out through their unions, forcing schools to

close." *Id.* But Wisconsin "avoided the large societal cost of immediate labor unrest among public safety employees," because Act 10 had exempted public-safety employees. *Id.*

Missouri had every reason to learn from this experience. Like Wisconsin, Missouri "could rationally … conclude that the state could not withstand that unrest with respect to public safety employees," especially the risk of interrupting life-saving services and critical public-safety services. *Id.* Like Wisconsin, Missouri "was free to determine that the costs of potential labor unrest exceeded the benefits of restricting the public safety unions." *Id.* Unlike in other professions, the risk of work stoppages and service disruptions in the public-safety professions are literally life-threatening to the public. Missouri was not required to risk such disruptions in the public-safety fields as the cost of public-sector union reform. Quite reasonably, Missouri first implemented reforms in areas where work stoppages and service disruptions would not directly threaten the public health and safety. Nothing prevents Missouri from expanding the reforms to public-safety unions once the reforms have been thoroughly tested and obtained widespread acceptance.

Missouri has long treated public-safety unions differently from other unions, D107, at 4, ¶ 8, and this distinction does not violate the Constitution. Indeed, "[t]his conclusion is uncontroversial: other courts have upheld distinctions between employee groups with similar classifications." *Wisc. Educ. Ass'n Council*, 705 F.3d

at 655; *see also, e.g., Am. Fed'n of Gov't Emps. v. Loy*, 281 F. Supp. 2d 59, 65–66 (D.D.C. 2003); *Margiotta v. Kaye*, 283 F. Supp. 2d 857, 864–65 (E.D.N.Y. 2003). Every court to consider a similar distinction has applied rational-basis scrutiny and upheld it. "Since a distinction limiting the collective bargaining rights of public employees involves neither a fundamental right nor a suspect classification, there need only be a rational relationship between any disparity of treatment and some legitimate government purpose." *Loy*, 281 F. Supp. 2d at 65 (D.D.C. 2003).

Plaintiffs argue that Missouri's exemption is different because it applies to public-safety *unions* instead of public-safety *employees*. *See* Resp. Br. 80-81. This argument is meritless. The rights guaranteed by the Missouri Constitution are held by individual employees, not by unions. *See* MO. CONST. art. I, §§ 2, 8-9, 29. By applying the exemption to public-safety unions, rather than public-safety employees, Missouri made the exemption *less* restrictive and *more* flexible for individual employees than other exemptions that courts have upheld. *See* § 105.503.2(1), RSMo; § 105.500(8), RSMo.

Moreover, judicial scrutiny does not require lines to be drawn with surgical precision, which is often impossible to achieve in real life. "[R]estraints on judicial review have added force where the legislature must necessarily engage in a process of line-drawing." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) (quotation marks omitted). "Defining the class of persons subject to a regulatory

requirement … inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact that the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *Id.* at 315-16 (alterations omitted).

Plaintiffs' other arguments against the exemption are also meritless. They argue that the exemption is supposedly "wildly underinclusive," Resp. Br. 83, but their evidence on that point is anecdotal or non-existent. Moreover, even when applying strict scrutiny, courts are skeptical of such "underinclusivness" arguments, which urge that the legislature should have imposed *greater* burdens on constitutional rights. The Missouri Constitution, like the First Amendment, "contains no freestanding 'underinclusiveness limitation.' A State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns." *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 449 (2015). Courts "have accordingly upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests." *Id.* This is all the more true where, as here, the exemption is subject to highly deferential rational-basis review, not strict scrutiny.

Plaintiffs rely on *Brown v. Alexander*, 718 F.2d 1417 (6th Cir. 1983), Resp. Br. 75-76, but *Brown* directly supports the State's argument here. *Brown* considered and upheld most provisions of a Tennessee statute that permitted some public-sector

unions, but not others, to engage in dues checkoff. *Id.* *Brown* expressly held a State may apply differential regulations to different public-sector unions: "the state may condition the privilege of union dues checkoff upon an organization's meeting certain requirements." *Id.* *Brown* applied rational-basis scrutiny to distinctions that permitted some public-sector unions, but not others, to exercise dues check-off: "the state must demonstrate a rational basis for distinguishing between employee organizations in granting the valuable privilege of dues checkoff." *Id.* at 1423. *Brown* emphasized that "[m]any cases have held that a state or city may favor one employee organization over another that has attained some official status, or has met some prescribed conditions imposed, despite an equal protection challenge by a union claiming discriminatory treatment." *Id.* ta 1424 (citing many cases). "These cases … have recognized that a labor association or organization chosen by a majority of employees may lawfully and constitutionally enjoy a status, as to check-off or other privileges, that other organizations may not enjoy." *Id.*

