No. 23A___

In the
Supreme Court of the United States

MISSOURI OFFICE OF ADMINISTRATION; KENNETH ZELLERS, COMMISSIONER OF THE OFFICE OF ADMINISTRATION; STACY NEAL, DIRECTOR, DIVISION OF ACCOUNTING, OFFICE OF ADMINISTRATION,

Applicants,

v.

MISSOURI CORRECTIONS OFFICERS ASSOCIATION, TERRY ENGBERG, AND TINA COURTWAY,

Respondents.

Application for Extension of Time to File a Petition for Writ of Certiorari to the Missouri Court of Appeals

ATTACHMENTS TO APPLICATION TO THE HONORABLE BRETT M. KAVANAUGH REQUESTING AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI PURSUANT TO RULE 13

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IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

MISSOURI CORRECTIONS OFFICERS ASSOCIATION, INC., et al.,	)	
Plaintiffs	)	No. 20AC-CC00137
v.	)	Div. 1
MISSOURI OFFICE OF ADMINISTRATION, et al.,	)	
Defendants.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW and JUDGMENT

On September 10 and 17, 2020, this Court held a non-jury trial in this matter, and took evidence and heard arguments in Plaintiffs' lawsuit challenging the constitutionality of a rule on payroll deductions promulgated by Defendants Office of Administration (OA) and the Commissioner of OA, and disputing decisions by Defendants Stacy Neal and OA on December 9, 2019 and March 17, 2020, to cease deducting dues for Plaintiff Missouri Corrections Officers Association (MOCOA) and to deny a request that OA resume deducting those dues. The parties filed post-trial briefs and submitted proposed findings of facts and conclusions of law. Upon consideration of the record in this matter and the arguments, the Court finds and concludes as follows:

FINDINGS OF FACT

A. The Parties

1. Plaintiff Missouri Corrections Officers Association, Inc. ("MOCOA") is a non-profit corporation. Since July 2004, MOCOA has been the certified bargaining representative of a bargaining unit of employees employed by the Department of Corrections ("DoC") as corrections officers I and II.

2. Plaintiffs Terry Engberg and Tina Courtway are members of MOCOA and are employed as corrections officers in the bargaining unit.

3. Defendant Missouri Office of Administration ("OA") is an agency of the State.

4. Defendant Sarah Steelman is the Commissioner of OA, with the authority to promulgate rules concerning payroll deductions.

5. Defendant Stacy Neal is the Director of the Division of Accounting in OA and is authorized to make decisions regarding payroll deduction authority.

B. State statute and rules on payroll deduction.

6. Section 33.103.1, RSMo., provides in relevant part:

> Whenever the employees of any state department, division or agency establish any voluntary retirement plan, or participate in any group hospital service plan, group life insurance plan, medical service plan or other such plan, *or* if they are members of an employee collective bargaining organization, or if they participate in a group plan for uniform rental, the commissioner of administration may deduct from such employees' compensation warrants the amount necessary for each employee's participation in the plan or collective bargaining dues, provided that such dues deductions shall be made only from those individuals agreeing to such deductions.

7. Section 33.103.2(3), RSMo., states that "[t]he commissioner of administration may, in the same manner, deduct from any state employee's compensation warrant . . . any amount authorized by the employee for the payment of dues in an employee association."

8. As of December 9, 2019, OA's rule on payroll deductions defined a "labor union" as "an exclusive state employee bargaining representative established in accordance with sections 105.500-105.530, RSMo." and defined "employee association" as "an organized group of state employees that has a written document, such as bylaws, which govern its activity." 1 CSR 10-3.010(6)(A) (effective May 20, 2019).

9. As of December 9, 2019, OA's payroll deduction rule defined "dues" as "a fee or payment owed by an employee to a labor organization as a result of and relating to employment in a bargaining unit covered by an existing labor agreement **or** a payment owed by an employee for membership in an employee association."

C. The history of MOCOA's payroll deduction authority.

10. Since inception in April 2000, MOCOA's purposes have included the promotion of the interests and welfare of corrections officers, to improve working conditions, and to work for legislation to assist corrections officers in the pursuit of their duties. (Jt. Stip. ¶12; Cutt Aff. (Pltfs' Ex. 99B); Cutt Aff. ¶7; Tr. at p. 113, ll. 17-20; Pls' Ex. 100.)

11. Since inception (and until February 2020), MOCOA authorized two types of members: (1) full members, for persons employed as a corrections officer by the Missouri Department of Corrections; and (2) auxiliary members, which could be non-state employees such as family members and retirees. (Jt. Ex. 5; Pls' Ex. 101.)

12. When OA granted MOCOA payroll deduction authority in July 2000, it was as an employee association. (Jt. Stip. ¶16.)

13. When OA granted MOCOA's request for payroll deduction authority in July 2000, OA knew by looking at MOCOA's Articles of Incorporation and draft bylaws, which OA possessed, that MOCOA could admit non-state employees into a lower level of membership. (Jt. Exs. 5 & 6.)

14. When OA granted MOCOA's request for payroll deduction authority in July 2000, OA allowed MOCOA to submit and rely on at least 100 employee-signed applications for the deduction of MOCOA dues that were already signed at the time MOCOA made its request to OA. (Jt. Ex. 3.)

15. Corrections officers join MOCOA by filling out a membership application. No state employee has ever been required to join or pay dues to MOCOA as a condition of employment. All state employees join and pay dues voluntarily. (Cutt. Aff. ¶¶11 & 12 [Pls' Ex. 99B].)

16. Corrections officers wanting MOCOA dues deducted from their pay fill out and sign a payroll deduction authorization. (Pls' Ex. 102.) Prior to December 9, 2019, MOCOA gave the employee-signed authorization to DoC, which then started deducting dues from the employee's pay. (Cutt. Aff. ¶10; Tr. at p. 97, l. 14 to p. 98, l. 3.) There is no evidence that any employee has been tricked or forced into signing a dues deduction authorization. (Buckley Depo. at p. 192, l. 17 to p. 193, l. 18.) An employee could revoke his or her dues deduction authorization at any time. (Cutt Aff. ¶ 12.)

17. MOCOA dues for full members is $10 per month. (Cutt. Aff. ¶ 11.) Full members have the right to elect members of the Board of Directors, the right to serve on the Board, and the right to attend meetings. (*Id.* ¶8; Pls' Ex. 101 at Article III, Section 3.).

18. For at least 10 years prior to February 2020 (when MOCOA removed auxiliary membership from its Articles and bylaws), MOCOA actually admitted some retirees as auxiliary members. (Cutt Aff. ¶15 [Pls' Ex. 99B].) MOCOA charged them a lower amount in dues -- $25 per year. (*Id.* ¶17.) These retirees did not have all the rights of regular members – such as the right to vote for members of MOCOA's Board of Directors and attend regular meetings. (*Id.* ¶16.) These retirees joined as auxiliary members to get access to MOCOA social events and AD&D insurance coverage. (*Id.* ¶17.)

19. From the time MOCOA was first granted payroll deduction authority in July 2000, until December 9, 2019, OA continued to allow the deduction of MOCOA dues from the pay of bargaining unit employees, without interruption. (Jt. Stip. ¶¶ 17 & 26.)

20. In July 2004, after MOCOA won a union election, MOCOA was certified by the State Board of Mediation as the exclusive bargaining representative of a unit of correction officers I and II employed by the Department of Corrections. (Jt. Stip. ¶18.) After MOCOA was certified, OA did not require MOCOA to obtain new dues deduction authorizations for employees, and OA continued to deduct MOCOA dues and continued to process new applications signed by employees. (Jt. Stip. ¶17; Buckley Depo. at p. 75, l. 12 to p. 76, l. 3 [Pls' Ex. 108].)

21. In an internal memo from March 2011, OA noted that MOCOA was listed in its files as an employee association and that, even though now a union, MOCOA was not "dually listed" as a union and an employee association. (Jt. Ex. 43.)

22. In March 2016, OA responded to a Sunshine request by Chris Grant about employee associations with payroll deduction authority, by providing a spreadsheet with a list of such employee associations. OA included MOCOA on the list for employee associations. (Jt. Stip. ¶¶ 67-68; Jt. Ex. 12 & 13.)

23. After MOCOA's most recent labor agreement expired on September 30, 2018, OA did not agree to keep it in effect while the parties were in negotiations for a new labor contract. Nonetheless, after expiration of the agreement, OA continued to deduct MOCOA dues from the pay of bargaining unit employees. (Jt. Stip. ¶¶17, 25, & 26.)

24. In June 2019, the Department of Corrections ceased deducting MOCOA dues from DoC employees who were not in the bargaining unit, but OA continued to allow the

deduction of MOCOA dues for bargaining unit employees. (Cutt. Aff. ¶¶ 16, 19-20, & 31; Jt. Stip. ¶¶17 & 26.)

25. Negotiations between OA, DoC, and MOCOA for a new labor agreement are ongoing. As of the date of trial, the parties have not reached agreement on a new contract. (Jt. Stip. ¶27; Jt. Exs. 28 & 29; Cutt Aff. ¶65.)

D. OA's December 9, 2019 decision to cease deducting MOCOA's dues and subsequent correspondence.

26. As of early December 2019, OA was deducting MOCOA dues from the pay of approximately 1,300 corrections officers, including Plaintiffs Engberg and Courtway, per authorizations they had signed. (Jt. Stip. at ¶¶38-39, 55; Engberg Aff. ¶5 (Pls' Ex. 136); Courtway Aff. ¶5 (Pls' Ex. 135); Tr. at p. 124, l. 23 to p. 125, l. 2; Defs' Answer ¶53.)

27. On December 9, 2019, OA ceased dues deduction for MOCOA because "State of Missouri employees represented by MOCOA are not covered by an existing labor agreement." (Jt. Stip. ¶36; Jt. Ex. 15.)

28. MOCOA through attorneys protested OA's decision. MOCOA argued it was also an employee association under the rules, and it was entitled to dues deduction notwithstanding the expiration of the labor agreement. (Jt. Ex. 17.)

29. In a series of e-mails beginning on December 18, 2019, an attorney for OA requested information from MOCOA about its auxiliary members. OA cited as the basis for this request provisions in MOCOA's Articles and bylaws, which OA already possessed, allowing for auxiliary members. OA stated the information was relevant to whether MOCOA was an organized group of state employees. In response, MOCOA's attorney stated that he would ask MOCOA, but questioned whether OA had asked other groups about their non-state employee members. (Jt. Ex. 18.)

30. The request by OA in December 2019 for information about MOCOA's auxiliary members was the first time that OA had ever asked MOCOA about admitting any non-state employees. (Cutt Aff. ¶ 40.)

31. On December 26, 2019, MOCOA's attorney informed OA that MOCOA had about 25 retirees as auxiliary members and that they did not pay full dues and did not have the same rights as full members. (Jt. Ex. 19.)

32. On January 15, 2020, in a phone call, OA through an attorney informed MOCOA's attorney that MOCOA did not qualify as an employee association because it admitted non-state employee as auxiliary members. (Jt. Stip. at ¶42.) In that same call, OA informed MOCOA that OA was considering an amendment to the rules that would "expand the definition of an employee association to include groups with non-state employees." (Jt. Stip. at ¶43; Jt. Ex. 20, 1/30/20 at 9:13 AM; compare Buckley Depo. at p. 137, l. 11 to p.138, l. 1 with Pls' Ex. 108B at 137:11 & 137:22).

33. On January 30, 2020, OA through an attorney informed MOCOA that OA would not be filing the rule amendment previously discussed on expanding the definition of employee association to include groups with non-state employees. (Jt. Ex. 20, 1/30/20 at 9:13 AM.) MOCOA asked if OA would not permit dues deduction so long as MOCOA gave auxiliary membership to retirees or if there were additional reasons. (Jt. Ex. 21.) OA did respond or provide an answer. (Am. Pet at ¶49; Answer at ¶49.)

E. MOCOA amends its Articles and bylaws and requests OA to resume dues deduction.

34. In early February 2020, MOCOA filed amended Articles of Incorporation with the Missouri Secretary of State, declaring that its members were corrections officers.

MOCOA also amended its bylaws to remove the provision on auxiliary membership. (Cutt Aff. ¶42, Pls' Ex. 104.)

35. On February 27, 2020, MOCOA delivered a written request to OA, demanding resumption of dues deduction. (Jt. Stip. ¶45; Jt. Ex. 23.) MOCOA attached to the request a copy of its amended Articles of Incorporation and amended bylaws. (Jt. Ex. 22.) It also attached approximately 130 employee-signed applications for dues deduction, signed before December 9, 2019. (Jt. Ex. 24.) These 130 applications were a subset of the approximately 1,300 applications which OA and/or DoC possessed at one time prior to December 9, 2019 (Answer at ¶53), and on which OA relied to deduct MOCOA dues from employee pay up until December 9, 2019. (Jt. Stip. at ¶38). MOCOA would have attached more applications but did not have them because it regularly gave the applications to DoC to effectuate dues deductions. (Cutt. Aff. ¶43.)

F. OA promulgates the Emergency Rule.

36. On February 11, 2020 OA filed an Emergency Amendment and Proposed Rule, amending the definition of "employee association" in 1 CSR 10-3.010(6). MOCOA was not aware at the time that OA filed the Emergency Amendment or Proposed Rule. (Jt. Stip. at ¶¶48, 49 & 51.)

37. The Emergency Amendment and Proposed Rule added language that an employee association "is not an exclusive bargaining representative for state employees established in accordance with sections 105.500 - 105.530, RSMo." (Jt. Stip. ¶48; Jt. Ex. 27.)

38. The Emergency Statement stated that the amendment "clarifies" the "original intent" of the rule on payroll deduction - that employee associations and labor unions

are “discrete classifications.” (Jt. Ex. 27.) The Statement further stated that OA was amending the rule in response to arguments by unions, including MOCOA, that they qualified for dues deduction as employee associations and to reduce the State’s exposure to damages from the unions’ claims. (Jt. Ex. 27; Buckley Depo. at 270, l. 12-25.)

39. Defendants issued the Emergency Amendment and Proposed Rule because they thought there was “ambiguity” in the rule. (Buckley Depo. at p. 146, ll. 24-25, p. 172, ll. 3-5, & p. 290, ll. 22-23 [Pls’ Ex. 108].)

40. In July 2020, OA adopted the Proposed Rule, and made it final, with one change. (Jt. Stip. ¶53; Jt. Ex. 30.) OA added to the amendment that an insurance company or credit union could not be an employee association. (Jt. Stip. ¶54; Jt. Ex. 31.)

G. OA’s March 17, 2020 decision denying MOCOA’s request to resume dues deduction.

41. On March 17, 2020, OA informed MOCOA that it could not approve MOCOA’s request to resume its payroll deduction authority. (Jt. Stip. ¶46; Jt. Ex. 25.). OA gave two reasons: 1) the dues deduction authorizations that MOCOA submitted were “not signed during the 90 day period” that commenced on February 27, 2020 but were signed on or before July 25, 2019; and 2) the Emergency Amendment, clarifying the definition of “employee association,” went into effect on February 27, 2020, prior to receipt of MOCOA’s request. (Jt. Ex. 25.)

42. By letter dated March 20, attorney Grant informed OA that MOCOA disagreed with OA’s decision. Among other things, the letter noted that when OA revoked MOCOA’s payroll deduction authority on December 9, 2019, OA had been relying on over 1,000 employee-signed applications. (Jt. Ex. 25.)

H. The impact of OA's decisions to deny MOCOA continued dues deduction.

43. As of December 9, 2019, all of MOCOA's corrections officer members including Plaintiffs Engberg and Courtway paid their dues by payroll deduction. (Cutt. Aff. ¶¶32-33 [Pls' Ex. 99B].) MOCOA was receiving close to $13,000 per month from dues deduction from state employees. (*Id.* ¶31.)

44. Following the cessation of dues deduction, MOCOA lost almost all of its income. (Cutt. Aff. ¶¶31 & 45.)

45. In late December 2019, MOCOA set up a PayPal account for members to pay their dues directly, and sought to communicate with members to get them to pay directly. (Cutt. Aff. ¶34.)

46. To date, about 288 members have signed up for PayPal and a few more by bank autodraft. (Cutt. Aff. ¶¶36-37.)

47. It is difficult for MOCOA to communicate with corrections officers because OA is not providing MOCOA lists of unit employees with contact information; and because DoC restricts access, limiting MOCOA representatives to lobbies and parking lots of prisons. (Cutt. Aff. ¶¶ 21-23 & 26; Tr. at p. 103, ll. 18-21.)

48. While MOCOA can send e-mails and regular mail to members, the address information is not always current and many employees do not want MOCOA sending union communications to their DoC e-mail address. (Tr. at p. 100, ll. 7-17 & p. 101, l. 20 to p. 102, l. 15.)

49. Plaintiffs Engberg and Courtway both paid their dues by payroll deduction before December 9, 2019, and both wish to continue to pay their dues by payroll deduction. (Engberg Aff. ¶6; Courtway Aff. ¶6.)

50. Prior to December 9, 2019, dues from payroll deduction supported three MOCOA staff members who engaged in collective bargaining, answered members' questions, administered the contract and handled disputes, recruited members, lobbied the legislature, operated the office, did word processing, and assisted with governance of the organization. (Cutt. Aff. ¶¶46-47, 51 57.) Due to the drop in income from the cessation of payroll deduction, MOCOA has reduced staff and operational costs. Since July 2020, MOCOA has functioned with one staff person – Tim Cutt – who does the work that Gary and Cyndi Gross used to perform as well as his work. (*Id.* ¶¶47, 50, 51, 55-57.) MOCOA lacks the funds to hire more staff, and it is difficult for members to pick up duties because they work full-time for the Department of Corrections. (*Id.* ¶62.)

51. MOCOA has reduced Cutt's benefits. (Cutt Aff. ¶ 55-56.) MOCOA has closed its office, so it does not have to pay for utilities. (Cutt. Aff. ¶58.) MOCOA has also ceased making hardship payments to members faced with financial difficulties. (*Id.* ¶61.)

52. Despite cutting expenditures, MOCOA's bank account balance has declined by around 90% since the end of November 2019. (Compare Pls' Ex. 103, at MCOA 00280 with Cutt. Aff. ¶60.)

53. To regain dues deduction, MOCOA has two options: it can either agree to a new labor agreement or it can cease being a union and be an employee association that does not engage in collective bargaining. (Buckley Depo. at p. 108, l. 12 to p. 109, l. 8.)

I. OA's Treatment of Other Employee Associations and Vendors

54. OA does not have standard payroll deduction guidelines or procedures for assessing issues involving employee associations. (Tr. at p. 162, ll. 1-12 & p. 163, ll. 19-20 & p. 172, l. 23 to p. 173, l. 2; Buckley Depo. at p. 132, l. 14 to p. 133, l. 3.)

55. OA keeps files on the groups that have requested and received payroll deduction authority as employee associations, including the Missouri State Troopers Association (MSTA), the Transportation Employees Associations of Missouri (TEAM), and the Missouri Probation and Paroles Officers Association (MPPOA). (Farrell Aff. (Defs' Ex. Y), at ¶ 9; Tr. at p. 154, ll. 21-25; Defs' Ex. V.) When issues arise, OA legal counsel can review information in the files. (Farrell Aff. at ¶ 9.)

56. MSTA, TEAM, and MMPOA exist to promote the interest and welfare of their members, to improve the working conditions of employment, and/or to lobby government for legislation to support their members. (Jt. Ex. 32 at Article II; Jt. Ex. 33 at Preamble; Jt. Ex. 34 at Article II.)

57. MSTA, TEAM, and MMPOA have the authority to admit non-state employees into lower levels of membership. The bylaws of MSTA state that an "Associate" member is "any member of the Missouri State Highway Patrol who has retired with a vested interest." (Jt. Ex. 32 at Article III, Section 4; Buckley Depo. at p. 38, ll. 7-20.) TEAM confers "honorary membership" upon individuals who have demonstrated an interest in the welfare of Transportation Department employees and upon widows and widowers of members, and confers "life membership" upon "any member who retires in good standing." (Jt. Ex. 33 at Article III(a).) And, MPPOA gives "associate membership" to "attorneys, treatment providers, and other persons and organizations whose goals are consistent" with that of the group. (Jt. Ex. 34 at Article III, Section 4.)

58. Another group, the Missouri Chapter of the International Association of Personnel in Employment Security (IAPES), that had payroll deduction in the past, allowed the admission of non-state employees. The bylaws for that group included "active

members" employed by "other Federal, State, or other agency who are regularly assigned to work in the Department of Employment Security;" and, "continuing members" who by reason of "retirement" become ineligible for active membership; and, "associate members" who engage in work similar to the group's members; and, "honorary members." (Defs' Ex. V. at ACCT043, at Article I, Sections 1, 2, 3 & 4.).

59. MSTA solicits donations from non-state employees on its website. On August 28, 2020, Tim Cutt made, and MSTA accepted, a $10 donation through its website. (Cutt Aff. ¶64; Tr. at p. 95, ll. 8-11 & p. 122, l. 5-11; Pls' Ex. 106.)

60. OA has not asked other groups seeking payroll deduction authority as an employee association whether they admit non-state employees, like it asked MOCOA. (Pls. Ex. 108B at 130:20.)

61. Between December 9, 2019 and March 17, 2020, OA did not communicate with the three employee associations participating in payroll deduction authority - MSTA, TEAM, and MPPOA - to ask whether they admitted non-state employees into membership. (Jt. Stip. ¶60; Answer at ¶¶96 & 97.) At the time, OA held a meeting on and considered TEAM's bylaws, but did not communicate with TEAM. (Buckley Depo. at p. 150, l. 17-24; Pls' Ex. 108B at 152:23; Pls' Ex. 109.)

62. In the 10 years prior to December 9, 2019, one group – the Correctional Peace Officers Foundation (CPOF) -- applied for dues deduction authority as an employee association. At that time, OA did not communicate with the group to determine if it admitted non-state employees. (Pls' Ex. 108B at 39:9 & 39:11.) The CPOF is a charity, and at the time of its request already received payroll deduction through the State's charitable campaign. When the CPOF made its request, it did not submit a copy

of its bylaws, and it was seeking the deduction of contributions, not dues. (Buckley Depo. at p. 164, ll. 20-23 & p. 165, ll. 15-19; Defs' Ex U.)

63. In drafting the 2011 Memo, OA did not communicate with the employee associations listed in the memo to determine whether they actually admitted any non-state employees. (Pls's Ex. 108B at 39:21 & 40:3.) The conclusions in that memo – that for each group, only state employees can be members – are not and cannot be correct because the bylaws of each group allow the admission of non-state employees, such as retirees and surviving spouses, into lower levels of membership. The only way the conclusion can be correct is if OA was looking at who are full or regular members – in which case MOCOA was identically situated to the other employee associations.

64. Defendants have in the past accepted employee-signed applications for groups seeking payroll deduction that were signed before the date the request was submitted to OA for deduction of dues. TEAM already possessed over 100 applications at the time the Department of Transportation submitted a request on the group's behalf. (Defs' Ex. V. at ACCT007 & ACCT021.) IAPES already received payroll deduction of dues through a credit union when it made its request, but wanted deduction as an employee association. (*Id.* at ACCT037 & 0049.) In support of its request, which OA approved, IAPES relied on employee-signed applications that were already on file and that were signed months before IAPES made its request and in some cases were unsigned and/or undated. (*Id.* at ACCT064, 066, 069, 072, 073, 082, 086, 090, 100, 101.)

65. OA allows vendors like insurance companies, who fall below 100 active employee deductions, up to three months extra time, to increase the number of participating employees back to 100. In doing so, OA allows these vendors to use

previously signed authorizations. (Tr. at p. 180, l. 21 to p. 181, l. 23.) OA gives vendors this extra time because OA wants to be "reasonable" and does not want to create the "uncertainty" of vendors coming "on and off, on and off" payroll deduction, because it creates "an administrative burden and confusion to our employees." (Tr. at p. 182, l. 16 to p. 183, l 12.)

J. Deposition of OA's Corporate Representative

66. On August 19 and 20, 2020, counsel for Plaintiffs took the deposition of OA's corporate representative, Paul Buckley. During the deposition, counsel for Plaintiffs instructed OA's corporate representative that he was to answer questions based on OA's knowledge, not his personal knowledge. (Buckley Depo. at p. 6, l. 20 to p. 7, l. 7 & p. 8, ll. 6-13 [Pls' Ex. 108].)

67. Following the deposition, OA's corporate representative submitted an errata sheet, (Pls' Ex. 108B), making multiple changes to his testimony, many of them substantive, including different answers to questions:

a) On whether OA had communicated with or asked other groups with or seeking payroll deduction as employee associations if they admitted non-state employees, like OA had asked of MOCOA, or during the application process, or when OA drafted the 2011 memo, or in December 2019 and January 2020 (*Id.* at 39:9, 39:11, 39:21, 40:3, at 41:3, at 45:3, at 130:20, at 131:9, & at 152:23),

b) about what spurred the drafting of the 2011 memo (*Id.* at 159:11),

c) about the reasons for rejecting a request by the CPOF for the deduction of charitable contributions from employee pay (*Id.* at 164:19),

d) about the role of the *Janus* case in OA's decision to cease deducting MOCOA dues (*Id.* at 115:8),

e) about discussions within OA about a possible rule amendment to expand the definition of "employee association" to include groups with non-state employees (*Id.* at 137:11 & 137:22),

f) about the "ambiguity" of the former rule's definition of employee association and examples of when OA has amended a rule (*Id.* at 145:3, 146:13, 146:25, 172:3 & 290:22),

g) about the status of OA's last contract proposal to MOCOA on dues deductions (*Id.* at 196:24),

h) about the relationship between an employee association and its members (*Id.* at 123:24 & 1124:3), and

i) about MOCOA's options for regaining dues deduction (*Id.* at 109:8).

68. The changes as outlined above are not corrections to spelling or grammar, changes to a mis-transcribed answer, or clarifications based on a misunderstood question. They amount to new answers, that in some cases contradict original testimony, and new arguments to soften previous testimony. The Court does not accept the reasons for the changes. OA was given notice that its representative would be asked questions on other employee associations "granted" payroll deduction authority in the past 10 years (which includes employee associations with continuing payroll deduction authority) as well as the "requirements for payroll deduction authority," the decision to cease deducting MOCOA's dues, "whether an employee association must be in a group of exclusively state employees", the decision to file the Emergency Rule,

and "Denials… in Defendants' Answer." (Pls. Ex. 108A.) Mr. Buckley was instructed to answer based on OA's knowledge, not his own. And, in some instances, Mr. Buckley raised issues about the 2011 Memo and other employee associations himself, unprompted.

69. The Court construes new substantive and argumentative answers on the errata sheet, including the changed answers outlined above, as evidence that OA is not credible on these points and has not interpreted the statute and rules on payroll deduction, and has not followed and applied procedures and made assessments relating to payroll dues deduction, in a consistent and even-handed manner.

CONCLUSIONS OF LAW

1. MOCOA has standing to bring this suit on its own behalf, because it was harmed by OA's decisions and by the Rule. MOCOA also "has associational standing to sue to enforce its members' rights under Article I, Section 29." *E. Mo. Coalition of Police v. City of Chesterfield*, 386 S.W.3d 755, 759 (Mo. 2012).

2. Count I of the First Amended Petition challenges the Constitutional validity of the Emergency Rule and the Final Rule, pursuant to Section 536.050, RSMo. Count III is a claim for review of non-contested administrative decisions pursuant to Section 536.150, RSMo., challenging Defendants' decision on December 9, 2019 to terminate MOCOA's dues deduction authority, and their decision on March 17, 2020 to deny MOCOA's request for reinstatement of its dues deduction authority. The Court will first address the Count III challenge to Defendants' December 9, 2019 decision, then the Count I challenge to the Rules, then the Count III challenge to Defendants' March 17, 2020 decision.

A. DEFENDANTS' DECISION OF DECEMBER 9, 2019 TO TERMINATE DUES DEDUCTION (COUNT III)

3. Since OA was not required to hold a hearing on the matters at issue, Defendants' December 9, 2019 decision to terminate MOCOA's payroll deduction authority is a non-contested case. *State ex rel. Christian Health Care of Springfield, Inc. v. Missouri Dept. of Health and Senior Services*, 229 S.W.3d 270, 275 (Mo. App. 2007). Under § 536.150, RSMo., the court "conducts a *de novo* review in which it hears evidence on the merits, makes a record, determines the facts and decides whether the agency's decision is unconstitutional, unlawful, unreasonable, arbitrary, capricious or otherwise involves an abuse of discretion." *Ard v. Shannon County Comm'n*, 424 S.W.3d 468, 473 (Mo. App. S.D. 2014).

4. "The fact that the legislature has vested discretion in an administrative official does not preclude a reviewing court from determining whether [her] findings were made or [she] otherwise acted in an unlawful, unconstitutional, arbitrary, capricious, unreasonable or abusive manner." *Barry Serv. Agency Co. v. Manning*, 891 S.W.2d 882, 892 (Mo. App. W.D. 1995).

5. An agency action is "unlawful" if it is inconsistent with or unauthorized by a statute or regulation. *See Normandy Sch. Dist. v. City of Pasadena Hills*, 70 S.W.3d 488 (Mo. App. E.D. 2002). The Court owes no deference to an agency's interpretation of the law. *Dep't of Soc. Servs. v. Senior Citizens Nursing Home Dist.*, 224 S.W.3d 1, 15 (Mo. App. W.D. 2009).

6. Whether an action is arbitrary focuses on whether an agency had a rational basis for its decision. *State ex rel. Div. of Transp. v. Sure-Way Transp., Inc.*, 948 S.W.2d 651, 655 n.4 (Mo. App. W.D. 1997). Capriciousness concerns whether the agency's action

was whimsical, impulsive, or unpredictable. *Id.* "An agency that completely fails to consider an important aspect or factor of the issue before it may be found to have acted arbitrarily or capriciously." *Beverly Enterprises-Mo v. Dep't of Soc. Servs.*, 349 S.W.3d 337, 345 (Mo. App. W.D. 2009). An agency's decision must be made using some kind of objective data rather than mere surmise, guesswork, or "gut feeling." *Missouri Nat'l Educ. Ass'n v. Missouri State Bd. of Educ.*, 34 S.W.3d 266, 281 (Mo. App. W.D. 2000).

7. Up until December 9, 2019, OA had deducted MOCOA dues for 19 years without interruption. It had also done so for over one year after MOCOA's labor agreement with OA and DoC had expired. MOCOA immediately informed OA that it also met the definition of "employee association" under the applicable rule and demanded that OA resume dues deduction; but, OA came up with invalid and conflicting excuses not to.

8. MOCOA plainly met the definition of "employee association" in the rule at the time. It was and is an "organized group of state employees that has a written document, such as bylaws, which govern its activity." 1 CSR 10-3.010(6)(A)(3)) (effective May 30, 2019). The fact that MOCOA admitted some 25 retirees into a lower level of non-voting membership did not preclude it from qualifying as an "organized group of state employees."

9. Defendants impermissibly read a word into the regulation, to narrow it, as if it defined employee association as an "organized group of ***exclusively*** state employees." "It would be inappropriate for the court to defer to an agency's interpretation of its own regulation that was in any way expanding upon, narrowing, or otherwise inconsistent with the plain and ordinary meaning of the words used in the regulation." *Senior Citizens Nursing Home Dist.*, 224 S.W.3d at 15.

10. The underlying statute does not restrict dues deduction to groups that only admit state employees, or use any words of limitation with reference to an employee association. Section 33.103.2(3), RSMo. states: "[t]he commissioner of administration may, in the same manner, deduct from any state employee's compensation… any amount authorized by the employee for the payment of dues in an employee association."

11. From an administrative point of view of deducting dues, it makes no difference if a group admits a few non-state employees into a lower form of non-voting membership. That has no effect on payroll deduction for state employees. OA is adding a limitation to the definition of "employee association" that is contrary to the clear language and purposes of the statute. *Emery v. Wal-Mart Stores, Inc.*, 976 S.W.2d 439, 449 (Mo. 1998).

12. Even if the statute gave OA the discretion to define an employee association as an organized group of "exclusively" state employees, which it does not, OA was required to exercise its discretion by promulgating a rule to that effect. OA's claim about the meaning of "employee association" is an agency announcement of interpretation of law, with future effect on multiple entities including other labor unions. OA cannot enforce that interpretation without going through the rule-making process, with notice and comment, which it failed to do before it revoked MOCOA's dues deduction authority on December 9. *Dep't of Soc. Servs. v. Little Hills Healthcare, L.L.C.*, 236 S.W.3d 637, 642 (Mo. 2007).

13. OA has consistently recognized MOCOA as an employee association. When MOCOA first formed, it was granted payroll deduction authority as an employee

association. MOCOA was later certified as an exclusive bargaining representative, but this did not change how it was organized, or the composition of its membership, or its bylaws.

14. In 2016, during the term of the most recent labor agreement, OA categorized MOCOA as "employee association" in response to a Sunshine request. Additionally, the 2011 memo listed MOCOA as an employee association. The memo noted that MOCOA became a labor union in 2004, but MOCOA was not "dually listed" as a union and an employee association. The reference to dual listing was an acknowledgement that an organization can logically qualify as both an employee association and a labor union.

15. It is arbitrary and capricious, as well as unlawful, for OA to now deny that MOCOA is an employee association when it granted MOCOA dues deduction authority as an employee association and it represented before, to outside persons and internally, that MOCOA is an employee association.

16. When Defendants revoked MOCOA's payroll deduction authority on December 9, 2019, they focused on only one factor (the expiration of MOCOA's labor agreement), and failed to consider MOCOA's continuous qualification as an employee association since 2000. *See Manning*, 891 S.W.2d. at 892 (in rejecting proposed interest rate, Commissioner of Finance erroneously failed to consider the profit margin and did not make a searching inquiry); *State ex rel. Public Counsel v. MO PSC*, 289 S.W.3d 240, 251 (Mo. App. W.D. 2009) (agency erroneously relied only on one person's testimony and failed to consider other factors).

17. To avoid the obvious conclusion that MOCOA was still entitled to payroll deduction, OA came up with a different reason to justify its actions - that MOCOA could not be an employee association because it admitted a few retirees into a lower level of membership. This was the only reason that OA gave MOCOA on January 15, 2020 for why it did not qualify as an employee association. (Jt. Stip. at ¶42.) The evidence shows this rationalization is unreasonable and discriminatory. OA selectively applied its misinterpretation of the rule only against MOCOA and not other employee associations.

18. It is undisputed that since its inception, MOCOA's Articles of Incorporation and Bylaws allowed non-state employees to join the group. MOCOA has no record of OA asking, prior to December 20, 2019, whether MOCOA admitted any non-state employees into any form of membership. (Cutt. Aff. ¶40 [Pls' Ex. 99B].)

19. The corporate documents of other employee associations with payroll deduction authority allow for the admission of non-state employees, such as retirees, survivors of deceased employees, and people who share the same goals of the group, whether as associate, life, continuing, or honorary members. OA never asked them for information about their lower level members, even when MOCOA's attorney raised the issue in December, 2019. (Jt. Stip. ¶60; Pls. Ex. 108B at 39:9, 39:11, 39:21, 40:3, 130:20; 131:9, 152:23; Jt. Ex. 18.)

20. MOCOA is the only group that has been asked about auxiliary members. One can easily surmise why: OA was afraid that it would learn that other groups did admit some retirees and, while OA wanted to turn off MOCOA's dues, it did not want turn off dues deduction for other employee associations.

21. OA claims to draw a distinction between groups that merely have the authority to admit non-state employees versus those that actually admit non-state employees. (Buckley Depo. at p. 28, l. 17 to p. 29, l. 6.) The language of the rule makes no such distinction and it is absurd. *Vaughn v. Mo. Dep't of Soc. Servs.*, 323 S.W.3d 44, 48 (Mo. App. E.D. 2010). The only way to enforce that reading of rule would be for OA to communicate with employee associations on a regular basis and ask them if, as allowed by their bylaws, they actually admit non-state employees. But, OA purposely does not do this. As a result, OA is left to make decisions based on guesswork about employee associations, not on objective information or data, which is arbitrary and capricious. *Manning*, 891 S.W.2d at 893.

22. The difference in how OA has treated MOCOA compared to other employee associations shows that the distinction that OA seeks to draw is pretextual. Looking at the e-mails in December 2019, OA's attorney raised the issue of MOCOA's auxiliary members on his own, unprompted. Mr. Hopper wrote: "the articles and bylaws [of MOCOA] appear to contemplate other possible classes of auxiliary members, such as family members, retired DOC employees, etc." (Jt. Ex. 18.) The bylaws of MSTA and TEAM also "contemplate other possible classes" of members, such as family members and retirees, but OA did not ask these groups the same question it asked MOCOA.

23. Stacy Neal testified that her office does not revisit the eligibility of an employee association *unless an issue is brought to its attention*. (Neal Aff. ¶15; Tr. at p. 194, ll. 15-20.) In December 2019, MOCOA pointedly asked whether OA had sought information from other employee associations about their non-state employee members. Still, OA did not contact these other groups.

24. The changing deposition answers of OA's corporate representative also demonstrate pretext. Mr. Buckley was emphatic during his deposition that OA had asked other employee associations whether they admitted non-state employees, including the groups listed in 2011 memo and the Correctional Peace Officers Foundation ("CPOF") in 2018. In his words, asking these groups this question was "the only way that the information could have been obtained," and OA "would not have any other ability to know whether or not they had members that aren't state employees other than that." (Buckley Depo. at p. 39, ll. 5-23; *see also* Buckley Depo. at p. 129, l. 19 to p. 130, l. 21 & p. 133, ll. 3-7). It turns out Mr. Buckley was wrong. OA did not ask them. OA acted capriciously by posing the question only to MOCOA.