Accordingly, *Brown* upheld a series of differential regulations on different kinds of public-sector unions by applying rational-basis scrutiny and rejecting the very arguments that Plaintiffs make here. *Id.* at 1423-25. *Brown*'s only exception was to apply strict scrutiny to a provision that "*directly* limit[ed] freedom of association between labor organizations" by denying dues-checkoff to unions that affiliated with other unions. *Id.* at 1425 (emphasis added). HB 1413 contains no

similar restriction, and it contains no provision that "directly limits" freedom of association in any way. *Id.* Instead, Plaintiffs posit (at most) an *indirect* burden on association arising from the fact that some unions, but not others, are exempt from HB 1413's requirements, and thus some employees may not wish to associate with the latter unions. *Brown* applied rational-basis scrutiny and upheld every similar provision that creates such an indirect burden. *Id.* at 1423-25; *see also Lyng v. Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW*, 485 U.S. 360, 366 (1988).

The other cases cited by Plaintiffs do not support them either. *See* Resp. Br. 76. As in *Brown*, *Firefighters Local No. 3808* involved a *direct* prohibition on association between supervisory firefighters and the international firefighters union, not an indirect burden arising from mere differential regulation of different public-sector unions. *Int'l Ass'n of Firefighters, Local No. 3808 v. City of Kansas City*, 220 F.3d 969, 973 (8th Cir. 2000). Likewise, *City of Cabool* involved a *direct* restriction on association, in which the employer retaliated against union membership by "laying off and reducing pay of … employees … to discriminate against and intimidate them for joining and having [the union] represent them." *State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35, 42 (Mo. 1969). Again, no such direct restriction is present here.

In addition, Plaintiffs' argument proves far too much. By their logic, *any* differential regulation of public-sector unions would impose a burden on the freedom of association of employees who might wish to associate with the "disfavored" unions, and thus trigger strict scrutiny. Virtually any regulation (or even recognition) of public-sector unions would be invalid under this theory. Thus, no court has accepted it. As *Brown* noted, "[m]any cases have held that a state or city may favor one employee organization over another that has attained some official status, or has met some prescribed conditions imposed, despite an equal protection challenge by a union claiming discriminatory treatment." 718 F.2d at 1424; *see also Lyng*, 485 U.S. at 366; *Sweeney v. Pence*, 767 F.3d 654, 668 (7th Cir. 2014.

B. Article I, § 29 Did Not Enact a Comprehensive State Labor-Relations Act (Supports Point I).

Plaintiffs repeatedly argue that the phrase "bargain collectively" in Article I, § 29 effectively incorporates the substantive protections that the federal National Labor Relations Act (NLRA) afforded to organized labor at the time Article I, § 29 was adopted in 1945. *See, e.g.,* Resp. Br. 24, 55-56, 58-59. This argument contradicts the plain language of the Missouri Constitution and numerous principles of interpretation. Article I, § 29 protects the right to "bargain collectively," but unlike the NLRA, it does not purport to define unfair labor practices or prescribe topics of bargaining. It leaves that authority to the Legislature.

Article I, § 29 states, in its entirety: "That employees shall have the right to organize and to bargain collectively through representatives of their own choosing." MO. CONST. art. I, § 29. By contrast, the National Labor Relations Act comprises sixteen statutory sections setting forth a comprehensive labor-management relations scheme. 29 U.S.C. §§ 151-167. Like Article I, § 29, Section 7 of the NLRA provides that "[e]mployees shall have the right … to bargain collectively through representatives of their own choosing." 29 U.S.C. § 157. But the NLRA provides much more besides—none of which is provided in Article I, § 29, contrary to Plaintiffs' argument.

For example, unlike Article I, § 29, the NLRA explicitly provides that topics of collective bargaining must include "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d); *see also id.* § 159(a). Unlike Article I, § 29, the NLRA imposes a series of substantive prohibitions against "unfair labor practices." 29 U.S.C. § 158(a)-(c), (e)-(f). Unlike Article I, § 29, the NLRA provides a comprehensive definition of the "unfair labor practices" prohibited by the Act. *Id.* Unlike Article I, § 29, the NLRA proscribes those "unfair labor practices" *in addition to* protecting the right "to bargain collectively." *See* 29 U.S.C. § 158(a)-(b), (d). And the NLRA provides a specific definition of the right "to bargain collectively" that is much narrower than its definition of "unfair labor practices." 29 U.S.C. § 158(d).