25. The 2011 memo stated that, for the employee associations listed in the memo, only state employees "can be members." This statement was not accurate. The bylaws of each group included and still include provisions allowing for the admission of non-state employees like retirees into associate or life membership. (Jt. Ex. 32, 33 & 34.) The only way for the memo's conclusions to be correct is if OA was distinguishing full membership (open only to state employees) from lower, non-voting levels of membership (open to others like retirees). If this was the distinction OA was making in the 2011 memo, then MOCOA was identically situated to the other employee associations receiving payroll deduction.

26. Defendants' denial of CPOF's request for dues deduction authority (allegedly on the grounds that its website proved it admits non-state employees to membership), does not support Defendants' argument that they were consistent in their handling of applications from employee associations. The CPOF was a charity seeking deductions

for “contributions,” not an employee association seeking deductions for “dues.” (Buckley Depo. at p. 167, l. 24 & p. 169, l. 10-14.) The controlling statute treats contributions to a charity separately from the deduction of labor union and employee association dues. Compare § 33.103.2(2) (“contribution” to “charities”) with § 33.103.1 & .2(3) (“collective bargaining dues” and “dues to an employee association”). CPOF already received payroll deductions of contributions through the state’s charitable campaign. (Buckley Depo. at p. 165, ll. 15-19; Defs’ Ex. U, at March 6, 2018 letter.) And, the CPOF did not ask to be treated as an employee association seeking “dues” deduction, and it did not submit bylaws showing that employees were involved in its governance. (Defs’ Ex. U, at August 10, 2017 letter and enclosed CPOF materials.) Along these lines, the 2011 Memo refers to an earlier request by the CPOF and states the reason it was denied was because the CPOF is a “charitable organization that allows contributions from many individuals.” (Jt. Ex. 43; Buckley Depo. at p. 164, ll. 8-23.)

27. At trial, counsel for Plaintiffs repeatedly questioned Stacy Neal as to why OA asked MOCOA in December 2019 about its auxiliary members. Ms. Neal could not give a straight answer. Counsel asked if any information or complaint had triggered the question. (Tr. at p. 196, ll, 20-23; p. 199, ll. 4-23, p. 200, ll. 3-18, p. 203, ll, 17-22.) Counsel also showed her the December 20, 2019 e-mail from Mr. Hopper asking about MOCOA’s auxiliary members. (Tr. at p. 205, ll. 15-25.) All that Ms. Neal could say was that no one ever asked the Division of Accounting to evaluate MOCOA’s eligibility as an employee association with respect to whether it admitted non-state employees, and that

she and her staff were not involved in such an investigation, even though that would ordinarily be their role. (Tr. at p. 211, ll. 19-23 & p. 213, ll. 9-21.)

28. That Ms. Neal, who was involved in the decision to terminate MOCOA's dues deduction, and is responsible for making decisions about payroll deductions, cannot explain why OA asked MOCOA in December 2019 about its auxiliary members shows that OA did not act based on a fair interpretation of its rules, or established procedure, or objective factors, but instead acted arbitrarily and capriciously.

29. The Court rejects Defendants' claim that OA had always believed that the categories of "employee association" and "labor union" in the then-existing rule were mutually exclusive. If OA had truly believed this, there would have been no reason for OA's attorney to search for another reason to deny MOCOA's request to reinstate its dues deduction authority as an employee association and no reason to promulgate the Emergency Rule. Even if OA had sincerely held this belief, a categorical distinction between employee associations that bargain collectively and those that do not is unconstitutional for the same reasons as the Emergency Rule.

30. The Court also rejects Defendants' claim (first raised in opposition to Plaintiffs' Motion for a Temporary Restraining Order) that Defendants relied on the U.S. Supreme Court's decision in *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448 (2018), in deciding to cease deducting MOCOA dues. *Janus* does not apply, and Defendants' reliance on it is unreasonable. In addition, the record evidence refutes Defendants' claims that they relied on *Janus*.

31. The plaintiff in *Janus* was not a union member, and he objected to having union fair share fees automatically deducted from his pay per Illinois law. *Id.* at 2486. The

Court found this procedure to violate the First Amendment, ruling that "nonmembers" cannot be "forced" to pay union dues or fair share fees, or have those amounts "extracted" from their pay, without their affirmative consent. *Id.* at 2459 and 2486.

32. Defendants argue that *Janus* applies to union members who have affirmatively and voluntarily authorized the deduction of dues from their pay. They believe that members cannot consent to deduction of dues unless they sign a waiver that specifically sets forth a First Amendment right not to pay dues.

33. *Janus* by its own terms applies only to non-members. Every court to consider *Janus*' application has rejected the idea that it applies to union members who agree to the deduction of dues. *See Belgau v. Inslee*, 2020 U.S. App. LEXIS 29478 (9th Cir. Sept. 16, 2020); *Oliver v. SEIU Local 668*, 2020 U.S. App. LEXIS 31805 (3rd Cir. October 7, 2020); *Loescher v. Minn. Teamsters Pub. & Law Enf't Employees' Union, Local No. 320*, 2020 U.S. Dist. LEXIS 32823 (D. Minn. Feb. 26, 2020; *Smith v. Teamsters Local 2010*, 2019 U.S. Dist. LEXIS 210904 (C.D. Cal. Dec. 3, 2019); *Anderson v. SEIU, Local 503*, 400 F. Supp. 3d 1113, 1116 (D. Or. 2019).

34. At trial, Defendants offered opinions from the attorneys general of Alaska and Texas, saying that *Janus* applies to voluntary payroll deductions. Notably, a trial court in Alaska enjoined implementation of the attorney general opinion there. *State of Alaska v. Alaska State Employees Association*, Temporary Restraining Order, Case No. 3AN-19-09971CI (3d Jud. Dist. Oct. 3, 2019) (Attachment A to Plfs' Post-Trial Brief). As for Texas, a Lexis search reveals no court decision applying the rationale of the attorney general opinion to invalidate a union's dues authorization form.

35. By contrast to the meager attorney general authority offered by Defendants, attorneys general in 14 other states have issued opinions or letters stating that *Janus* does not apply to voluntary payroll deductions. (Attachment B to Plfs' Post-Trial Brief.) Given the complete dearth of legal authority in support of Defendants' interpretation of *Janus*, Defendants' reliance on the case is unreasonable.

36. Notably, prior to December 9, 2019, OA even acknowledged that *Janus* did not apply to Missouri state employees. In response to a Sunshine request, an OA attorney wrote that the "State did not withhold any 'fair share' fees prior to the *Janus* decision, so there was no implementation necessary following the decision." (Pls' Ex. 110, e-mail at 08/19/19 at 3:54 PM). In addition, OA's November 27, 2019 contract proposal to MOCOA on dues deduction does not address any purported *Janus* problem. (Jt. Stip. ¶28; Jt. Ex. 11.)

37. Not only is it unreasonable for Defendants to rely on *Janus*, the record evidence shows that they did not in fact rely on *Janus*. Unlike the December 9 letters to the SEIU and CWA about their dues, the December 9 letter to MOCOA makes no mention of *Janus*. This was not an oversight. When OA's corporate representative was asked why, Mr. Buckley testified that *Janus*, as applied to MOCOA, was not an "obvious violation." (Buckley Depo. at p. 111, ll. 11-20 [Pls' Ex. 108].) Pressed further, Mr. Buckley stated: "it wasn't applicable to the overarching decision, which was compliance with our rules." (Id. at p. 115, ll. 5-9.) OA may have believed (wrongly) that *Janus* applied to dues being deducted from the compensation of SEIU and CWA members. However, OA did not think the decision was applicable to MOCOA, or it would have cited *Janus* in its decision of December 9, 2019.

B. THE EMERGENCY RULE AND FINAL RULE ARE UNCONSTITUTIONAL (COUNT I).[1]

38. In Count I, Plaintiffs allege that the Emergency and Final Rules violate Article I, Sections 29, 8, 9, and 2 of the Missouri Constitution.

39. Article I, Section 29 states that employees have the right to organize and bargain collectively through representatives of their own choosing. The right applies to public as well as private employees. *Independence-Nat'l Educ. Ass'n v. Independence Sch. Dist.*, 223 S.W.3d 131 (Mo. 2007).

40. The right is a fundamental right protected by strict scrutiny, because it is "explicitly... guaranteed by the Constitution." *Mahoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503, 512 (Mo. banc 1991). Other states with a constitutional right of collective bargaining have held the same. *See Hillsborough County. Govtl. Emps. Ass'n v. Hillsborough Cnty Aviation Auth.*, 522 So.2d 358, 362 (Fla. 1988); *Hernandez v. State*, 173 A.D.3d 105, 113–15 (N.Y. App. Div. 2019).

41. Article I, Sections 8 and 9 of the Missouri Constitution give individuals the rights of freedom of speech and freedom of association. These rights are also fundamental rights protected by strict scrutiny. *In re Marriage of Woodson*, 92 S.W.3d 780, 784 (Mo. 2003).

42. The robust protections for speech and association under the Missouri Constitution include "rights of freedom of expression and association" with regard to employment and union activities, including associating with and joining labor organizations for purposes of negotiating with employers. *Parkway Sch. Dist. v. Parkway Ass'n of Educ. Support Pers.*, 807 S.W.2d 63, 66–67 (Mo. 1991).

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[1] As appears below, the Court finds for the Plaintiffs on Count III.

43. The state may not discriminate against speakers by favoring one's viewpoint over another's. *Citizens United v. Federal Election Commission*, 558 U.S. 310, 340 (2010). *See also Ysursa v. Pocatello Education Association*, 555 U.S. 353, 361 n.3 (2009) (public employers may not ban payroll deductions on the basis of viewpoint – that is, "permit deductions for some political activities but not for those of unions.")

44. Article I, Section 2 of the Missouri Constitution provides "that all persons are created equal and are entitled to equal rights and opportunity under the law." This provision is meant to guard the state's citizenry against governmental action that results in invidious discrimination, particularly with respect to the exercise of their constitutional rights. *Weinschenk v. State*, 203 S.W.3d 201, 210-11 (Mo. 2006); *State v. Ewing*, 518 S.W.2d 643, 646 (Mo. 1975). If a regulatory classification "impinges upon a fundamental right explicitly or implicitly protected by the Constitution," then it is subject to strict scrutiny. *Weinschenk*, 203 S.W.3d at 210–11. *See also Rolla Manor v. Missouri Dep't of Social Services*, 865 S.W.2d 812 (Mo. App. S.D. 1993) ("Distinctions made when a state distributes benefits unequally are subject to scrutiny under the Equal Protection Clause…" depending on whether they create a classification which burdens a suspect class or impinges on a fundamental right).

45. In the case of strict scrutiny, the burden of proof shifts to the Defendants. *Witte v. Dir. of Revenue*, 829 S.W.2d 436, 439 n.2 (Mo. banc 1992). A regulation can only survive if the State can show that discrimination between groups is "narrowly tailored" to furthering a "compelling state interest." *Weinschenk*, 203 S.W.3d at 211.

46. The Emergency Rule and now Final Rule discriminates on its face against employees who exercise their constitutional rights to organize and to join a labor

organization. In amending the definition of "employee association" to exclude labor unions established in accordance with Missouri's public sector labor law, the Rule denies a state benefit (payroll deduction) to members of an employee association who wish to be represented by that association in collective bargaining, while preserving it for members of an employee association who do not bargain collectively.

47. The Emergency Statement expressly targets "[t]he labor unions in question," which include MOCOA, "for suggesting that they qualify for dues deduction as employee associations under the rule." It further provides, that "while the Office of Administration strongly disagrees with their interpretation and additionally does not believe the labor unions have the ability to recover damages in any potential litigation," this emergency will resolve "the conflict in favor" of the statute's "grant of authority" to OA.. (Jt. Ex. 27.) This is a clear statement of discriminatory intent, just as unlawful as that in *SEIU, Local 2000 v. State*, 214 S.W.3d 368, 373-374 (Mo. App. W.D. 2007) (statements by legislators that they wished to "roll back" raises given to union-represented employees, and legislators' subsequent exclusion of such employees from across the board cost-of-living raises given to other employees supported inference that the decision was discriminatory, in violation of Article I, Sections 8 and 9 and Section 105.510, RSMo.).

48. OA's corporate representative testified that, under the Rule, there are "two possible options" for MOCOA to regain dues deduction: (1) it can "obtain a labor agreement as defined by the rule that provides for the deduction of dues;" or, (2) it can "cease being a labor organization and reapply as an association and obtain a minimum of 100 applications during a 90 day period following that application." (Buckley Depo. at p. 108, l. 12 to p. 109, l. 8.) The State and MOCOA have been in contract negotiations

for nearly two years. By law, OA and DoC cannot be compelled to agree to any particular contract proposal, and they can continue to seek concessions from MOCOA provided they are bargaining in good faith. *AFT v. Ledbetter*, 387 S.W.3d 360, 365 (Mo. 2012). Unless the members of MOCOA capitulate to the State's bargaining demands or they give up their collective bargaining rights, they are denied dues deduction.

49. While the First Amendment does not confer an affirmative right to use payroll deduction for the purpose of obtaining funds for expression, the government may not discriminate in the provision of payroll deduction among speakers based on viewpoint. *Ysursa*, 555 U.S. at 361 & n.3; *see also Okla. Corr. Prof'l Ass'n v. Doerflinger*, 521 Fed. Appx. 674, 678 (10th Cir. 2013).

50. The bylaws of other employee associations with payroll deduction authority show that they, like MOCOA, have the purpose of seeking to advance the welfare of their members and to improve working conditions through lobbying and legislation. (Compare Pls' Ex. 101 with Jt. Exs. 32, 33 & 34.) Because MOCOA chooses to speak through collective bargaining as well as lobbying and legislation, it is denied access to the same benefit to fund that same type of speech. In this way, the Rule discriminates on its face between speakers and their members based on their perspective – that is, based on MOCOA's desire to speak through collective bargaining. *See Good News/Good Sports Club v. School Dist,* 28 F.3d 1501, 1507 (8th Cir. 1994) (school district policy discriminated on its face by permitting Scouts to use school facilities to speak about moral development but denying permission to religious club to use the same facilities to speak on same subject from a religious perspective); *see also United Food & Commercial Workers, Local 99 v. Brewer*, 817 F. Supp. 2d 1118 (D. Ariz. 2011)

(law that placed restrictions on an employee's ability to donate through payroll deduction to certain unions, but not to charitable organizations, banks, insurance companies and to other unions which also used dues money to fund political activity, unconstitutionally discriminated on the basis of viewpoint); *Univ. of Mo. at Columbia-National Educ. Assoc. v. Dalton*, 456 F. Supp. 985, 997 (W.D. Mo. 1978) (university's denial of use of campus facilities to union, but not employee association, violated the equal protection clause, where record showed that organizations were practically identical except that the union had one of its goals collective bargaining with the university and the employee association did not).

51. The case here is even stronger than under federal law because Missouri's Constitution gives employees the right to organize and collectively bargain. "Coercion from any source is a denial of this right and a direct infringement on it, which is a wrong against the employees." *Quinn v. Buchanan*, 298 S.W.2d 413, 417 (Mo. 1957), *overruled on other grounds, Eastern Mo. Coal. of Police v. City of Chesterfield,* 386 S.W.3d 755, 762 (Mo. 2012). The Rule impermissibly tends to coerce employees into accepting bargaining concessions or seeking to decertify their union which is rendered impotent by the discriminatory withdrawal of dues deduction authority.

52. *West Central Missouri Regional Lodge No. 50 v. Board of Police Comm'rs*, 916 S.W.2d 889 (Mo. Ct. App. W.D. 1996), is not to the contrary. The Court there upheld as rational a police board's decision to deny automatic dues withholding for union members. The Court noted that the withholding of dues (1) could be construed as recognition of the union as a labor union in violation of Missouri's public sector labor law at that time, (2) it would be administratively time consuming to accommodate the union

and, (3) it would violate state law prohibiting police department employees from donating to political organizations indirectly. *Id*. at. 892-893. These reasons do not apply here. Most notably, *West Central Missouri Regional Lodge No. 50* was decided before *Independence* and did not consider Article I, Section 29, which gives public employees the constitutional right to organize into a labor union. In addition, the facts are different. Here, OA has been deducting MOCOA dues for 19 years. It would not be administratively time consuming for OA to continue to automatically deduct MOCOA's dues. In addition, the law does not prevent corrections officers from paying dues to a group like MOCOA.

53. The Final Rule is not saved by the belated addition of other groups (private insurance carriers and credit unions) to the list of organizations that cannot be an employee association. Private insurance carriers and credit unions are businesses and do not seek to improve the working conditions of state workers or engage in collective bargaining. Employee associations can and do. Moreover, there is no constitutional right to purchase a life insurance policy or open a credit union bank account, while there is a fundamental right to organize and bargain collectively through a representative.

54. Because the Rule impinges on the fundamental right to organize and bargain collectively as well as on freedoms of speech and association, it is subject to strict scrutiny. *Weinschenk*, 203 S.W.3d at 210-11. Defendants must show that the rule is "narrowly tailored" to further a "compelling state interest." They cannot carry that burden or show that the Rule satisfies any meaningful standard of heightened scrutiny.

55. The Emergency Statement identifies several purported State interests, including governmental efficiency, saving taxpayer resources, and the legislature's delegated

authority. None of these interests are legitimate, let alone compelling. OA has deducted MOCOA dues from state employee compensation for 19 years without interruption. It did so before MOCOA was a labor organization, while it was a labor organization (before its first labor agreement and between its first and second agreements), and for over one year after its most recent labor agreement expired. OA did not materially save more money, or make DoC any more efficient, or protect the legislature's grant of delegated authority any more, by revoking MOCOA's payroll deduction authority while continuing to deduct dues for other employee associations. Moreover, if MOCOA and OA and DoC reach agreement on a new labor contract, OA will presumably resume dues deduction, which will take time and resources.

56. The Emergency Statement also claims a compelling interest in avoiding liability for the December 9, 2019 decision to revoke MOCOA's payroll deduction authority. If OA is concerned about litigation from labor unions like this lawsuit, the answer is to remedy the original wrongdoing, not legislate away OA's liability through rulemaking.

57. OA cannot show that the Emergency Rule is narrowly tailored. If the goal is to make government more efficient or to save taxpayer resources, then OA cannot explain how continuing to allow payroll deduction to any employee association with as few as 100 members is more defensible than continuing to allow it to an employee association which is also a union, with over 1,000 dues-paying members.

58. Defendants have also asserted that OA filed the Emergency Amendment and adopted the Final Rule to address the risk of litigation over the *Janus* case. This assertion is not credible since the Emergency Statement says nothing about *Janus.* (Jt.

Ex. 27.) Moreover, as noted above, Defendants' reliance on *Janus* is unreasonable, because *Janus* does not apply to union members who voluntarily agree to pay dues.

59. Even if *Janus* did apply to union members, the Rule is not tailored to deal with *Janus.* The amendment to the definition of "employee association" does nothing to ensure that an employee's consent to payroll deduction of dues is "freely given." *Janus*, 138 S. Ct. at 2486. When asked in his deposition how the Emergency Amendment solved the problem of *Janus*, Mr. Buckley admitted as much, saying that the amendment – that a labor union cannot also be an employee association -- is not related to the "risk of litigation under Janus." (Buckley Depo. at p. 289, l. 10 to p. 291, l. 11 [Pls' Ex. 108].)

C. DEFENDANTS' DECISION OF MARCH 17, 2020 TO DENY MOCOA'S REQUEST TO RESUME DUES DEDUCTION (COUNT III).

60. The legal standard to apply to Defendants' March 17, 2020 decision is the same as for the December 9, 2019 decision. An agency must act consistently with governing statutes and regulations, *City of Pasadena Hills,* 70 S.W.3d 488, as well as the State Constitution. "An agency that completely fails to consider an important aspect or factor of the issue before it may be found to have acted arbitrarily or capriciously." *Beverly Enterprises-Mo.*, 349 S.W.3d at 345. An agency's decision must be made using some kind of objective data rather than mere surmise, guesswork, or "gut feeling." *Missouri Nat'l Educ. Ass'n*, 34 S.W.3d at 281.

61. MOCOA amended its Articles of Incorporation and bylaws in early February 2020 to eliminate auxiliary membership for non-state employees and then submitted a written request for OA to resume payroll deduction of dues. Unknown to MOCOA at the time,

OA was already in the process of issuing the Emergency Rule, to carve out labor organizations from the definition of "employee association."

62. Stacy Neal's March 17, 2020 letter cites two reasons for not approving MOCOA's request to resume dues deduction.

63. OA first claimed that the 130 employee-signed authorizations enclosed with MOCOA's request were invalid because they were all signed before February 27, 2020, the date when OA acknowledged MOCOA's request. But, MOCOA has always been an employee association so it did not need to obtain any new applications. Furthermore, the rule does not require applications to be "signed" within a 90-day period; it simply says MOCOA is responsible for "obtaining" them within that period. 1 CSR 10-3.010(6)(F). While the applications at issue were signed on July 25, 2019 or before, OA had been relying on them to deduct dues from correction officers' pay and they had not been revoked. The rule does not prevent MOCOA from "obtaining" the same valid applications.

64. Defendants in their Answer admitted that prior to December 9, 2019, OA and DoC were relying on authorization forms signed by approximately 1,300 employees, and, Defendants admitted that as of February 27, 2020, at least 100 of the 1,300 employees were still correctional officers who had not revoked their payroll authorizations. (Defs' Answer ¶ 53.) The date these employees actually signed their authorizations is irrelevant. What matters for purposes of the rule is whether MOCOA "obtained" a sufficient number of valid applications of current employees, which it did – namely, the approximately 1,300 applications that OA and DoC had been relying on prior to December 9, 2019 including the approximately 130 which MOCOA re-submitted.

65. The Court rejects Defendants' claim that OA has always interpreted the rule to require applications to be signed within the 90-day period. Stacy Neal admitted on cross-examination that no document sets forth this interpretation. (Tr. at p. 172, l. 23 to p. 173, l. 6.) She also conceded that OA does not require a particular form for dues deductions. (Tr. at p. 173, ll. 12-15.) Even if some policy set forth Defendants' interpretation, the Rule does not say that employees must sign an application within a 90-day period and not before. OA cannot use an interoffice announcement to narrow the plain language of the rule. *See Dep't of Soc. Servs.*, 224 S.W.3d at 15

66. OA's practices with respect to the employee signature requirement have been inconsistent. According to letters kept by OA, when a vendor insurance company falls below 100 active employees, OA gives the vendor three months to increase the number. (Neal Aff., Ex. B-53.) OA allows the vendor to rely on previously signed authorizations to meet the threshold. (Tr. at p. 181, l. 19 to p. 182, l. 8 & p. 185, ll. 2-8.) If the vendor fails to meet the three-month deadline, OA continues deductions for the vendor until the end of the calendar year. (Neal Aff., Ex. B-54.) Stacy Neal candidly admitted that the rule does not say that OA can do any of this. (Tr. at p. 183, ll. 3-13.) Rather, the rule says the opposite by saying that OA "will terminate" deductions for any product that does not maintain 100 active employee deductions. 1 CSR 10-3.010(6)(G). Yet, Ms. Neal testified that OA wants to be "reasonable" and gives vendors extra time to gather more applications because OA does not want "to create confusion to our employees" and "uncertainty of vendors coming on and off, on and off." (Tr. at p. 182, ll. 23-25 & p. 183, ll. 9-12.)

67. OA's willingness to act contrary to its purported guidelines, or to use different interpretations of the rules, for some vendors, but not MOCOA, is arbitrary and capricious and unreasonable.

68. Beyond the letters to vendors, documents from initial requests submitted by other employee associations show that OA historically has accepted employee applications that were signed before OA acknowledged receipt of the organization's request for payroll deduction. It appears from documents in OA's files that both MOCOA and TEAM relied on authorizations signed before the groups made a request to OA for payroll deduction authority. Notes in the files of each group suggest that they already had "over 200 applications" and "over 100 deductions," respectively, at the time their requests were made.

69. In addition, the record shows that OA allowed the Missouri Chapter of the International Association of Personnel in Employment Security (IAPES) to change its payroll deduction status from "credit union" to "employee association," using previously signed authorizations and in some cases undated and unsigned authorizations. MOCOA was not even trying to change its status like IAPES – MOCOA has always been an employee association. But, MOCOA was not allowed to rely on previously signed authorizations.

70. The second reason Ms. Neal's letter gave for denying MOCOA's February 27, 2020 request was the Emergency Rule. As explained above, the Emergency Rule is unconstitutional. OA's decision is unconstitutional and unreasonable to the extent it relied on an unconstitutional rule.

71. Defendants seek to avoid their reliance on the Emergency Rule by claiming that OA acted pursuant to a long-held belief that a labor union cannot be an employee association, and that the Emergency Amendment simply clarified the original intent of the rule. This suggests that OA engaged in some meaningless act by promulgating the Rule, which is not credible. The Emergency Amendment makes clear that OA amended the rule to protect itself from claims of damages in litigation brought by the unions. Additionally, OA's corporate representative repeatedly characterized the former rule as "ambiguous." (Buckley Depo. at p. 146, ll. 24-25; p. 290, ll. 22-23; p. 172, ll. 3-5 [Pls' Ex. 108].) Neither he nor Ms. Neal could identify one example of OA making in the past a change to a rule because an outside group disagreed with OA's interpretation of a rule. (Buckley Depo. at p. 146, ll. 6-14; Tr. p. 220, l. 24 to p. 221, l. 8.)

72. OA's own conduct belies its assertion that it long interpreted the Rule as creating mutually exclusive categories for "labor organizations" and "employee associations." At no time between December 17, 2019 and January 30, 2020, when OA was asking MOCOA about its auxiliary members, did OA mention that MOCOA could not be an employee association because it is a labor union. In fact, OA implied the opposite. After learning the MOCOA admitted a few retirees, OA told MOCOA that OA was considering a rule that would expand the definition of an employee association to include groups with non-state employees.

74. Defendants' decision of March 17, 2020 is no less unlawful, even though the Emergency Rule is no longer in effect. As explained above, the Final Rule is unconstitutional for the same reasons as the Emergency Rule. On its face, it infringes on and violates the constitutional right to organize and collectively bargain, on freedoms

of speech and association, and equal protection. The Emergency Statement also affirms that the Proposed Rule, later the Final Rule, was issued for the same reasons as the Emergency Rule – to target the claims by the labor unions including MOCOA. The only reason OA also issued the Emergency Rule was that it wanted immediate action to protect itself from liability, which OA could not get through the proposed amendment that, under the law, could not take effect so quickly. (Jt. Ex. 27.)

75. OA's corporate representative made clear in his deposition that Defendants will apply the Final Rule against MOCOA in the same way they applied the Emergency Rule in the March 17, 2020 decision. The only way for MOCOA to regain dues deduction as an employee association would be for it to cease being a labor union. (Buckley Depo. at p. 108, l. 12 to p. 109, l. 8 [Pls' Ex. 108].)

D. Plaintiffs are entitled to injunctive relief as they lack an adequate remedy at law.

76. The Rule infringes on the constitutional rights of MOCOA and its members. It penalizes them for exercise of the right to organize and bargain collectively, by denying them payroll deduction authority, while other employee associations, who seek to promote the welfare of employees and to lobby like MOCOA, continue to receive the benefit.

78. MOCOA lacks an adequate remedy at law. Damages, even if they were available, would not remedy the afore described problems.

WHEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that:

1. Plaintiffs shall have judgment on Count I of the Amended Petition. The Court declares that the Emergency Rule and now the Final Rule are unconstitutional because they infringe on the constitutional right to organize

and bargain collectively, and the freedoms of speech and association; and they violate equal protection as guaranteed under the Missouri Constitution;

2. Plaintiffs shall have judgment on Count III of the Amended Petition:
    a. The Court declares that Defendants' decision on December 9, 2019 to cease deducting MOCOA dues was unlawful, and arbitrary, capricious, unreasonable, and an abuse of discretion because MOCOA qualified for dues deduction at that time as an employee association; and 100 or more employees had authorized the deduction of MOCOA dues from their pay in accordance with the rules.
    b. The Court declares that Defendants' decision on March 17, 2020 to deny MOCOA's request to resume dues deduction was unconstitutional, arbitrary, capricious, and unreasonable, because MOCOA qualified for dues deduction as an employee association, and 100 or more employees had timely authorized the deduction of MOCOA dues from their pay in accordance with the rules; and because the Emergency Rule was unconstitutional;
3. Count II is dismissed as moot. Count II challenged the statutory validity of the Emergency Rule under Sections 536.025 and 536.050, RSMo., on the grounds that it should not have been adopted as an Emergency Rule. This claim is moot because the Final Rule has superseded the Emergency Rule and because relief on Count II is moot.
4. The Court orders Defendants to resume and payroll deductions for any current employees who were having MOCOA dues deducted from their pay

right before December 9, 2019, pursuant to the authorizations they had signed, except for employees who have since retired, quit, been fired, or otherwise left employment with the State or for employees who have subsequently and voluntarily revoked their existing authorizations;

5. The Court orders Defendants to accept new MOCOA dues deduction authorizations signed by employees in the future, and begin and continue deductions for those employees, pursuant to their authorizations;
6. The actions ordered in this judgment shall be stayed until the later of November 1, 2021 or the final resolution of this cause by the appellate courts.
7. Plaintiffs shall have 30 days from entry of this Order to file their Motion for Attorneys' Fees and Costs; and same shall be held in abeyance until the judgment entered herein shall be finally resolved.

SO ORDERED this 27th day of September, 2021.

Jon E. Beetem, Circuit Judge – Division I
Circuit Judge

Respectfully submitted,

/s/ Christopher N. Grant

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 22nd day of October, 2020, a true and accurate copy of the foregoing was electronically filed via the Court's electronic filing system.

/s/ Christopher N. Grant

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In the
Missouri Court of Appeals
Western District

MISSOURI CORRECTIONS OFFICERS ASSOCIATION, INC., ET AL.,	)	**WD84917**
Respondents,	)	**OPINION FILED: December 6, 2022**
v.	)	
MISSOURI OFFICE OF ADMINISTRATION, ET AL.,	)	
Appellants.	)	

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Jon Edward Beetem, Judge

Before Division Four: Gary D. Witt, Chief Judge, Presiding, Mark D. Pfeiffer, Judge and Thomas N. Chapman, Judge

Missouri Office of Administration; Sarah Steelman[1], Commissioner of the Office of Administration, in her official capacity; and Stacy Neal, Director of the Division of Accounting of the Office of Administration, in her official capacity (collectively, "OA") appeal the judgment of the Circuit Court of Cole County ("trial court"), following a bench

[1] We note that Sarah Steelman is no longer the Director of the Office of Administration and that position is currently held by Kenneth J. Zellers. However, no substitution of parties has been filed with the court and therefore Sarah Steelman remains a party in her former official capacity.

trial, in favor of Missouri Corrections Officers Association, Inc., Terry Enberg, and Tina Courtway (collectively, "MOCOA") on MOCOA's amended petition against OA. The trial court issued findings of fact, conclusions of law, and judgment ("Judgment") finding that the Emergency Rule and Final Rule (collectively, "Rules") issued by OA were unconstitutional because they infringed on MOCOA's constitutional rights to organize and to bargain collectively, freedoms of speech and association, and equal protection. The trial court also found that OA's decisions in December 2019 to suspend payroll deduction and in March 2020 to deny payroll deductions for MOCOA were unlawful, arbitrary, capricious, and unreasonable. The trial court ordered OA to resume payroll deductions for current Department of Corrections ("DOC") employees who were having MOCOA dues deducted from their pay prior to OA's December 9, 2019, decision to suspend payroll deduction, and the trial court ordered OA to accept new MOCOA payroll deduction applications signed by DOC employees in the future.

OA raises nine points on appeal: OA argues the trial court erred in: (1) finding that OA's December 2019 decision to discontinue MOCOA dues deduction was unlawful under section 536.150[2] because MOCOA did not meet the regulatory requirements for dues deduction in that (a) it could not deduct dues as a labor union because it had no existing labor agreement, (b) it could not deduct dues as an employee association because it was not a "group of state employees," and (c) it could not deduct dues as an employee association because 1 C.S.R. 10-3.010 (2019) does not permit labor unions to be employee

[2] All statutory references are to Revised Statutes of Missouri (2016), as currently updated by supplement, unless otherwise indicated.

associations; (2) finding that OA's December 2019 decision to discontinue MOCOA's dues deduction was arbitrary, capricious, and unreasonable under section 536.150 because 1 C.S.R. 10-3.010 (2019) required OA to deny dues deductions; (3) finding the Rules violated article I, section 29 of the Missouri Constitution because the Rules did not violate the right to bargain collectively; (4) finding the Rules violated article I, section 8 of the Missouri Constitution because the Rules did not violate union-members' constitutional right to free speech; (5) finding the Rules violated article I, section 9 of the Missouri Constitution because the Rules did not violate union-members' right to freedom of association; (6) finding the Rules violated article I, section 2 of the Missouri Constitution because the Rules did not violate union-members' right to equal protection; (7) finding OA's March 2020 decision denying MOCOA dues deduction was unlawful under section 536.150 because OA's decision was lawful under the Emergency Rule and under 1 C.S.R. 10-3.010 (2019); (8) finding OA's March 2020 decision denying MOCOA dues deduction was arbitrary, capricious, and unreasonable under section 536.150 because the trial court's factual findings do not satisfy the arbitrary and capricious standard; and (9) awarding MOCOA injunctive relief because the requirements for injunctive relief were not met. We affirm the judgment of the trial court.

Factual Background

MOCOA was established in 2000 as a non-profit corporation to promote the interests and welfare of all corrections officers in Missouri by advocating for favorable legislation, mitigating hazards of employment, improving working conditions, and raising the social standing of its members. Only corrections officers employed by the DOC were

eligible for full membership, however the MOCOA Board of Directors was empowered to pass a resolution allowing auxiliary membership to other persons who actively supported the goals of MOCOA on account of family affiliation, work history, or other reasons.

Under Missouri law, certain groups may request OA to voluntarily have payments from their members' paychecks automatically deducted and remitted toward the funding of those groups. *See* section 33.103. Among the groups eligible to receive such membership funding through automatic payroll deduction are labor unions and employee associations. *See id.* At the time MOCOA was established, Missouri regulations defined each group: a labor union was "an exclusive state employee bargaining representative established in accordance with sections 105.500-105.530[;]" and an employee association was "an organized group of state employees that has a written document, such as bylaws, which govern its activity[.]" 1 C.S.R. 10-4.010(1)(B), (C) (1990). To receive payroll deduction, employee associations, but not labor unions, were required to obtain a minimum of 100 state-employee-signed applications within ninety days of their request to OA for payroll deduction. 1 C.S.R. 10-4.010(2)(F), (H) (1990).

In July 2000, MOCOA filed a request with OA that its members be permitted to voluntarily deduct MOCOA dues from their paychecks. Although MOCOA was not a labor union at the time, OA granted the request for payroll deduction because MOCOA qualified as an employee association. Following the approval of payroll deductions for MOCOA members, OA and DOC, which was responsible for payroll for corrections officers, began deducting MOCOA dues owed by DOC employees pursuant to employee-signed applications. The dues collected were remitted to MOCOA. New DOC employees

who signed authorization applications also had MOCOA dues deducted from their paychecks.

In July 2004, Corrections Officers I and II voted to make MOCOA their exclusive bargaining representative pursuant to section 105.525 (2000). Thus, MOCOA became qualified as a labor union under the regulations. MOCOA and DOC entered into their first labor agreement in February 2007 ("2007 Agreement"), which was set to expire in January 2011. Payroll deductions for MOCOA dues continued under the 2007 Agreement, although the agreement did not specify whether dues were being deducted pursuant to MOCOA's status as a labor union or employee association, or both. An internal memo from OA in 2011 regarding payroll deductions for employee associations ("2011 memo") stated that MOCOA was listed as an employee association, although the 2011 memo noted that the accounting department within OA had mischaracterized MOCOA as an employee association. The OA memo stated, "Accounting's files indicate that this group may have been an employee association when the payroll deductions were first set up in 2000. But it is now a union that currently represents state employees. And it is not dually listed in Accounting's records as a union and an employee association." Despite describing MOCOA's status as an employee association as a "mischaracterization" in the 2011 memo, a 2016 Sunshine request to OA requesting a list of employee associations that had payroll deduction authority revealed that MOCOA was listed as an employee association within OA's own records.

The terms of the 2007 Agreement were extended past January 2011 while the parties negotiated a new labor agreement, which was finally agreed upon and entered into in

October 2014 ("2014 Agreement"). Payroll deductions for MOCOA dues continued under the 2014 Agreement. When the 2014 Agreement expired in September 2018, DOC and OA declined to extend the terms of the agreement while they negotiated with MOCOA to enter into a new labor agreement. Negotiations between MOCOA, OA, and DOC continued during this litigation, but as of the date of trial no existing labor agreement between the parties had been reached or approved.