In fact, the definition of "to bargain collectively" in Section 8(d) of the NLRA directly supports the State's interpretation of that same phrase in Article I, § 29—not Plaintiffs' interpretation. *See* 29 U.S.C. § 158(d) (providing that "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith"). And the NLRA's definition of "to bargain collectively" explicitly agrees with this Court's understanding of that phrase: "such obligation does not compel either party to agree to a proposal or require the making of a concession." *Id.*

Thus, Article I, § 29 does not purport to incorporate the substantive provisions and protections of a comprehensive labor relations act—the Missouri Constitution leaves that task to the Legislature. *See Missouri State Conference of Nat'l Ass'n for the Advancement of Colored People v. State*, No. SC98744, 2020 WL 5988505, at *5 (Mo. Oct. 9, 2020) (per curiam) ("*NAACP*").

For these very reasons, this Court has rejected the argument that Article I, § 29 incorporates federal labor law as it existed in 1945. In *Ledbetter*, this Court rejected the union's argument that "Missouri's adoption of article I, section 29 evinces an intent to adopt the same duty of good faith in collective bargaining as under settled federal labor law," and it specifically cautioned against citing NLRA decisions to expand the meaning of Article I, § 29. *Am. Fed'n of Teachers v. Ledbetter*, 387 S.W.3d 360, 367 n.5 (Mo. 2012) (emphasizing that "cases interpreting federal

statutes [such as the NLRA] are not binding with regard to this Court's interpretation of Missouri law"). In *City of Cabool*, this Court held that, under Article I, § 29, "the prior discretion in the legislative body to adopt, modify or reject outright the results of the discussions is untouched," and that Article I, § 29 "provides only a procedure for communication between the organization selected by public employees and their employer without requiring adoption of any agreement reached." *State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35, 41 (Mo. banc 1969). Likewise, *City of Grandview* emphasized that "Sec. 29, Art. I *is not a labor relations act*, specifying rights, duties, practices and obligations of employers and labor organizations." *W. Cent. Missouri Region Lodge #50 of Fraternal Order of Police v. City of Grandview*, 460 S.W.3d 425, 446 (Mo. App. W.D. 2015) (emphasis added) (quoting *Quinn v. Buchanan*, 298 S.W.2d 413, 417 (Mo. banc 1957)).

For these reasons, in *Ledbetter*, this Court explained that the constitutional provision places only two affirmative duties on public employers—to "meet and confer" and "bargain in good faith." *Ledbetter*, 387 S.W.3d at 367. Likewise, *City of Chesterfield* refused to interpret the employer's duty to "meet and confer" under Article I, § 29 to require the city to establish any specific procedures, holding instead that "it is a proper role of the courts to compel legislative bodies to meet their constitutional obligations while leaving it to those bodies to determine how to meet them." *Eastern Mo. Coalition of Police, Fraternal Order of Police, Lodge 15 v. City*

of Chesterfield, 386 S.W.3d 755, 763 (Mo. banc 2012); *see also Independence-Nat. Education Ass'n v. Independence Sch. Dist.*, 223 S.W.3d 131, 138, 141 (Mo. banc 2007).

Consistent with these cases, Plaintiffs' ability to reach certain bargaining outcomes has always been subject to statutory limitations under Missouri law. Before 2018, many public employees engaged in collective bargaining were subject to the State Personnel Law (Merit System), which indirectly controlled collective bargaining outcomes over a variety of topics, such as discipline, dismissal, seniority, tenure, sick and annual leave. *See* §§ 36.010, *et seq.*, RSMo (2010). State agency employers could not use collective bargaining as a means to negotiate around the law's mandates, even if the agency wanted a different outcome. Thus, Plaintiffs appear to welcome legislation that restricts the outcomes of bargaining topics when they consider it favorable, but they attack legislation as interfering with their right to "bargain collectively" if they consider the law's impact unfavorable.