In June 2019, OA and MOCOA had not reached a new labor agreement, and OA notified MOCOA that it was terminating dues deduction for employees not in the MOCOA bargaining unit. However, OA continued the dues deduction for roughly 1,300 MOCOA-member employees until December 2019. On December 9, 2019, OA sent a letter to MOCOA that OA was terminating payroll deduction for all MOCOA members. According to OA's letter to MOCOA, "Because the State of Missouri employees represented by MOCOA are not covered by an existing labor agreement, [OA] will no longer make payroll deductions of MOCOA dues from State of Missouri employee compensation." MOCOA responded to OA's letter on December 17, 2019, through its attorney, Chris Grant ("Grant"). Grant asserted that MOCOA was an employee association under the applicable regulation as well as a labor union. Therefore, according to Grant, MOCOA members were still eligible for payroll deduction for MOCOA dues. Grant attached the Sunshine request MOCOA had received from OA in 2016 that listed MOCOA as an employee association to his response. OA's legal counsel responded to Grant by asking MOCOA to provide information regarding any MOCOA auxiliary members that had been admitted pursuant to MOCOA's bylaws. Grant replied that such information was irrelevant, and if OA was

asking MOCOA to provide this information, MOCOA would expect to know if other employee associations were required to provide this information to OA as well. In a subsequent e-mail, Grant stated to OA's legal counsel that MOCOA has admitted "about 25 retirees (former corrections officers) who are auxiliary members who pay a reduced amount in dues per year and do not have full-fledged membership rights. They pay this small amount to [MOCOA] directly."

On January 15, 2020, OA's legal counsel informed Grant that MOCOA did not qualify as an employee association because it admitted membership to non-state employees, i.e. the auxiliary members. OA's legal counsel told Grant that OA was considering amending the relevant regulation to expand the definition of employee association to include non-state employee members. However, on January 30, 2020, Grant was informed that OA would not be making that amendment to the rule. Instead, on February 11, 2020, OA filed an Emergency Amendment and Proposed Rule ("Emergency Rule") to "clarif[y] what was originally intended in this rule: that employee associations and labor unions are discrete classifications of vendors under this rule and section 33.103[.]" The Emergency Rule amended the definition of employee association to read, "an organized group of state employees that has a written document, such as bylaws, which governs its activity, and that is not an exclusive bargaining representative for state employees established in accordance with sections 105.500-105.530[.]" MOCOA, which was unaware of the Emergency Rule changing the definition of employee association, had amended its bylaws to remove the provision allowing for auxiliary membership in an attempt to qualify as an employee association under OA's prior interpretation of the

regulation communicated to Grant. Accordingly, on February 27, 2020, MOCOA sent OA a written request to resume dues deduction as an employee association based on the removal of auxiliary members. MOCOA attached 130 employee-signed applications for dues deduction to its request.

On March 17, 2020, OA denied MOCOA's request to resume dues deduction because the Emergency Rule amending the definition of employee association went into effect before OA received MOCOA's request to resume payroll deduction, and OA stated that MOCOA did not satisfy the requirement that it submit at least 100 state-employee-signed applications within the 90-day period after MOCOA requested dues deduction.

Prior to OA suspending MOCOA's dues deduction in December 2019, all of MOCOA's corrections officer members, nearly 1,300 members, paid their dues by payroll deduction. Following the dues deduction suspension, MOCOA lost nearly all its revenue. MOCOA set up a Pay-Pal account so that members could contribute directly, but MOCOA's representative, Tim Cutt ("Cutt"), testified that it is difficult to communicate with MOCOA members to encourage them to contribute directly to MOCOA. Without the revenue generated from payroll deduction, MOCOA was forced to reduce its operating staff from three persons to one person.

On March 24, 2020, MOCOA sued OA, alleging that (1) the Emergency Rule[3] was unconstitutional for violating MOCOA's rights to organize and bargain collectively, to free speech, to free association, and to equal protection; (2) OA failed to demonstrate

[3] At the time MOCOA filed their amended petition, the Emergency Rule had not yet become final.

emergency-rulemaking conditions; and (3) OA's decisions in December 2019 to suspend payroll deductions and in March 2020 to deny payroll deductions as an employee association were unlawful, unreasonable, arbitrary, capricious, and an abuse of discretion under section 536.150. In July 2020, OA adopted the Emergency Rule, making it final, and also amended it to read that insurance companies and credit unions, in additional to labor unions, also cannot be employee associations.

The trial court held a bench trial on MOCOA's amended petition. The trial court issued its Judgment finding that: (1) OA had unlawfully, arbitrarily, and capriciously suspended MOCOA dues deduction from DOC employees in December 2019; (2) the Rules violated article I, sections 2, 8, 9, and 29 of the Missouri Constitution; and (3) OA unlawfully, arbitrarily, and capriciously refused to resume MOCOA dues deduction for DOC employees in March 2020. The trial court ordered OA to resume dues deduction for employees who were having dues deducted in December 2019, and the trial court ordered OA to accept new payroll deduction applications. This timely appeal follows.[4]

Analysis

Standard of Review

This appeal involves judicial review of a noncontested administrative decision, which is governed by section 536.150.1. *Sanders v. City of Columbia*, 602 S.W.3d 288, 295 (Mo. App. W.D. 2020). The trial court may determine whether an administrative decision, "in view of the facts as they appear to the court, is unconstitutional, unlawful,

[4] Additional facts may be discussed throughout the analysis portion of this opinion, including relevant credibility determinations made by the trial court.

unreasonable, arbitrary, or capricious or involves an abuse of discretion[.]" Section 536.150.1. "On appeal, this Court's review of a noncontested case requires review of the judgment of the trial court and not the agency, and thus the standard of review is the same as in any other court-tried case." *Sanders*, 602 S.W.3d at 296 (internal quotations omitted). Our review, therefore, is governed by Rule 73.01 as construed in *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976). *Id.* "The trial court's judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, it erroneously declares the law, or it erroneously applies the law." *Id.* "Accordingly, the appellate court reviews the [trial] court's judgment to determine whether its finding that the agency decision was or was not constitutional, unlawful, unreasonable, arbitrary, capricious, or the product of an abuse of discretion rests on substantial evidence and correctly declares and applies the law." *Mo. Nat. Educ. Ass'n v. Mo. State Bd. of Educ.*, 34 S.W.3d 266, 275 (Mo. App. W.D. 2000). "This Court applies de novo review to questions of law decided in court-tried cases." *Shomaker v. Dir. of Revenue*, 504 S.W.3d 84, 86 (Mo. App. E.D. 2016).

Point One

OA argues the trial court erred in finding OA's December 2019 decision to discontinue dues deduction was unlawful under section 536.150 because MOCOA did not meet the regulatory requirements for dues deduction in that: (1) it could not deduct dues as a labor union because it had no existing labor agreement; (2) it could not deduct dues as an employee association because it was not a group of state employees; and (3) it could not deduct dues as an employee association because labor unions cannot also be employee

associations. "Administrative rules and regulations are interpreted under the same principles of construction as statutes." *Matter of Trenton Farms RE, LLC v. Mo. Dept. of Nat. Res.*, 504 S.W.3d 157, 164 (Mo. App. W.D. 2016). "In the absence of a given definition in a regulation, the word or term will be given its plain and ordinary meaning as derived from a dictionary." *Id.* "[I]t is inappropriate to defer to an agency's interpretation of its own regulation that in any way expanded upon, narrowed, or was otherwise inconsistent with the plain and ordinary meaning of the words used in the regulation." *Id.* "Regulations should be interpreted reasonably, and absurd interpretations should not be adopted." *Id.*

The applicable regulation at the time OA suspended MOCOA's payroll deduction for DOC employees defined employee association as "an organized group of state employees that has a written document, such as bylaws, which govern its activity." 1 C.S.R. 10-3.010(6)(A)(3) (2019). A labor union was defined as "an exclusive state employee bargaining representative established in accordance with sections 105.500-105.530[.]" 1 C.S.R. 10-3.010(6)(A)(2) (2019). Although MOCOA fit the definition of a labor union, it did not have an existing labor agreement, which disqualified it from receiving payroll deduction as a labor union because the regulations also defined "dues" as "a fee or payment owed by an employee to a labor organization as a result of and relating to employment in a bargaining unit covered by an existing labor agreement or a payment owed by an employee for membership in an employee association." 1 C.S.R. 10-3.010(6)(A)(5) (2019). Therefore, in 2019, under the then existing regulations, MOCOA

was eligible to receive dues through DOC employees' payroll deduction only if it was an employee association.

OA argues MOCOA was not an employee association because it was not a "group of state employees." That is, because MOCOA also permitted twenty-five retirees to be auxiliary members, OA argues, it was a group of both state and non-state employees. Also, according to OA, although MOCOA initially began receiving dues through payroll deduction as an employee association in 2000, it ceased being an employee association when it was recognized as a labor union for Corrections Officers I and II in 2004 following its union election. We disagree with both arguments. Under the plain and ordinary meaning of 1 C.S.R. 10-3.010(6)(A)(3), a group of state employees does not require the group to be composed of *exclusively* state employees in order to be an employee association. Here, MOCOA was receiving dues from roughly 1,300 DOC state employees at the time OA terminated payroll deduction. The twenty-five retirees who were admitted as auxiliary members were not full members of MOCOA, could not vote for directors, paid a reduced fee directly to MOCOA, and used their auxiliary membership for social and insurance purposes. To say that auxiliary membership of a small group of non-state employees in a lower-tier of membership disqualifies the entire group from classification as an employee association would be an absurd result and contrary to the plain meaning of the regulation. We also reject OA's "slippery slope" argument that interpreting employee association as the trial court did will lead to employee associations being diluted by hundreds of non-state employees as auxiliary members. Rather, this Court interprets the regulation in a reasonable manner, and a reasonable interpretation of the regulation

recognizes that the overall composition of MOCOA's members as state employees satisfies the regulatory requirement that an employee association be a group of state employees.

Moreover, in December 2019, nothing in the regulations prohibited a group from being both a labor union and an employee association. If a group's characteristics met each definition under the regulation, as MOCOA's did, there was no language to make the types of groups mutually exclusive or require a group to select only one such designation. The regulations provided that "dues" could be deducted from labor unions with an existing labor agreement or from employee associations. 1 C.S.R. 10-3.010(6)(A)(5) (2019). MOCOA did not have an existing labor agreement, but it was still a group of state employees governed by bylaws. Therefore, it qualified as an employee association. Accordingly, the trial court did not misapply the law in finding that the 2019 decision by OA to suspend payroll deductions for MOCOA members as an employee association was unlawful.

Point one is denied.

Point Two

In OA's second point on appeal, it argues the trial court erred in finding the December 2019 decision to discontinue dues deduction for MOCOA was arbitrary, capricious, and unreasonable because the regulation required it to discontinue payroll deduction because MOCOA was not an employee association. "'Arbitrary and capricious' has been defined in the context of rules and regulations as 'willful and unreasoning action, without consideration of and in disregard of the facts and circumstances.'" *Beverly Enters.-Mo. Inc. v. Dep't of Soc. Servs., Div. of Med. Servs.*, 349 S.W.3d 337, 345 (Mo. App. W.D. 2008). "[A]n administrative agency acts unreasonably and arbitrarily if its findings are not

based upon substantial evidence." *Hundley v. Wenzel*, 59 S.W.3d 1, 8 (Mo. App. W.D. 2001). "Moreover, an agency which completely fails to consider an important aspect or factor of the issue before it may also be found to have acted arbitrarily and capriciously." *Barry Serv. Agency Co. v. Manning*, 891 S.W.2d 882, 892 (Mo. App. W.D. 1995) (citing *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which [the legislature] has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Prime Healthcare Servs.-Kan. City, LLC v. Dep't of Health and Senior Servs., __S.W.3d__, 2022 WL 3031644, *5 (Mo. App. W.D. 2022).

Here, the trial court did not err in finding that OA's decision to discontinue MOCOA's dues deduction was arbitrary and capricious. In OA's letter to MOCOA on December 9, 2019, OA explained that DOC employees would no longer be able to deduct MOCOA dues from their paycheck because "the State of Missouri employees represented by MOCOA are not covered by an existing labor agreement." The letter made no mention of MOCOA's status, or supposed lack thereof, as an employee association. Yet, in subsequent e-mails between OA's legal counsel and Grant, OA inquired into whether MOCOA had admitted auxiliary members pursuant to MOCOA bylaws. This was the first time OA had ever asked MOCOA about its auxiliary members. After Grant informed OA that MOCOA had admitted twenty-five retirees as auxiliary members, OA stated, after it had already suspended payroll deduction, that MOCOA could not be considered an

employee association for this reason. It is clear that OA did not consider MOCOA's status as an employee association before discontinuing its payroll deduction in December 2019, and merely provided this rationale after the fact.

The record contains substantial evidence from which the trial court could find that OA arbitrarily inquired into MOCOA's auxiliary membership in order to justify its prior decision to disqualify it from payroll deduction. When Grant asked OA if it had requested auxiliary membership information from any other employee association, OA's legal counsel did not respond. The trial court found that, between December 9, 2019, and March 17, 2020, OA did not communicate with the three other employee associations participating in payroll deduction to ask whether they admitted non-state employees into membership. These three employee associations, the Missouri State Troopers Association, Transportation Employees Association of Missouri, and the Missouri Probation and Parole Officers Association, all permit lower-level membership to individuals who support the respective purposes of the associations. OA attempted to distinguish its treatment of MOCOA from these three groups by arguing the other groups merely have the authority to admit non-state members while MOCOA actually admitted them. But OA discontinued payroll deduction for MOCOA *before* it knew whether or not MOCOA had actually admitted auxiliary members. The trial court found this distinction to be pretextual. And the trial court found that OA did not communicate with the only employee association that had applied for payroll deduction within the previous ten years, the Correctional Peace Officers Foundation, to determine if it admitted non-state members. OA's representative, Paul Buckley ("Buckley") also testified that OA does not have standard payroll deduction

guidelines or procedures regarding the authorization of employee associations. The record shows that OA's interpretation of the regulations and its stated reasons for amending the regulations was a moving target, supporting the trial court's determination that its rationale was pretextual and its decision to suspend MOCOA's payroll dues deductions applied the regulation in an arbitrary and capricious manner.

OA argues that its decision to discontinue payroll deduction for MOCOA dues was rational because it was based on its interpretation of the regulation that classifies MOCOA as a labor union and not an employee association. But it is clear from the record that OA previously understood MOCOA to be an employee association and failed to consider this factor in its suspension of payroll deductions. Even though the 2011 OA internal memo stated that MOCOA had been mischaracterized as an employee association, the 2016 Sunshine request obtained by MOCOA revealed that it remained classified as an employee association in OA's internal records. Despite OA's argument that MOCOA ceased being an employee association in 2004, the record shows two separate occasions in which OA continued to classify MOCOA as an employee association. Yet, OA refused to consider this important factor when terminating MOCOA's dues deduction in December 2019.

The trial court found that OA has provided shifting reasons for discontinuing MOCOA's dues deduction. As discussed previously, OA only provided one reason when it initially discontinued payroll deduction in December 2019, however new and different justifications have emerged throughout the course of this litigation. For example, OA argued before the trial court that the recent Supreme Court decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S.Ct. 2448 (2018),

played a factor in discontinuing MOCOA's payroll deductions. OA argued that the *Janus* decision exposed OA to the risk of litigation if it continued to deduct dues from employee paychecks for employee associations. The trial court did not find OA credible in this regard. The trial court found that the evidence showed that OA did not rely on *Janus* in suspending MOCOA's payroll deduction. OA suspended two other employee associations' payroll deductions along with MOCOA, and in letters to each group explaining OA's rationale, OA cited the *Janus* decision. But this rationale was never articulated to MOCOA, and OA seemingly argued this justification for suspending MOCOA dues for the first time before the trial court. Therefore, because the trial court did not find OA credible in its argument that it suspended the payroll deduction in response to *Janus*, we do not opine on the extent to which *Janus* applies or does not apply to payroll deduction for MOCOA members. The record contains substantial evidence that supports the trial court's finding that OA's reliance on *Janus* was pretextual, and its suspension of MOCOA's payroll deduction was arbitrary and capricious.

Point two is denied.

Point III

OA argues the trial court erred in finding the Rules violated article I, section 29 of the Missouri Constitution because the rules did not violate the right to collectively bargain. OA argues that because the rules do not impinge on the right of employees to collectively bargain, this Court need not apply any level of judicial scrutiny to our analysis of the Rules; in the alternative, OA argues the Rules are subject to rational basis review, not strict

scrutiny, because collective bargaining is not a fundamental right, and the Rules do not severely restrict that right.

The Emergency Rule promulgated by OA, effective February 27, 2020, amended the definition of employee association. According to OA, the Emergency Rule was adopted to "clarif[y] what was originally intended in this rule: that employee associations and labor unions are discrete classifications of vendors under this rule and section 33.103[.]" Emergency Amendment, 45 Mo. Reg. 415 (Mar. 16, 2020) (to be codified at 1 C.S.R. 10-3.010). The new definition defined employee association as "an organized group of state employees that has a written document, such as bylaws, which govern its activity, and *that is not an exclusive bargaining representative for state employees established in accordance with sections 105.500-105.530[.]*"[5] 1 C.S.R. 10-3.010(6)(A)(3) (emphasis added). Under this Emergency Rule, OA refused to resume payroll deduction for MOCOA after it had amended its bylaws to remove the lower-tier of auxiliary membership. The trial court held the Rules violated MOCOA's constitutional right to organize and to bargain collectively because, under strict scrutiny, OA was unable to show that its action was narrowly tailored to further a compelling government interest. The trial court applied strict scrutiny to its review of the Rules because it found that the Rules violated a fundamental right to organize and to bargain collectively; that is, the Rules discriminated against employee associations that wish to exercise their right to organize and bargain collectively

[5] When the Emergency Rule became final, the definition of employee association read: "an organized group of state employees that has a written document, such as bylaws, which govern its activity, and that is not a private insurance carrier or company, credit union, or exclusive bargaining representative for state employees established in accordance with sections 105.500-105.530[.]" 1 C.S.R. 10-3.010(6)(A)(3).

by denying them payroll deduction, but it allowed payroll deduction for employee associations that do not collectively bargain. OA argues this was error because, although the right to collectively bargain is explicitly mentioned in the Missouri constitution, it is not a fundamental right subject to strict scrutiny review. Instead, OA argues article I, section 29 is a mere procedural right that guarantees employees may engage in a particular process, but it does not confer any substantive rights whose violation would subject them to strict scrutiny.

As an initial matter, OA's arguments on appeal are directed at the right "to bargain collectively" and provide little discussion of the rest of article I, section 29, which, in full, provides: "That employees shall have the right to organize and to bargain collectively through representatives of their own choosing." OA takes the puzzling position that "[t]he plain language of article I, section 29 only guarantees the right to 'bargain collectively.'" This is not an accurate assessment of article I, section 29, which clearly provides an organizational right in addition to the right to bargain collectively. "The purpose of article I, section 29 is 'to protect employees against legislation or acts which would prevent or interfere with their organization and choice of representatives for the purpose of bargaining collectively.'" *Missouri Nat'l Educ. Ass'n v. Missouri Dep't of Labor and Indus. Relations*, 623 S.W.3d 585, 590-91 (Mo. banc 2021) (quoting *Quinn v. Buchanan*, 298 S.W.2d 413, 419 (Mo. banc 1957), *overruled on other grounds by E. Mo. Coal. of Police, Fraternal Ord. of Police, Lodge 15 v. City of Chesterfield*, 386 S.W.3d 755, 762 (Mo. banc 2012)). Although the trial court's judgment was based in part on the discriminatory treatment of organizations that desired to bargain collectively as opposed to employee organizations

that did not bargain collectively, the trial court's judgment made clear that OA's discriminatory treatment of such employee organizations also interfered with the right of employees to *organize* in the form of a labor union for the purpose of bargaining collectively. OA's arguments on appeal would have us ignore this organizational right.

In an equal protection challenge, we apply the traditional two-step analysis. "The first step requires a court to identify the classification at issue to ascertain the appropriate level of scrutiny[,]" and the second step involves applying the appropriate level of scrutiny to the facts. *Labrayere v. Bohr Farms, LLC*, 458 S.W.3d 319, 331 (Mo. banc 2015). As we previously noted, prior to OA's promulgation of the Rules at issue before us, a group could be both a labor union and an employee association if it satisfied the plain and ordinary meaning of each classification in the regulation. The Rules amended the definition of employee association and thus drew a distinction between employee associations that collectively bargain and employee associations that do not collectively bargain. Those that do not collectively bargain may benefit from payroll deduction while employee associations that were also labor unions, but do not have an existing labor agreement, may not benefit from payroll deduction. In other words, an employee association that would be eligible for the benefit in all other respects is deprived of such benefit due to the exercise of the constitutional right to organize and to bargain collectively. The right to organize and to bargain collectively is impinged, therefore, because the Rules provide a benefit only available to employee associations that do not collectively bargain and interfere with the right of employees to organize for the purpose of collective bargaining. We reject OA's argument that the Court need not apply any judicial scrutiny to the Rules. Instead, we must

determine which level of scrutiny applies to government action that discriminates based on the constitutional right to participation in collective bargaining.

"In terms of equal protection, a statute [or regulation] that neither creates suspect classifications nor impinges on a fundamental right will withstand constitutional challenge if the classification bears some rational relationship to a legitimate state purpose." *Mahoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503, 512 (Mo. banc 1991). "If the challenged law draws a distinction on the basis of a suspect classification or curtails the exercise of a fundamental right, then strict scrutiny applies." *Labrayere*, 458 S.W.3d at 331. "A *fundamental right*, under this analysis, is a right 'explicitly or implicitly guaranteed by the Constitution.'" *Mahoney*, 807 S.W.2d at 512 (quoting *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-34, 93 S.Ct. 1278, 1296-97, 36 L.Ed. 2d 16 (1972)). "The fundamental rights requiring strict scrutiny are the rights to interstate travel, to vote, free speech, and other rights explicitly or implicitly guaranteed by the constitution." *Labrayere*, 458 S.W.3d at 331-32. If strict scrutiny applies, the law will be upheld only if the government shows "it is narrowly tailored to serve a compelling state interest." *Priorities USA v. State*, 591 S.W.3d 448, 453 (Mo. banc 2020).

The right to organize and to bargain collectively is explicit in the constitution. The Missouri constitution provides, "[E]mployees shall have the right to organize and to bargain collectively through representatives of their choosing." Mo. Const. art. I, section 29. "Missouri's public sector labor law, codified in section 105.500, *et seq.*, creates a procedural framework for collective bargaining for public employees[.]" *Am. Fed'n of Teachers. v. Ledbetter*, 387 S.W.3d 360, 363 (Mo. banc 2012). "[B]ecause article I, section

29 of Missouri's constitution imposes on employers a duty to meet and confer with collective bargaining representatives, employers must also engage in the bargaining process in good faith." *Id.* at 367; *see also E. Mo. Coal. of Police*, 386 S.W.3d at 762 ("[A]rticle I, section 29 of the Missouri Constitution imposes on employers an affirmative duty to bargain collectively."). "If public employers were not required to negotiate in good faith, they could act with the intent to thwart collective bargaining so as never to reach an agreement--frustrating the very purpose of bargaining and invalidating the right." *Id.* at 364. As previously discussed, article I, section 29 protects "employees against legislation or acts which would prevent or interfere with their organization and choice of representatives for the purpose of bargaining collectively." *Missouri Nat'l Educ. Ass'n*, 623 S.W.3d at 590-91 (quoting *Quinn*, 298 S.W.2d at 419). In *Quinn*, which was later overruled in part due to an erroneously narrow interpretation of the scope of the rights declared in article I, section 29, the Missouri Supreme Court made clear that article I, section 29 "is a declaration of a fundamental right of individuals." *See Quinn*, 298 S.W.2d at 418; *see also E. Mo. Coal. of Police*, 386 S.W.3d at 761-62 (overruling *Quinn*'s holding that article I, section 29 provides for no affirmative duties due to *Quinn*'s erroneously narrow reading of the limits of article I, section 29).

As other state courts have found, when a right is explicit in the state constitution, it is a fundamental right, and government action that discriminates on the basis of exercising this right is subject to strict judicial review. *See Hillsborough Cty. Gov't Emps. Ass'n, Inc. v. Hillsborough Cty. Aviation Auth.*, 522 So.2d 358, 362 (Fla. 1988) ("The right to bargain collectively is, as part of the state constitution's declaration of rights, a fundamental right);

Hernandez v. State of New York, 173 A.D.3d 105, 114 (N.Y. App. Div. 2019) ("[W]e are firmly convinced that the constitutional right bestowed upon 'employees' in this state 'to organize and to bargain collectively through representatives of their own choosing' (NY Const, art I, [section] 17) is a fundamental right, and that any statute impairing this right must withstand strict scrutiny[.]"); *George Harms Const. Co., Inc. v. New Jersey Tpk. Auth.*, 644 A.2d 76, 87 (N.J. 1994). We find this precedent persuasive. Accordingly, because the Rules discriminate based on an employee association's exercise of the fundamental right to organize and to bargain collectively, OA must show that its Rules are narrowly tailored to further a compelling governmental interest.

OA must show that the Rules are narrowly tailored to further a compelling governmental interest, which it failed to do. OA argues the government's compelling interest is administrative effectiveness and efficiency. OA argues, "[E]stablishing clear terms and conditions about dues deduction in a contract lessens the likelihood of litigation, which increases government efficiency and effectiveness by, among other things, lessening the amount of Missouri-citizens' tax dollars spent defending State action." OA's stated interests, in the context of this case, are unpersuasive. MOCOA members have benefitted from payroll deduction for nineteen years without interruption, even at times when MOCOA did not have an active labor agreement with DOC or the state. The record does not reflect that, by passing the Rules, OA has contributed toward administrative effectiveness and efficiency. In fact, in the event OA and MOCOA reach a new labor agreement, OA will presumably resume payroll deduction under MOCOA's status as a labor union with an existing labor agreement, a potentially costly undertaking that would

have been unnecessary but for OA's suspension of MOCOA's payroll deduction in the first place. Because the application of strict scrutiny depends on context, including the controlling facts, *see State v. Merritt*, 467 S.W.3d 808, 813 (Mo. banc 2015), we do not believe, on this record, the Rules are narrowly tailored to achieve governmental efficiency.[6]

On appeal, OA provides an additional rationale for promulgating the Rules to deny MOCOA payroll deduction. OA asserts that it wished to incentivize MOCOA to reach a new labor agreement by withholding payroll deduction. According to OA, "Unions often obtain benefits from collective bargaining, including the ability to deduct dues. Thus, this Court should not hold that incentivizing a union to agree with the State violates article I, section 29." Notwithstanding the fact this argument was not presented to the trial court, this admission by OA underscores the targeted nature of the Rules to deny MOCOA a benefit it was entitled to receive under the regulations during any period of contract negotiations. This aligns with Buckley's testimony, in which he stated that, if MOCOA wanted to restart its dues, it must either obtain a labor agreement or cease being a labor union. In this regard, we agree with the trial court that the "Rule impermissibly tends to

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[6] OA argues the recent Missouri Supreme Court case, *American Federation of State, County and Municipal Employees, AFL-CIO, Council 61 v. State*, 653 S.W.3d 111 (Mo. banc 2022) (hereinafter, "*American Federation*"), compels this Court to find that OA's promulgation of the Rules was lawful because the Rules do not prohibit a labor union from negotiating with its employer in good faith. The Court in *American Federation* held that Senate Bill (S.B.) 1007, which required all non-merit employees to be employed at-will, did not violate article I, section 29 because S.B. 1007 "merely limits the terms and conditions of employment the State is authorized to bargain." *Id.* at 126. This case is distinguishable, however, because OA has determined who may receive a certain governmental benefit based on a group's desire to participate in collective bargaining. Unlike *American Federation*, the Rules at issue do not restrict the substantive terms about which MOCOA may negotiate with the state in its ongoing negotiations for a new CBA. Our task, therefore, is to determine whether OA's action is related to a government interest according to the applicable standard of judicial review. *American Federation* is silent on this issue. *See id.* at 125 n.10. Because the right to organize and collectively bargain is explicitly addressed in the Missouri constitution, OA must show the Rules are narrowly tailored to further a compelling government interest, which, on this record, it did not do.

coerce employees into accepting bargaining concessions or seeking to decertify their union which is rendered impotent by the discriminatory withdrawal of dues deduction authority." *See Missouri Nat'l Educ. Ass'n*, 623 S.W.3d at 591 ("Inherent in this freedom of choice is that coercion from any source is a denial of this right and a direct infringement on it." (internal quotations and alterations omitted)). The practical result of the Rule is to give OA an unfair advantage in the negotiations by starving the labor union for dues funding during the contract negotiations process. OA has failed to meet its burden of showing that its action was narrowly tailored to further a compelling governmental interest. Accordingly, the trial court did not err in finding that the Rules violated MOCOA's constitutional right to organize and to bargain collectively under an equal protection analysis.

Point three is denied.

Points IV-VI

In points IV, V, and VI, OA argues the trial court erred in finding that the Rules violated MOCOA's constitutional rights to freedom of speech, freedom of association, and equal protection, respectively. In each argument, OA asserts that the Rules do not violate MOCOA's constitutional rights because the Rules merely regulate conduct by distinguishing labor unions that have collective bargaining agreements from labor unions that do not have collective bargaining agreements.

OA's arguments appear to misunderstand both the nature of MOCOA's claims against OA and the trial court's Judgment. MOCOA did not allege, and the trial court did not find, that the Rules distinguished labor unions based on whether or not they have an

existing labor agreement. Rather, the trial court found that the Rules distinguish *employee associations* that wish to collectively bargain from *employee associations* that do not collectively bargain. The Rules allowed employee associations that do not collectively bargain to benefit from payroll deduction, but prohibits employee associations that do collectively bargain from receiving the benefits of payroll deduction. And because the right to organize and to bargain collectively is a fundamental right protected by the Missouri constitution, laws that discriminate on the basis of the exercise of that right are subject to strict scrutiny. *See Labrayere*, 458 S.W.3d at 331. The trial court found, "In amending the definition of 'employee association' to exclude unions established in accordance with Missouri's public sector labor law, the Rule denies a state benefit (payroll deduction) to members of an employee association who wish to be represented by that association in collective bargaining, while preserving it for members of an employee association who do not bargain collectively." OA's points relied on misstate the trial court's Judgment. Furthermore, we have already addressed the merits of OA's points regarding the applicable standard of judicial review afforded to laws that discriminate on the basis of an exercise of a fundamental right.

Points IV-VI are denied.

Points VII-VIII

In OA's points VII and VIII, OA argues the trial court erred in holding the March 2020 decision to deny MOCOA's request to resume payroll deduction was unlawful, arbitrary, capricious, and unreasonable because the Emergency Rule constitutionally prevented labor unions from deducting dues as employee associations, MOCOA was

unable to deduct dues as an employee association under 1 C.S.R. 10-3.010 (2019), and MOCOA did not obtain either 100 employee signatures or 100 signed employee-applications within the requisite 90-day window. The success of OA's arguments rests on the disposition of points I-III. Because we have already found that MOCOA was an employee association as well as a labor union, MOCOA did not need to request OA to resume payroll deduction in March 2020. Further, MOCOA did not need to obtain 100 signed employee-applications because it had already qualified as an employee association under the applicable regulation. And, because the Rules are unconstitutional, in that they impermissibly discriminate against MOCOA's constitutional right to collectively bargain, OA's reliance on the Rules to deny MOCOA's request to resume payroll deduction is without merit.

Points VII and VIII are denied.

Point IX

OA argues the trial court erred in granting injunctive relief because the requirements for equitable injunctive relief have not been met, in that (a) OA did not act improperly; (b) MOCOA failed to show irreparable harm; and (c) the injunction was against the public interest. Even if MOCOA prevails on points I-III, OA argues, injunctive relief is still improper because automatically reinstating dues deductions for employees having dues deducted in December 2019, as the trial court ordered, threatens to violate those employees' First Amendment rights, which require that "employees clearly and affirmatively consent before any money is taken from them." App. Br. 60 (quoting *Janus*, 138 S.Ct. at 2486).

OA suggests that the proper response, if MOCOA prevails on points I-III, is to allow MOCOA to re-apply with the requisite 100 signatures and consents. We disagree.

In accordance with section 536.150, "the administrative agency's decision may be reviewed by an action for an injunction, certiorari, mandamus, prohibition, or another appropriate suit." *State ex rel. Swoboda v. Mo. Comm'n on Hum. Rts.*, 651 S.W.3d 800, 805 (Mo. banc 2022). "[A] party seeking a permanent injunction must show only irreparable harm and a lack of adequate remedy at law." *Karney v. Dep't of Lab. & Indus. Relations*, 599 S.W.3d 157, 167 (Mo. banc 2020). Here, the trial court found that MOCOA was receiving nearly $13,000 per month in dues revenue before payroll deduction was terminated in December 2019. Following the termination of payroll deduction for DOC employees, MOCOA lost nearly all of its income. The trial court found that it is difficult for MOCOA to communicate with corrections officers, and DOC employees wish to continue paying dues by payroll deduction. MOCOA was forced to reduce its staff from three employees to one employee who manages all the work previously done by three MOCOA staff members. The trial court found that despite cutting expenditures, MOCOA's bank account balance has declined by around 90% since the end of November 2019. The trial court found that MOCOA lacks an adequate remedy at law, and as previously discussed, the trial court found that OA's reliance on *Janus* in suspending payroll deduction was not credible. The trial court ordered OA to continue payroll deduction for DOC employees who had MOCOA dues deducted from their pay prior to December 2019 and to begin accepting new payroll deduction applications. The trial court did not err in issuing injunctive relief.

Point IX is denied.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

Gary D. Witt, Judge

All concur

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IN THE MISSOURI COURT OF APPEALS

WESTERN DISTRICT

MISSOURI CORRECTIONS OFFICERS ASSOCIATION, INC., ET AL.,	)	
	)	
Plaintiffs-Respondents,	)	
	)	
v.	)	Case No. WD84917
	)	
MISSOURI OFFICE OF ADMINISTRATION, ET AL.,	)	
	)	
Defendants-Appellants.	)	

APPELLANT'S MOTION FOR REHEARING OR APPLICATION FOR TRANSFER TO THE MISSOURI SUPREME COURT

Appellants Missouri Office of Administration et al. ("OA" or "the State") respectfully move this Court to vacate its December 6, 2022, order dismissing the appeal, and grant rehearing under Supreme Court Rule 84.17(a)(1), or alternatively, grant this application to transfer the case to the Supreme Court of Missouri under Rule 83.02.

I. Questions of General Interest and Importance

1. Whether article I, section 29's right to organize and bargain collectively should be reviewed under strict scrutiny. This Court's Opinion is the first time that a Missouri court has addressed this question.
2. Whether 1 CSR 10-3.010 (Feb. 2020) and 1 CSR 10-3.010 (July 2020) ("Emergency and Final Rules" or "Rules") violate the equal-protection clause in Mo. Const. article I, section 2, by permitting employee associations, but not unions, to deduct dues without a collective bargaining agreement ("CBA").
3. Whether the Rules violate the rights to free speech, to free association, and to the right to organize and to bargain collectively, Mo. Const. art. I, §§ 8, 9, and 29, by requiring unions to have CBAs with the State before the State will deduct union dues from State-employee paychecks on the unions' behalf, given that the unions are no worse off than if the State had no dues-deduction program at all.
4. Whether now reinstating dues deduction for State employees who had dues deducted in December 2019, but have not consented to dues deduction since then, violates *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

II. Appellate Authority Contrary to the Division's Opinion

- *Committee for Educational Equality v. State*, 294 S.W.3d 477 (Mo. banc 2009)
- *Sweeney v. Pence*, 767 F.3d 654, 669 (7th Cir. 2014)
- *Coyne v. Edwards*, 395 S.W.3d 509, 519 (Mo. banc 2013)
- *Weinschenk v. State*, 203 S.W.3d 201, 215-16 (Mo. banc 2006)
- *City of Maryland Heights v. State*, 638 S.W.3d 895, 899 (Mo. banc 2022)
- *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018)

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REASONS FOR GRANTING TRANSFER

I. Statement of Facts.

In 1951, section 33.103 became law. It permitted, but did not require, state agencies to deduct money directly from State-employee paychecks and deposit that money into voluntary retirement and health plans. 1951 Mo. Laws 544. In 1977, the General Assembly amended the section to permit, but not require, deductions from State-employee paychecks to labor unions. *Compare* 1977 Mo. Laws 149, 149-50, *with* 1951 Mo. Laws 544, *and* 1969 Mo. Laws 92, 92-93. In September 1990, OA implemented a regulation separately defining "labor union" and "employee association" and requiring different things from each before the State would deduct and pay to them dues from State-employees' paychecks. *See* 1 CSR 10-4.010(1)(B) (1990) (different definitions); 1 CSR 10-4.010(2), (2)(H) (different requirements). In 2005, OA updated the definitions in 1 CSR 10-4.010(1) (Jan. 2005) by defining the term "dues," as used in section 33.103, RSMo (1999), in a way that required each labor organization have a CBA with the State before the State would deduct dues from State-employee paychecks on behalf of that labor organization. 1 CSR 10-4.010(1)(E) (Jan. 2005). OA did not enforce this rule because the Missouri Governor purported to terminate it. Jt. Ex. 1, p.13.

In 2019, MOCOA was a labor union that represented certain Missouri Department of Corrections ("MDOC") employees and whose most recent CBA had expired in September 2018. D121, p. 5, ¶ 23. In May 2019, OA promulgated a rule amendment reinstating the requirement that a labor organization have a CBA with the State before the State deducts dues on that labor organization's behalf. *Compare* CSR 10-4.010(1) (2015); *with* 1 CSR 10-3.010(6) (2019). By December 2019, MOCOA and the State still had not agreed to a new CBA, so OA stopped deducting dues for MOCOA's 1,300 member-employees. D121, p.6, ¶ 26; D121, p.6, ¶ 27. MOCOA objected, suggesting that it should still qualify for dues deduction as an employee association, D121, p.6, ¶ 28. OA responded that MOCOA could not qualify as an employee association because it admitted non-State employees as auxiliary members. D121, p.6, ¶ 32; D105, ¶ 42.