Plaintiffs' repeated reliance on federal cases interpreting and applying the substantive protections of the NLRA is misplaced. These cases relied on the specific language of the NLRA that prohibits unfair labor practices and requires bargaining on certain topics—language which is absent from Article I, § 29. For example, *Westinghouse* involved a complete refusal to bargain on any topic except one; in holding this refusal to constitute an "unfair labor practice," the court relied on

specific language in the NLRA that requires bargaining on "rates of pay, wages, hours of employment, or other conditions of employment." *NLRB v. Westinghouse Air Brake Co.*, 120 F.2d 1004, 1005 (3d Cir. 1941) (quoting 29 U.S.C. § 159(a)). *Reed & Prince* involved an employer who engaged in "a mere formal pretence at collective bargaining with a completely closed mind" who was "going through the motions of bargaining with a complete absence of the good faith"; it did not address substantive limitations on topics of bargaining. *NLRB v. Reed & Prince Mfg. Co.*, 118 F.2d 874, 885 (1st Cir. 1941). Other federal cases cited by Plaintiffs likewise rely on provisions of the NLRA that differ from Article I, § 29.

Plaintiffs' arguments regarding HB 1413's regulations of union election procedures are meritless for the same reason. Plaintiffs argue that "[e]lections and voluntary recognition were the usual means by which employees chose union representation at the time of Article I, Section 29's adoption in 1945." Resp. Br. 24. But they do not point to any provision of Missouri or federal law that mandates voluntary recognition as a method of union recognition, and none exists. No language in Article I, § 29 purports to mandate union-recognition procedures commonly employed in 1945. Rather, it guarantees that employees may be represented by "representatives of their own choosing." MO. CONST. art. I, § 29. The undisputed evidence in the summary-judgment record demonstrates that HB 1413's secret ballots, periodic recertification elections, and true-majority standards

protect employees' ability to select "representatives of their own choosing." *See* D78, at 4-5, ¶¶ 12-16; *id.* at 5-6, ¶¶ 18-21; *id.* at 6-8, ¶¶ 22-33.

C. Collective Bargaining by Public Employees Is Not a "Fundamental Right" (Supports Point II).

Plaintiffs argue at length that the right to bargain collectively is a "fundamental" right. Resp. Br. 46-54. Plaintiffs erroneously conflate two distinct questions—whether the right to collective bargaining is a "fundamental right" for equal-protection purposes under Article I, § 2; and what standard of review, if any, applies to claims arising directly under Article I, § 29. *See id.* Instead, Plaintiffs argue that, because collective bargaining is protected under Article I, § 29, it must also be a "fundamental right" that triggers strict scrutiny under Article I, § 2. *Id.*

This is incorrect. This Court has made clear that the set of fundamental rights that trigger strict scrutiny for equal-protection purposes is narrower than the set of rights enumerated in the Constitution. Only those rights that are "deeply rooted in … history and tradition," or "implicit in the concept of ordered liberty," are included as "fundamental." *Comm. for Educ. Equal. v. State*, 294 S.W.3d 477, 490 (Mo. banc 2009). *Id.* Collective bargaining is not such a "fundamental right." *Id.*

Moreover, Plaintiffs assert a much more specific right—the right of *public employees* to engage in collective bargaining with a government employer. *State ex rel. Nixon v. Powell*, 167 S.W.3d 702, 705 (Mo. banc 2005) (holding that "a careful description of the asserted fundamental right is required"). This right was not

recognized in Missouri until 2007, and thus it is not deeply rooted in Missouri's history and tradition. *See Independence-NEA*, 223 S.W.3d at 137. Even if collective bargaining were a fundamental right, collective bargaining *by public-sector employees* is not. *See NAACP*, No. SC 98744, 2020 WL 5988505, at *5 ("Holding that the right to vote is fundamental, however, is a separate matter from determining whether *absentee* voting is a fundamental right.").

D. HB 1413 Does Not Create "Disfavored Speakers" (Supports Point III).

Plaintiffs argue that the public-safety exemption creates "disfavored speakers" under *Citizens United* and *Iowa Right to Life v. Tooker*. Resp. Br. 84; *see also id.* at 77-78. This argument lacks merit. Both *Citizens United* and *Iowa Right to Life* involved *direct* regulations of political speech that disfavored certain speakers, which are absent here. *Citizens United* held that corporations and labor unions could not be directly prohibited from using their general treasury funds to engage in core political speech. *Citizens United v. FEC*, 558 U.S. 310, 318-19 (2010). *Iowa Right to Life* held that Iowa could not single out corporations, but not other entities, for a requirement that a corporate officer certify political-speech expenditures. *Iowa Right to Life v. Tooker*, 717 F.3d 576, 605-06 (8th Cir. 2013). In both cases, there was a direct regulation of core political speech that distinguished among speakers. HB 1413 contains no direct regulation of political speech (other than the provision that this Court already addressed in *Karney*).