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On February 11, 2020, OA filed an Emergency Amendment and Proposed Rule amending the definition of "employee association" to clarify that labor unions could not be employee associations. *See* Jt. Ex. 27. On February 21, 2020, the Emergency Rule became effective, and the State accepted MOCOA's amended Articles of Incorporation and Bylaws, which did not permit non-State-employee members.

On February 27, 2020, MOCOA sent OA a written request demanding OA resume deducting dues on MOCOA's behalf because MOCOA was an employee association. D105, ¶45; Jt.Ex. 23 (A0195). Along with MOCOA's request, it sent approximately 130 employee-signed applications for dues deduction dated before August 2019, and some as early as 2018. D121, p. 8, ¶ 35; *see generally* Jt. Ex. 24B (A0210). OA denied this request for two reasons: (1) the Emergency Rule clarified that employee associations could not be labor organizations, and because MOCOA was a labor union, it could not be an employee association; and (2) even if the Emergency Rule did not prevent labor unions from being employee associations, MOCOA did not satisfy one of the requirements for becoming an employee association—that it submit at least 100 State-employee-signed applications, signed within the 90-day period *after* MOCOA requested dues deduction on February 27, 2020. D121, p.9, ¶ 41. MOCOA never gathered any new employee signatures after February 27, 2020, and never provided OA any (let alone 100).

On March 24, 2020, MOCOA and two individual plaintiffs filed suit against OA. They filed an amended petition in July 2020. D87. As relevant here, in Count I, Plaintiffs challenged the 2020 Emergency and Final Rules on the grounds that they violated article I, sections 2, 8, 9, and 29 of the Missouri Constitution. Also in July 2020, OA adopted the 2020 Emergency Rule, making it final with one change—adding that an insurance company or credit union also could not be an employee association. D121, p. 9, ¶ 40.

The circuit court held a bench trial on September 10 and 17, 2020. D121, p. 1. On September 27, 2021, as relevant here, the circuit court ruled for Plaintiffs on Count I, holding that the Emergency and Final Rules violated article I, sections 2, 8, 9, and 29. D121, pp. 30-36. The circuit court also ordered OA to resume payroll deductions for employees who had been having dues deducted from their paychecks for MOCOA in early

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December 2019. *Id.* pp. 42-43. Defendants appealed to this Court, D128, and this Court affirmed, Op. at 29.

II. Argument:

This Court should rehear this case or otherwise transfer it to the Missouri Supreme Court because this Court's Opinion conflicts with Missouri Supreme Court and federal precedent on four questions of general interest and importance:

First, this is the first time a Missouri court has addressed whether abridgements of article I, section 29 are subject to strict scrutiny or rational-basis scrutiny. This Court's Opinion held that the rights in article I, section 29 are protected by strict scrutiny, but the Missouri Supreme Court case *Committee for Educational Equality v. State*, 294 S.W.3d 477 (Mo. banc 2009), supports the opposite.

Second, this case concerns whether entities are similarly situated enough to compare under the equal-protection clause. Here, the Opinion mistakenly compares two entities (employee associations and employee associations that are also labor unions) that cannot be compared because one of them cannot obtain a CBA—the very thing that causes their differential treatment.

Third, this case concerns whether government action can violate article I, sections 8, 9, and 29 when the government action leaves the complaining party no worse off than if the government action never existed. The Missouri Supreme Court's case, *City of Maryland Heights v. State*, 638 S.W.3d 895, 899 (Mo. banc 2022), clearly answers that question, "No," while this Court's Opinion answered it, "Yes."

Fourth and finally, this case concerns whether the circuit court's order that OA reinstate dues deductions for 1,000 State employees who have not paid any dues to MOCOA in three years violates the U.S. Supreme Court's decision in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018). This Court's Opinion left in place the circuit court's order despite *Janus*'s requirement that non-union-member employees "clearly and affirmatively consent before any money is taken from them

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A. Subjecting article I, section 29 to strict scrutiny runs afoul of the Missouri Supreme Court's opinion in *Committee for Educational Equality v. State*, and instead relies on other states' cases, which use different tests than Missouri.

This Court's Opinion determined that strict scrutiny applies when the government abridges article I, section 29's right to organize and to bargain collectively. Op. at 21. This is the first time that any Missouri appellate court has addressed the level of scrutiny that applies to laws that impinge upon article I, section 29. In doing so, the Opinion relied on an older, 1991 Missouri Supreme Court case—*Mahoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503 (Mo. banc 1991)—instead of relying on the most recent Missouri Supreme Court case on the issue—*Committee for Educational Equality v. State*, 294 S.W.3d 477 (Mo. banc 2009) ("*Educational Equality*"), without mentioning or distinguishing the newer case. The Opinion also relied on other states' cases, which use different tests than Missouri does. This Court should rehear the case and analyze this issue under the controlling precedent in *Educational Equality*, or otherwise transfer this case to the Missouri Supreme Court.

The rules in *Educational Equality* and *Mahoney* are quite different. Both cases state that laws impinging on fundamental rights are subject to strict scrutiny, *Mahoney*, 807 S.W.2d at 512; *Educational Equality*, 294 S.W.3d at 490, but they define "fundamental right" differently. Under *Mahoney*, fundamental rights are any rights "explicitly or implicitly guaranteed by the Constitution." 807 S.W.2d at 512 (quoting 1972 U.S. Supreme Court case *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1972)). *Educational Equality* reflects that the Missouri Supreme Court has updated its approach to what constitutes a fundamental right as "the general federal approach to defining fundamental rights" has changed. 294 S.W.3d at 490 ("[A]lthough Missouri's Constitution may contain additional protections, Missouri courts have followed the general federal approach to defining fundamental rights."). And federal courts define fundamental rights as 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.*; *see also Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

The Opinion does not explain why article I, section 29's right to organize and bargain collectively satisfies *Educational Equality*'s definition of a fundamental right. Other courts applying the same rule, such as the Seventh Circuit *Sweeney v. Pence*, have explicitly stated that it does not: "Collective bargaining is not a fundamental right, and a union and its members are not suspect classes." 767 F.3d 654, 669 (7th Cir. 2014) (cleaned up). Organizing and bargaining collectively are not fundamental rights in Missouri because they are not so implicit in the concept of ordered liberty that neither liberty nor justice would exist if they were jettisoned. For instance, the right to organize and to bargain collectively: (1) is not synonymous with the First Amendment right to petition and extends further than that First-Amendment right; (2) only first appeared in the Missouri Constitution in 1945; (3) other States prevent or limit certain employees from bargaining collectively;[1] and (4) the U.S. Constitution provides no such right. Therefore, liberty and justice can exist without the rights to organize and to bargain collectively. Thus, they are not fundamental rights protected by strict scrutiny.

The only cases the Opinion cites for its conclusion that the right to organize and to bargain collectively are fundamental rights are cases from other states that do not use the *Educational Equality* test. Op. at 22-23 (citing *Hillsborough Cnty. Gov't Emps. Ass'n, Inc. v. Hillsborough Cnty. Aviation Auth.*, 522 So.2d 358, 362 (Fla. 1988); *Hernandez v. State of New York*, 173 A.D.3d 105, 114 (N.Y. App. Div. 2019); *George Harms Const. Co., Inc. v. New Jersey Tpk. Auth*, 644 A.2d 76, 87 (N.J. 1994)). None of these three cases address whether liberty and justice can exist without the right to bargain collectively. Thus, laws that impinge upon the right to organize and to bargain collectively in article I, section 29 should be subject to rational-basis scrutiny. *Educational Equality*, 294 S.W.3d at 490.

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[1] *See, e.g.*, N.C. Gen. Stat. § 95-98; *Branch v. City of Myrtle Beach*, 532 S.E.2d 289, 292 (S.C. 2000); Va. Code § 40.1-57.2.

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B. The Opinion erroneously concluded that regulations requiring unions, but not non-union employee associations, to have CBAs violate the Missouri Equal Protection Clause in article I, section 2.

The Opinion determined that State regulations providing dues deductions for non-union employee associations, but not for unions, violated the equal-protection clause, article I, section 2. Op. at 26 ("The Rules allowed employee associations that do not collectively bargain to benefit from payroll deduction, but prohibit[] employee associations that do collectively bargain from receiving the benefits of payroll deduction."). There are several problems with this conclusion. First, it misstates what actually occurred. Not all unions are denied dues deductions—only those who have no CBA with the State. 1 CSR 10-3.010(6)(A)(5) (2019). Thus, the relevant comparators here are employee associations without CBAs versus unions with CBAs, not all unions versus all non-union employee associations. Second, if these are the relevant comparators, the regulations do not violate the equal-protection clause because unions and non-union employee associations are not similarly situated in all relevant aspects. *Coyne v. Edwards*, 395 S.W.3d 509, 519 (Mo. banc 2013) (requiring comparators to be similarly situated in all relevant aspects to implicate the equal-protection clause). Namely, one cannot say it is unfair that unions need CBAs to deduct dues but non-union employee associations do not, because only unions can have CBAs. Therefore, non-union employee associations and unions are not similarly situated in all relevant aspects in this case, and the regulations do not violate the equal protection clause. *See id.*

Further, even if the regulations did implicate the equal-protection clause, they do not violate equal protection because they survive rational-basis scrutiny. *See Weinschenk v. State*, 203 S.W.3d 201, 215-16 (Mo. banc 2006) (stating that if the law does not impose "a heavy burden on a [fundamental right], it will be upheld provided [it is] rationally related to a legitimate state interest"). There is certainly a rational basis for having unions enter into CBAs before they are granted dues deductions. This allows OA to have one agreement with a union that governs all State obligations to the union. In fact, that is where OA keeps

all terms and conditions governing MOCOA's dues deduction. *See, e.g.*, Jt. Ex. 10, pp. 6-7 (A0139-A0140); Jt. Ex. 9, pp. 5-7 (A0117-A0119).

C. The Opinion incorrectly concludes that the Rules violate article I, sections 8, 9, and 29 even though the Rules make unions no worse off than if the State had no dues-deduction program at all, which contradicts *City of Maryland Heights v. State*, 638 S.W.3d 895, 899 (Mo. banc 2022).

1. Article I, sections 8 and 9: Speech and Association

The Opinion holds that the Emergency and Final Rules violate article I, section 8 and 9 because the Rules distinguish employee associations that bargain collectively from employee associations that do not and that the Rules "prohibit[] employee associations that do collectively bargain from receiving the benefits of payroll deduction." Op. at 26. This statement is incorrect. Employee associations that bargain collectively *may* receive payroll deduction if they have a CBA with the State. But even if the Opinion's statement was correct, this would not violate article I, sections 8 and 9 because the unions are no worse off than if the State had no payroll-deduction program at all.

Article I, section 8 states that "no law shall be passed impairing the freedom of speech." Article I, section 9 states that "the people have the right peaceably to assemble for their common good, and to apply to those invested with the powers of government for redress of grievances…." The Rules do not impair free speech because the unions may speak in any way they please. The Rules also do not prevent unions from forming or presenting grievances to the government. The mere fact that the government has chosen to fund certain groups but not others based on their speech or association does not violate article I, section 8 or article I, section 9. For instance, in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 548 (1983), the U.S. Supreme Court expressly disavowed the notion that "strict scrutiny applies whenever [the law] subsidizes some speech, but not all speech." Rather, "selecti[ng] [] particular entities or persons for entitlement to [government] largesse is obviously a matter of policy and discretion and not open to judicial review…." *Id.* at 549. The U.S. Supreme Court came to a similar conclusion in *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009), where the Court

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held that an Idaho law that allowed payroll deductions to labor unions for anything except political activities and speech did not violate the First Amendment.

Essentially, because unions are no worse off under the Rules than they would be if OA had no dues-deduction program at all, the Rules do not violate article I, sections 8 or 9. *See City of Maryland Heights v. State*, 638 S.W.3d 895, 899 (Mo. banc 2022) (citing *Rust v. Sullivan*, 500 U.S. 173, 203 (1991), for the proposition that a government "decision not to subsidize the exercise of a fundamental right does not infringe the right"). For instance, in *Rust*, the U.S. Supreme Court held that the Title X program, which did not fund abortions, did not violate due process because "Title X clients are in no worse position than if Congress had never enacted Title X." 500 U.S. at 203. *Rust* reasoned that "[t]he financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions…, but rather of her indigency." *Id.* The same reasoning applies here. OA has not limited MOCOA's rights to speak or associate. Rather, it is MOCOA and its members who have made continued organizing and bargaining difficult—MOCOA by failing to keep updated records on its members so that it could request dues directly, and MOCOA's members by refusing to pay dues to MOCOA directly when asked. D121, p.10, ¶¶ 43-48.

2. Article I, section 29: Right to Organize and Bargain Collectively

The same principles apply to article I, section 29. The Opinion states that the Rules "prevent or interfere with [employees'] organization and choice of representatives for the purpose of bargaining collectively." Op. at 22. It also holds that the "Rule impermissibly tends to coerce employees into accepting bargaining concessions or seeking to decertify their union[,] which is rendered impotent by the discriminatory withdrawal of dues deduction authority." Op. at 24-25. But the Rules do not "prevent or interfere with employees' organization or choice of representatives" because they do not make unions or their members any worse off than they would be if OA had no dues-deduction program at all. Further, the Rules are not coercive because, if there was no dues-deduction program

at all, the unions would have to reach an agreement with OA before getting the benefits of dues deduction. Thus, the Rules do not violate article I, section 29.

D. The Opinion's requirement that OA reinstate dues deduction, when more than three years has passed between now and the last time dues were deducted for 1,000 employees, violates *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

The Opinion declined to reverse the circuit court's order that OA reinstate dues deductions for all State employees from whose paychecks the State was deducting MOCOA dues in December 2019. D121, pp.42-43, ¶ 4; Op. at 27-29. Since OA stopped deducting dues in December 2019, three years have passed during which 1,000 former MOCOA members (including one of the *named plaintiffs in this case*) have failed to pay MOCOA any dues. D121, p.6, ¶ 26; p.10, ¶ 46.

Janus requires that non-union-member employees "clearly and affirmatively consent before any money is taken from them," 38 S. Ct. at 2486, and MOCOA as plaintiff bears the burden of proving this, *see Johnson v. State*, 366 S.W.3d 11, 19 (Mo. banc 2012). Here there is no indication that the 1,000 State employees, who previously had dues deducted for MOCOA, wish to reinstitute dues deductions. In fact, the opposite is true. In its Response Brief, MOCOA stated that its members have no right to avoid paying dues. Resp. at 57-58. Thus, under MOCOA's own argument, *see* Resp. at 57-58, the 1,000 non-dues-paying employees are not MOCOA members because they have not paid dues. And because those 1,000 employees have not given "clear[] and affirmative[] consent" to dues deductions now, the Opinion and circuit court judgment require OA to violate *Janus*, 38 S. Ct. at 2486.

III. Conclusion

For the reasons stated *supra*, this Court should grant rehearing under Supreme Court Rule 84.17(a)(1), or alternatively, grant this application to transfer the case to the Supreme Court of Missouri under Rule 83.02.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2022, the foregoing Motion for Rehearing or Application for Transfer to the Missouri Supreme Court was filed through the Missouri CaseNet e-filing system, which will send notice to all counsel of record.

/s/ Maria A. Lanahan
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APPLICATION FOR TRANSFER
TO THE MISSOURI SUPREME COURT

Applicant Missouri Office of Administration et al. ("OA" or "the State") respectfully move this Court to grant this Application for Transfer to the Supreme Court of Missouri under Rule 83.04.

I. Questions of General Interest and Importance

1. Whether article I, section 29's right to organize and bargain collectively should be reviewed under strict scrutiny. The Court of Appeals Opinion is the first time that a Missouri court has addressed this question.
2. Whether 1 CSR 10-3.010 (Feb. 2020) and 1 CSR 10-3.010 (July 2020) ("Emergency and Final Rules" or "Rules") violate the Equal Protection Clause in article I, section 2 of the Missouri Constitution by permitting employee associations, but not unions, to deduct dues without a collective bargaining agreement.
3. Whether the Rules violate a union's or its members' rights to free speech, to free association, and to organize and to bargain collectively, Mo. Const. art. I, §§ 8, 9, and 29, when the Rules leave unions and their members no worse off than if the State had no dues-deduction program at all.
4. Whether automatically reinstating union dues deductions from State employees who have not had union dues deducted from their paychecks for more than three years, and who have not affirmatively consented to union dues, violates *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

II. Appellate Authority Contrary to the Court of Appeals Opinion

- *Committee for Educational Equality v. State*, 294 S.W.3d 477 (Mo. banc 2009)
- *Sweeney v. Pence*, 767 F.3d 654, 669 (7th Cir. 2014)
- *Coyne v. Edwards*, 395 S.W.3d 509, 519 (Mo. banc 2013)
- *Weinschenk v. State*, 203 S.W.3d 201, 215–16 (Mo. banc 2006)
- *City of Maryland Heights v. State*, 638 S.W.3d 895, 899 (Mo. banc 2022)
- *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018)

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REASONS FOR GRANTING TRANSFER

I. Statement of Facts

Missouri law recognizes two different kinds of organizations that can represent the interests of workers in different ways. First, "employee associations"—for instance, trade organizations—can generally advocate on behalf of workers. But these associations must compete with each other. If workers are not satisfied with an employee association, they are free to switch. Second, "labor unions" are given monopoly bargaining power. They have the "exclusive" right to enter into collective bargaining agreements. Because this right is exclusive, a worker dissatisfied with a labor union cannot switch.

Since 1977, Missouri law has allowed, but not required, State agencies to deduct dues for both kinds of organizations automatically from State-employee paychecks. § 33.103.1, RSMo; 1977 Mo. Laws 149, 149–50. But Missouri law treats employee-association dues differently from union dues. *Compare* § 33.103.1 *with* .3 (treating unions and employee associations separately). Similarly, in the regulations promulgated under § 33.103, these dues are deducted differently depending on whether an organization is a "labor union" or "employee association." *See* 1 CSR 10-4.010(1)(B)–(C) (1990) (different definitions); 1 CSR 10-4.010(2), (2)(H) (different requirements).

Historically, labor unions and employee associations have been defined differently. For instance, in 1990, a labor union was defined as "an exclusive state employee bargaining representative established in accordance with sections 105.500-105.530, RSMo." As of the same year, an employee association was defined as "an organized group of state employees that has a written document, such as bylaws, which govern its activity." 1 CSR 10-4.010(1)(B)–(C) (1990). The same was true in 2019. 1 CSR 10-3.010(6)(A)(2)–(3) (2019) (using the same definitions as the 1990 regulation). As relevant here, in accordance with § 33.103's authorization for deduction only of "the amount necessary for each employee's participation in the plan or *collective bargaining dues*," OA's Rules since 2005 have provided that dues can only be deducted for labor unions if the union in fact has a collective bargaining agreement with the State in place. 1 CSR 10-4.010(1)(E) (Jan. 2005).

Respondent labor union MOCOA—which represented certain Missouri Department of Corrections employees—was able to automatically deduct dues until September 2018, when its collective bargaining agreement expired. D121, p. 5, ¶ 23. Although OA did not begin enforcing its rule requiring a collective bargaining agreement in 2005 because the Missouri Governor purported to terminate it, Jt. Ex. 1, p.13, the office promulgated a rule amendment in May 2019 reinstating that requirement. *Compare* CSR 10-4.010(1) (2015); *with* 1 CSR 10-3.010(6) (2019). By December 2019, MOCOA still did not have a collective bargaining agreement in place, so OA stopped deducting dues for MOCOA. D121, p.6, ¶ 26; D121, p.6, ¶ 27. MOCOA objected, suggesting that it should still qualify for dues deduction as an employee association, D121, p.6, ¶ 28. OA responded that MOCOA could not qualify as an employee association because labor unions cannot also be employee associations and also because MOCOA admitted non-State employees as members, contrary to OA's interpretation of its regulations. D121, p.6, ¶ 32; D105, ¶ 42; *see also* 1 CSR 10-3.010(6)(A)(3) (2019) (Jt.Ex. 2) (A0099).

On February 11, 2020, OA filed an Emergency Amendment and Proposed Rule amending the definition of "employee association" to clarify that labor unions could not be employee associations. *See* Jt. Ex. 27. On February 21, 2020, the Emergency Rule became effective and, on the same date, the Missouri Secretary of State accepted MOCOA's amended Articles of Incorporation and Bylaws, which did not permit non-State-employee members. Jt.Ex. 22 (A0184).

On February 27, 2020, MOCOA sent OA a declaration that MOCOA was an employee association and demanding OA resume deducting dues on MOCOA's behalf. D105, ¶45; Jt.Ex. 23 (A0195). Along with MOCOA's request, it sent approximately 130 employee-signed applications for dues deduction dated before August 2019—and some as early as 2018. D121, p. 8, ¶ 35; *see generally* Jt.Ex. 24B (A0210). OA denied this request for two reasons: (1) because MOCOA was a labor union, it could not be an employee association under the Emergency Rule; and (2) even if the Emergency Rule did not prevent labor unions from being employee associations, MOCOA did not satisfy one of the requirements for becoming an employee association—that it submit at least 100 State-

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employee-signed applications, signed within the 90-day period *after* MOCOA requested dues deduction on February 27, 2020. D121, p.9, ¶ 41. MOCOA never gathered any new employee signatures after February 27, 2020, and never provided OA any (let alone 100).

The next month, MOCOA and two individual plaintiffs filed suit against OA. They filed an amended petition in July 2020, which is the operative pleading here. D87. As relevant here, in Count I, Plaintiffs challenged the 2020 Emergency and Final Rules on the grounds that they violated article I, sections 2, 8, 9, and 29 of the Missouri Constitution. Also in July 2020, OA adopted the 2020 Emergency Rule, making it final with one change not relevant here (expressly stating that an insurance company or credit union could not be an employee association). D121, p. 9, ¶ 40.

After a bench trial in September 2020, the circuit court ruled for Plaintiffs on Count I, holding that the Emergency and Final Rules violated article I, sections 2, 8, 9, and 29. D121, pp. 30–36. The circuit court also ordered OA to resume payroll deductions for employees who had been having dues deducted from their paychecks for MOCOA in early December 2019, many of whom had not paid dues to MOCOA for almost two years. *Id.* pp. 42–43.

The State appealed to the Missouri Court of Appeals, D128, which affirmed the circuit court, Op. at 29. The State then moved for rehearing and applied for transfer with the Court of Appeals, which it denied.

II. Argument

This Court should grant this application transfer because the Court of Appeals Opinion conflicts with this Court's precedent and federal precedent on four questions of general interest and importance:

First, the Court of Appeals Opinion is the first time a Missouri court has addressed whether regulations that implicate the constitutional rights to organize and to bargain collectively are subject to strict scrutiny or rational-basis scrutiny. The Court of Appeals Opinion held that the rights in article I, section 29 are protected by strict scrutiny, but this Court's decision in *Committee for Educational Equality v. State*, 294 S.W.3d 477 (Mo. banc 2009), supports the opposite.

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Second, this case concerns when entities are similarly situated enough to compare under the equal-protection clause. Here, the Opinion mistakenly assumes that unions are employee associations. The Opinion then finds it significant that unions are treated different from employee associations—not recognizing that they are treated differently because employee associations by definition lack the monopoly, exclusive bargaining power of unions and cannot obtain a collective bargaining agreement—the very thing that causes their differential treatment.

Third, this case concerns whether a government program can violate the Missouri Constitution's prohibitions on impairing the freedom of speech, the right to peaceably assemble, or the right to organize and bargain collectively, *see* Mo. Const., art. I, §§ 8, 9, 29, when that program leaves the complaining party no worse off than if the government had never instituted such a program at all. This Court's decision in *City of Maryland Heights v. State*, 638 S.W.3d 895, 899 (Mo. banc 2022), clearly answers that question, "No," while the Court of Appeals Opinion answered it, "Yes."

Fourth and finally, this case concerns whether the circuit court's order that OA automatically reinstate dues deductions for 1,000 State employees, who have not paid any dues to MOCOA in three years, violates the U.S. Supreme Court's decision in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018). The trial court decision would force OA to deduct dues from over 1,000 people who have not consented—some of whom have expressly rejected direct requests to pay dues—contrary to the U.S. Supreme Court's requirement that employees "clearly and affirmatively consent" before any money is taken from them.

A. Subjecting the challenged regulation to strict scrutiny cannot be squared with this Court's decision in *Committee for Educational Equality v. State*.

The Court of Appeals Opinion determined that strict scrutiny applies when the government abridges the constitutional right to organize and to bargain collectively. Op. at 21; art. I, § 29. This appears to be the first time any Missouri appellate court has addressed the level of scrutiny that applies to laws that implicate article I, section 29. In doing so, the

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Opinion relied on a 1991 decision—*Mahoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503 (Mo. banc 1991)—that is no longer good law. The Court of Appeals failed to assess or even cite the much more recent case that in fact controls: *Committee for Educational Equality v. State*, 294 S.W.3d 477 (Mo. banc 2009). The Opinion also relied on case law from other states, which use different tests than Missouri. This Court should grant this application for transfer and analyze this issue under the controlling precedent in *Educational Equality*.

Educational Equality abandons the approach initially set out in *Mahoney*. Although both cases acknowledge that laws implicating fundamental rights are subject to strict scrutiny, *Mahoney*, 807 S.W.2d at 512; *Educational Equality*, 294 S.W.3d at 490, they define "fundamental right" differently. *Mahoney* defined "fundamental rights" the way they were defined in 1991 by the U.S. Supreme Court: any rights "explicitly or implicitly guaranteed by the Constitution." 807 S.W.2d at 512 (quoting *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33–34 (1972)). But federal doctrine underwent a sea change shortly after. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702 (1997) (adopting the modern form). *Educational Equality* acknowledges that "the general federal approach to defining fundamental rights" has changed and thus this Court's approach has, too. 294 S.W.3d at 490 ("Missouri courts have followed the general federal approach to defining fundamental rights.").

Now instead of asking simply whether a right is "explicitly or implicitly guaranteed by the Constitution," this Court asks whether a right is "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.*; *see also Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Only if this right is so deeply rooted will this Court declare it fundamental.

The Court of Appeals Opinion entirely fails to assess the right to organize and bargain collectively under this standard. It does not even cite *Educational Equality*. Other courts applying the same rule, such as the Seventh Circuit in *Sweeney v. Pence*, have explicitly stated that the right to organize and bargain collectively is *not* fundamental:

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"Collective bargaining is not a fundamental right, and a union and its members are not suspect classes." 767 F.3d 654, 669 (7th Cir. 2014) (cleaned up). Organizing and bargaining collectively are not fundamental rights in Missouri because they are not so implicit in the concept of ordered liberty that neither liberty nor justice would exist if they were jettisoned. For instance, the right to organize and to bargain collectively: (1) is not synonymous with the First Amendment right to petition and extends further than that First-Amendment right; (2) only first appeared in the Missouri Constitution in 1945; (3) is greatly limited or prevented entirely in other States;[1] and (4) is not guaranteed by the U.S. Constitution. Therefore, liberty and justice can exist without the rights to organize and to bargain collectively. Thus, they are not fundamental rights protected by strict scrutiny.

The only cases the Opinion cites for its conclusion that the right to organize and to bargain collectively are fundamental rights are cases from other states that do not use the *Educational Equality* test. Op. at 22–23 (citing *Hillsborough Cnty. Gov't Emps. Ass'n, Inc. v. Hillsborough Cnty. Aviation Auth.*, 522 So.2d 358, 362 (Fla. 1988); *Hernandez v. State of New York*, 173 A.D.3d 105, 114 (N.Y. App. Div. 2019); *George Harms Const. Co., Inc. v. New Jersey Tpk. Auth*, 644 A.2d 76, 87 (N.J. 1994)). None of these three cases address whether liberty and justice can exist without the right to bargain collectively. Thus, laws that implicate the right to organize and to bargain collectively in article I, section 29 should be subject to rational-basis scrutiny. *Educational Equality*, 294 S.W.3d at 490.

B. The Opinion erroneously concluded that regulations requiring unions, but not employee associations, to have collective bargaining agreements violate the Missouri Equal Protection Clause in article I, section 2.

The Opinion determined that State regulations providing automatic dues deductions for employee associations, but not for unions, violated the equal-protection clause, article I, section 2. Op. at 26 ("The Rules allowed employee associations that do not collectively bargain to benefit from payroll deduction, but prohibit[] employee associations that do

[1] *See, e.g.*, N.C. Gen. Stat. § 95-98; *Branch v. City of Myrtle Beach*, 532 S.E.2d 289, 292 (S.C. 2000); Va. Code § 40.1-57.2.

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collectively bargain [labor unions] from receiving the benefits of payroll deduction."). There are several problems with this conclusion.

First, the Court of Appeals erroneously assumed that labor unions are employee associations. *See* § 33.103(1), (3) (treating employee collective bargaining organizations and employee associations separately for dues-deduction purposes). The Court of Appeals characterized unions as "employee associations that do collectively bargain." Op. at 26. But labor unions are different from employee associations because labor unions get monopoly power: the *exclusive* right to collectively bargain.

Second, the Court of Appeals decision misunderstands the regulation. Nothing in the regulation "prohibits employee associations that do collectively bargain [labor unions] from receiving the benefits of payroll deduction." Those organizations are expressly permitted to deduct dues automatically, so long as they have a collective bargaining agreement in place. 1 CSR 10-3.010(6)(A)(5) (2019). In other words, these organizations get to deduct dues so long as they have in fact collectively bargained. This basic protection makes sense. Unlike employee associations, a labor union is a monopoly— the "exclusive" representative for a field or industry. 1 CSR 10-3.010(6)(A)(2) (2020) (defining "[l]abor union" as "an exclusive state bargaining representative"). Workers dissatisfied with their employee associations may seek out another. Not so with exclusive labor unions. To protect workers and their dues, the OA regulation thus requires the exclusive labor union to in fact have collectively bargained. The regulation prevents an exclusive labor union from sitting passively by and continuing to collect dues automatically while making no progress toward obtaining a collective bargaining agreement or holding the State to the terms of said agreement.

It thus makes no sense to compare employee associations to unions *without* a collective bargaining agreement. The relevant comparator here is an employee association with a union *with* a collective bargaining agreement. And under OA's regulations, both these organizations are treated the same: they get to deduct dues automatically. Stated differently, it makes no sense to say—as the Court of Appeals does—that unions must go through one hurdle more than employee associations (obtaining a collective bargaining

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agreement) to obtain dues. Employee associations cannot have collective bargaining agreements in the first place given that they never can have the monopoly exclusive representation right that unions receive. Employee associations and unions without collective bargaining agreements simply are not similarly situated in all relevant aspects. *Coyne v. Edwards*, 395 S.W.3d 509, 519 (Mo. banc 2013) (requiring comparators to be similarly situated in all relevant aspects to implicate the equal-protection clause).

Third, even if the regulations did implicate the equal-protection clause, they do not violate equal protection because they survive rational-basis scrutiny. *See Weinschenk v. State*, 203 S.W.3d 201, 215–16 (Mo. banc 2006) (stating that if the law does not impose "a heavy burden on a [fundamental right], it will be upheld provided [it is] rationally related to a legitimate state interest"). It is far from irrational to require unions to enter into collective bargaining agreements before they are granted automatic dues deductions. This allows OA to have one agreement with a union that governs all State obligations to the union. In fact, that is where OA keeps all terms and conditions governing MOCOA's dues deduction. *See, e.g.*, Jt. Ex. 10, pp. 6–7 (A0139–A0140); Jt. Ex. 9, pp. 5–7 (A0117–A0119). It also makes it impossible for a union, which has an exclusive right to representation, to sit passively and collect dues without actually bargaining.

C. The Opinion incorrectly concludes that the Rules violate article I, sections 8, 9, and 29 even though the Rules make unions no worse off than if the State had no dues-deduction program at all, which contradicts *City of Maryland Heights v. State*, 638 S.W.3d 895, 899 (Mo. banc 2022).

1. Article I, sections 8 and 9: Speech and Association

The Opinion holds that the Emergency and Final Rules violate article I, section 8 and 9 because the Rules distinguish employee associations that bargain collectively from employee associations that do not and because the Rules "prohibit[] employee associations that do collectively bargain from receiving the benefits of payroll deduction." Op. at 26. This statement is doubly incorrect. First, as noted *supra* in Part II.B, unions cannot be employee associations. Second, unions *may* receive payroll deductions if they have a collective bargaining agreement with the State. But even if the Opinion's statement was

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correct, the Rules would not violate article I, sections 8 and 9 because the unions are no worse off than if the State had no payroll-deduction program at all.

Article I, section 8 states that "no law shall be passed impairing the freedom of speech." Article I, section 9 states that "the people have the right peaceably to assemble for their common good, and to apply to those invested with the powers of government for redress of grievances…." The Rules do not impair free speech because the unions may speak in any way they please. The Rules also do not prevent unions from forming or presenting grievances to the government. The mere fact that the government has chosen to fund certain groups but not others based on their speech or association does not violate article I, section 8 or article I, section 9. For instance, in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 548 (1983), the U.S. Supreme Court expressly disavowed the notion that "strict scrutiny applies whenever [the law] subsidizes some speech, but not all speech." Rather, "selecti[ng] [] particular entities or persons for entitlement to [government] largesse is obviously a matter of policy and discretion and not open to judicial review…." *Id.* at 549. The U.S. Supreme Court came to a similar conclusion in *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009), where the Court held that an Idaho law that allowed payroll deductions to labor unions for anything except political activities and political speech did not violate the First Amendment.

Essentially, because unions are no worse off under the Rules than they would be if OA had no dues-deduction program at all, the Rules do not violate article I, sections 8 or 9. *See City of Maryland Heights v. State*, 638 S.W.3d 895, 899 (Mo. banc 2022) (citing *Rust v. Sullivan*, 500 U.S. 173, 203 (1991), for the proposition that a government "decision not to subsidize the exercise of a fundamental right does not infringe the right"). For instance, in *Rust*, the U.S. Supreme Court held that the Title X program, which did not fund abortions, did not violate due process because "Title X clients are in no worse position than if Congress had never enacted Title X." 500 U.S. at 203. *Rust* reasoned that "[t]he financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions…, but rather of her indigency." *Id.* The same reasoning applies here. OA has

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not limited MOCOA's or its members' rights to speak or associate. Rather, it is MOCOA and its members who have made continued organizing and bargaining difficult—MOCOA by failing to keep updated records on its members so that it could request dues directly, and MOCOA's members by refusing to pay dues to MOCOA directly when asked. D121, p.10, ¶¶ 43–48.

2. Article I, section 29: Right to Organize and Bargain Collectively

The same principles apply to article I, section 29. The Opinion states that the Rules "prevent or interfere with [employees'] organization and choice of representatives for the purpose of bargaining collectively." Op. at 22. It also holds that the "Rule impermissibly tends to coerce employees into accepting bargaining concessions or seeking to decertify their union[,] which is rendered impotent by the discriminatory withdrawal of dues deduction authority." Op. at 24–25. But the Rules do not "prevent or interfere with employees' organization or choice of representatives" because they do not make unions or their members any worse off than they would be if OA had no dues-deduction program at all. Further, the Rules are not coercive because, if there was no dues-deduction program at all, the unions would have to reach an agreement with OA before getting the benefits of dues deduction. Thus, the Rules do not violate article I, section 29.

D. The Opinion's requirement that OA reinstate dues deduction, when more than three years has passed since the last time dues were deducted for 1,000 employees, violates *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

The Opinion declined to reverse the circuit court's order that OA reinstate dues deductions for all State employees from whose paychecks the State was deducting MOCOA dues in December 2019. D121, pp.42–43, ¶ 4; Op. at 27–29. Since OA stopped deducting dues in December 2019, three years have passed, and 1,000 former MOCOA members (including one of the *named* plaintiffs in this case) have failed to pay MOCOA any dues. D121, p.6, ¶ 26; p.10, ¶ 46.

Janus requires that non-union-member employees "clearly and affirmatively consent before any money is taken from them," 138 S. Ct. at 2486, and MOCOA as plaintiff

bears the burden of proving consent, *see Johnson v. State*, 366 S.W.3d 11, 19 (Mo. banc 2012). Here there is no indication that the 1,000 State employees, who previously had dues deducted for MOCOA, wish to reinstitute dues deductions. In fact, the opposite is true. In its Response Brief, MOCOA stated that its members have no right to avoid paying dues. Resp. at 57–58. Thus, under MOCOA's own argument, *see* Resp. at 57–58, the 1,000 non-dues-paying employees are not MOCOA members because they have not paid dues for more than three years. And because those 1,000 employees have not given "clear[] and affirmative[] consent" to dues deductions now, the Opinion and circuit court judgment require OA to violate *Janus*, 38 S. Ct. at 2486.

III. Conclusion

For the reasons stated *supra*, this Court should grant this application to transfer the case to the Supreme Court of Missouri under Rule 83.04.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2023, the foregoing Application for Transfer and all required attachments was served on counsel of record via email:

Christopher N. Grant: cng@scwattorney.com
Loretta K. Haggard: lkh@scwattorney.com

/s/ Maria A. Lanahan
Maria A. Lanahan

Supreme Court of Missouri
en banc

SC99981
WD84917

January Session, 2023

Missouri Corrections Officers
Association, Inc., et al.,
Respondents,

vs. (TRANSFER)

Missouri Office of Administration,
et al.,
Appellants.

Now at this day, on consideration of Appellants' application to transfer the above-entitled cause from the Missouri Court of Appeals, Western District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Betsy AuBuchon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session, 2023, and on the 4th day of April, 2023, in the above-entitled cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of said Court, at my office in the City of Jefferson, this 4th day of April, 2023.

Betsy AuBuchon, Clerk

Christina Strauss, Deputy Clerk