Instead, Plaintiffs argue that HB 1413 creates "disfavored speakers" *indirectly* by imposing different regulations that do not directly regulate political speech on different kinds of unions. No court has accepted this indirect-burdens argument, and for good reason. As with Plaintiffs' other arguments, it proves far too much. By their logic, any differential regulation of different kinds of unions (or corporations) would create "disfavored speakers" because those unions or corporations might subsequently engage in political speech. This would subject virtually all economic regulation to strict scrutiny under the First Amendment.

Plaintiffs also argue that HB 1413's disclosure requirements "distinguish among different speakers." Resp. Br. 85 (quoting *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2378 (2018)). This argument lacks merit for the same reason. Like *Citizens United* and *Iowa Right to Life*, *NIFLA* involved a *direct* regulation of speech—in that case, a regulation that compelled an anti-abortion group to convey a government message. 138 S. Ct. at 2378. None of these cases supports the Union's argument that a regulation of some unions, but not others, *indirectly* creates "disfavored speakers."

Plaintiffs also challenge HB 1413's disclosure requirements by arguing that such requirements cannot be "unjustified or unduly burdensome," "broader than reasonably necessary," or address "purely hypothetical" harms. Resp. Br. 78. Here, the State presented extensive evidence demonstrating that the disclosure

requirements are justified, are not unduly burdensome or overbroad, and address real harms. *See* App. Br. 40-42, 117-120. In particular, the disclosure requirements mirror the disclosure requirements imposed on most private-sector unions by the Labor-Management Reporting and Disclosure Act (LMRDA). D78, ¶ 44. These requirements render unions transparent to their members and the public, promote informed exercise of franchise in union elections, allow members and nonmembers to monitor union activities, deter corruption, and make corruption easier to detect. *Id.* ¶¶ 44-45. These reporting requirements "provide union members with the vital information necessary for them to take effective action in regulating affairs of their organization." *Gabauer v. Woodcock*, 594 F.2d 662, 665 (8th Cir. 1979).

Moreover, even if campaign-finance cases were applicable here, *Citizens United*—which Plaintiffs repeatedly cite—expressly reaffirmed that "[t]he Government may regulate corporate political speech through … disclosure requirements." 558 U.S. at 319. This Court upheld similar disclosure requirements on political speakers in *Geier v. Mo. Ethics Comm'n*, 474 S.W.3d 560, 565 (Mo. banc 2015), which Plaintiffs do not cite or discuss. If Plaintiffs' analogy to campaign-finance disclosures is applicable, it supports the State, not Plaintiffs.

Plaintiffs argue that *Janus* does not require the annual certifications from union members to authorize payroll deductions or political expenditures, because *Janus* concerned non-members. Resp. Br. 86. But *Janus* stated: "States and public-

sector unions may no longer extract agency fees from nonconsenting *employees*." *Janus v. Am. Fed. of State, County, and Mun. Employees, Council 31*, 138 S. Ct. 2448, 2486 (2018) (emphasis added). Spending union members' hard-earned money on political expenditures without their consent raises valid concerns under the First Amendment. By contrast, the burden on any employee in making an affirmative expression of consent—such as sending an email—is minimal or non-existent, while the requirement safeguards important freedom-of-expression interests of union members and non-members alike. *See id.*

More fundamentally, Plaintiffs have no constitutional right to obtain funds through payroll deductions at all, because the Constitution "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). "[T]he State is not constitutionally obligated to provide payroll deductions at all." *Id.* at 359. Thus, Missouri could prohibit payroll deductions outright, or it could prohibit political expenditures from payroll deductions, as did the statute in *Ysursa*. *See id.* HB 1413 adopts the much more lenient course of merely requiring annual certification of consent to payroll deductions from nonmembers, and annual certification of consent to political expenditures from members and non-members alike. §§ 105.505.1, 105.505.2, RSMo. Because Missouri could prohibit both these

practices outright, *a fortiori*, Missouri's much more lenient regulations do not violate the Constitution.

E. The State's Summary-Judgment Evidence Provides Compelling Empirical Justifications for HB 1413's Provisions (Supports Point IV).

Plaintiffs do not defend the trial court's principal rationales for disregarding the State's summary-judgment evidence. Plaintiffs concede that the trial court was obliged to "consider[] the State's evidence," Resp. Br. 88; that the State was entitled to submit empirical evidence to defend its statutes under any standard of scrutiny, *id.*; and that "empirical evidence is … admissible in a strict scrutiny analysis," *id.* And Plaintiffs never dispute that they submitted *no* evidence to address or refute the State's evidence of empirical justifications for the provisions of HB 1413.

Instead, Plaintiffs argue that, because the Legislature did not have before it the specific expert affidavits that the State submitted to the trial court when it enacted HB 1413, those affidavits should be disregarded as "post hoc rationalizations" for HB 1413. Resp. Br. 93. This argument lacks merit. First, the provisions of HB 1413 are subject to rational-basis review for the reasons discussed above, and Plaintiffs admit that under "rational basis review, … the court is free to speculate about any plausible legislative intent." Resp. Br. 90. Plaintiffs' arguments about the actual motivation of the legislature are thus beside the point. *See Beach Communications*, 508 U.S. at 315. "[I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually

motivated the legislature. Thus, the absence of 'legislative facts' explaining the distinction 'on the record' has no significance in rational-basis analysis." *Id.* (citations and quotation marks omitted).

Second, Plaintiffs rely heavily on *Shaw v. Hunt*, 517 U.S. 899, 910 (1996), but they plainly misconstrue that case. Resp. Br. 88-90. In *Shaw*, the legislative evidence demonstrated that concerns about remediating past discrimination had *not*, in fact, motivated the challenged redistricting decision, and thus two subsequent reports on remediating past discrimination were not relevant to justify the legislative decision under strict scrutiny. 517 U.S. at 910. *Shaw* did not hold that the State in litigation can never provide more specific, empirical evidence to support the legitimacy of the concerns that *actually did* motivate the legislature. *See id.* On the contrary, *Shaw* clearly indicated that the subsequent reports would have been relevant to justify the state's decision if the legislature had been motivated by the same concerns. *See id.*

Here, by contrast, there is overwhelming evidence that the concerns reflected in the State's evidence were the same concerns that motivated the passage of HB 1413. First and foremost, for virtually every provision of HB 1413, the reform-based purpose of the provision is evident from its face—one is not left to wonder or speculate as to what concerns they were intended to address. Moreover, as the State noted in its opening brief, "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." App. Br. 128. Plaintiffs do not dispute that this is true. Resp. Br. 90. The State's evidence provided empirical justifications addressing those widely debated problems and concerns.

In addition, even if there were any question about the legislature's concerns, the legislative debates provide extensive evidence that the General Assembly was concerned about, and debated, the very policy issues discussed in the State's expert affidavits. D68, at 35-38, ¶¶ 32-42. Plaintiffs dismiss the record of legislative debates as "meager," Resp. Br. 90, but their own discussion of those debates recounts concerns about (1) safeguarding the First Amendment rights of employees under *Janus*, Resp. Br. 90 n.25; (2) the infrequency of recertification elections, *id.*; (3) promoting "financial transparency" through disclosure and reporting requirements, *id.* at 90-91; (4) reforming the collective bargaining process to empower individual employees, *id.* at 91 n.26; (5) the problem of indefinite recognition without meaningful democratic review, *id.*; (6) the problem political insiders picking their bargaining opponents, *id.*; (7) public-sector collective bargaining agreements infringe legislative prerogatives by committing public resources without accountability to the taxpayer, *id.*; (8) union elections lacking democratic accountability and basing union certification on the votes of a tiny minority of current employees, *id.* n.27; (9) protecting the political viewpoints of

public sector union members who disagree with union leadership," *id.* at 91; and (10) union representation resulting in a bias against the interests of shorter-term workers, *id.*; among other things. In other words, even on Plaintiffs' parsimonious account of the legislative debates, they addressed virtually all the major concerns raised in the State's expert affidavits. *See also* D68, at 35-38, ¶¶ 32-42.

Plaintiffs also argue that the Court should discount the affidavit of Dr. Shoag, D78, because he supposedly "did no more than speculate about what rationales the legislature might have had for different provisions of HB 1413." Resp. Br. 92; *see also id.* at 67 n.16. This description mischaracterizes Dr. Shoag's affidavit. Dr. Shoag addressed "whether the provisions of HB 1413 can advance the interests of the State and its employees." D78, at 1, ¶ 6. He found that the provisions of HB 1413 to be "supported by the academic economics literature and by data to which I had access." *Id.* ¶ 7. He then provided 20 single-spaced pages and 70 paragraphs of detailed analysis with 68 footnotes, including both a comprehensive literature review and an analysis of Missouri-specific data. *Id.* Each of his points provides a compelling empirical justification that supports the concerns that evidently motivated the Legislature to enact the relevant provisions of HB 1413. *See id.* at 1-20, ¶¶ 1-70. This evidence is highly relevant under any standard of review. *See id.* Moreover, Plaintiffs' attempts to distort Dr. Shoag's affidavit violate a basic principle of summary-judgment law—*i.e.*, that the evidence must be viewed in the

light most favorable to the non-moving party. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993).

Plaintiffs also argue that "the only way the legislature could have articulated a genuine, compelling interest surviving strict scrutiny would have been to set forth its findings or purpose in the statute." Resp. Br. 90. But Plaintiffs cite no case that adopts this holding, *see id.*, and for good reason. In Missouri, legislative history is sparse and legislative findings of that sort are unusual. Formal findings would have been superfluous in this case in any event, because the concerns regarding public-sector unions were extremely well-documented and subject of widespread public debate. Plaintiffs rely on *Ocello v. Koster*, but that case also does not support their argument. The statute regulating sexually-expressive businesses in *Ocello* contained formal findings and statement of purpose, but *Ocello* never held that such findings are necessary for *any* statute to be upheld. *See Ocello v. Koster*, 354 S.W.3d 187, 200-02 (Mo. banc 2011). As *Ocello* noted, prior court decisions called for specific legislative findings in the unique context of sexually expressive businesses. *See id.* No such special requirements exist for public-sector unions.

In sum, the Constitution does not require a formal recital of legislative purpose in every statute. Here, the purposes of the legislative policy (1) are evident on the face of the statute, (2) were the subject of extensive public debate for several years before the statute's passage, (3) were discussed in detail in the legislative debates

about the statute, and (4) are supported by extensive empirical evidence in the summary-judgment record. D78, D79, D80, D81. No more is required under any standard of review.

F. Plaintiffs Fail to Satisfy the Demanding Standard for a Facial Challenge to Any Provision of HB 1413 (Supports Point V).

In arguing for facial invalidity, Plaintiffs rely principally on their argument that the public-safety exception's so-called "discriminatory carve-out" renders every application of the statute invalid. Resp. Br. 93-94. Because that exception is plainly valid, Plaintiffs' main argument for facial invalidation fails. *See supra* Part A.

Plaintiffs concede that, to mount a facial challenge, they 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)). But they argue that, in applying that standard, the Court should disregard situations "where a union is already willing to abide by [the statute] voluntarily." Resp. Br. 94-95 (citing *Weinschenk v. State*, 203 S.W.3d 201, 206 (Mo. banc 2006), and *Citizens United*, 558 U.S. at 329-36). This qualification is absent from *Perry*, *Salerno*, and other cases applying the facial-challenges standard. Moreover, even if this argument accurately reflected that standard, the argument would not avail Plaintiffs here. Even if one were to assume that some applications of HB 1413 may be constitutionally problematic—which they are not—every provision of HB 1413 plainly has many conceivable circumstances in which it could

be validly enforced, even against an unwilling union. For example, the requirement of secret ballots could be validly enforced against an unwilling union that engaged in pressure, coercion, and harassment of employees during the non-secret "voluntary" card-check campaign. The requirement of renegotiating economic provisions during budget shortfalls could be validly enforced against an unwilling union whose collective-bargaining agreement imposed ruinous liabilities on a local government. The mandatory disclosure and reporting requirements could be validly enforced against an unwilling union that wished to evade financial transparency because it was seeking to conceal corruption and financial improprieties, etc.

Finally, Plaintiffs argue that this Court should facially invalidate all of HB 1413's provisions because allowing as-applied challenges might result in uncertainty and duplicative litigation. This is the exact opposite of what this Court's cases counsel. Addressing discrete constitutional issues on a case-by-case basis is a feature, not a bug, of as-applied challenges. This Court does not decide constitutional issues needlessly, but prudently waits until they are actually presented for decision on particular facts. *See, e.g., Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 838-39 (Mo. banc 1991) (holding that courts do not decide constitutional issues unnecessarily, and that "[t]he courts will undoubtedly need to develop further details, on a case by case basis"); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (upholding

"the prudential concern that constitutional issues not be needlessly confronted"). And as this Court has stated, "a person to whom the statute may constitutionally be applied may not challenge the statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *State v. Jeffrey*, 400 S.W.3d 303, 308 (Mo. banc 2013) (quotation omitted).

G. Every Provision of HB 1413 Is Severable (Supports Point VI).

Plaintiffs' argument on severability rests exclusively on their claim that the public-safety exemption is invalid, Resp. Br. 96-101, which is meritless for the reasons discussed above. *See supra*, Part I. Plaintiffs present no argument that the other substantive provisions of HB 1413 are so "essentially and inseparably connected" with each other, or "incomplete and … incapable of being executed in accordance with the legislative intent," as to overcome the strong policy in favor of severability. § 1.140, RSMo.

This Court's recent opinion in *Karney* strongly supports severability of HB 1413, because this Court held that five words within one subsection of HB 1413 were severable from the rest of the statute. *Karney v. Dep't of Labor & Indus. Relations*, 599 S.W.3d 157, 166 (Mo. 2020). Plaintiffs' contention that every substantive provision of HB 1413 is inseperable from every other substantive provision cannot be squared with *Karney*. If any substantive provision of HB 1413 is invalid, "the remaining portions are in all respects complete and susceptible of

constitutional enforcement." *Id.* (quoting *Dodson v. Ferrera*, 491 S.W.3d 542, 558 (Mo. banc 2016)). In addition, given the strength of the legislative policy reflected in HB 1413, it is also clear that "the remaining statute is one that the legislature would have enacted if it had known that the rescinded portion was invalid." *Id.*

This Court need not decide whether the public-safety exception is severable, because that provision is plainly valid. But even if the Court were to reach that issue, Plaintiffs' arguments against severability are unconvincing. Plaintiffs cite *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017), but that case supports the severability of the public-safety exception. App. Br. 141-42. *Morales-Santana* invalidated an exception—the opposite of what Plaintiffs urge here. 137 S. Ct. at 1686. *Morales-Santana* held that, when considering whether to sever such an exception, "a court should measure [1] the intensity of commitment to the residual policy—the main rule, not the exception—and consider [2] the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation." *Id.* at 1700 (quotation marks omitted). Here, both factors decisively favor severance. "The intensity of commitment to the residual policy" of public-sector union reform is very great, as reflected by the comprehensive and detailed reform legislation enacted in HB 1413, *id.*; and "the degree of potential disruption of the statutory scheme" is maximal, as Plaintiffs seek a complete invalidation of the entire legislation. *Id.*

Plaintiffs also cite *Trout v. State*, 231 S.W.3d 140, 147 (Mo. banc 2007), but that case does not support them. *Trout* involved a detailed enactment history that "conclusively prove[d]" that the two provisions would not have been enacted separately, because an amendment to separate them was presented for vote and failed: "that the two provisions were inseparably connected and dependent upon each other is conclusively proven by the fact that the Senate amendment to decouple the provisions failed." *Id.* at 148. By contrast, Plaintiffs here rely solely on the fact that the public-safety exception was added late in the legislative process. Resp. Br. 98. They argue that this late amendment implies that the bill could not have passed without it, but their argument is based entirely on speculation on how legislators might have voted on a bill without the exception—a vote that was never held. *See id.* at 98-99. Unlike in *Trout*, where there was a vote on the very question of separating the two provisions, Plaintiffs' argument rests entirely on conjecture. In fact, the legislative process here supports the opposite inference—that the comprehensive reforms were the strong focus and driving motive of the Legislature, while the public-safety exception was a cautionary measure added late in the process that does not undermine the overarching legislative policy favoring reform.

Finally, Plaintiffs argue that severance would create other constitutional problems that they have never raised before—such as issues under Missouri's Contract Clause, MO. CONST. art. I, § 13. Resp. Br. 100. These belated

constitutional concerns are chimerical, and could easily be addressed on a case-by-case basis through appropriate as-applied challenges in any event.

CONCLUSION

The trial court's judgment should be reversed.

Dated: November 10, 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 November 10, 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 7,516 words, excluding the portions exempted from the word count under Supreme Court Rule 84.06(b).

/s/ D. John Sauer