

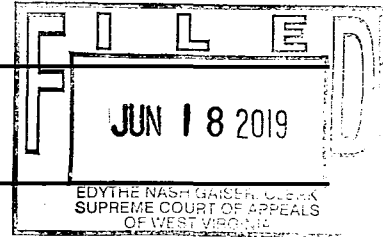
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 19-0298

CHARLESTON



**PATRICK MORRISEY, in his capacity  
as West Virginia Attorney General, and  
the State of West Virginia.  
Defendants Below,**

**Petitioners,**

**v.**

**WEST VIRGINIA AFL-CIO, et al.,  
Plaintiffs Below,**

**Respondents.**

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**BRIEF OF *AMICUS CURIAE* ASSOCIATED BUILDERS AND CONTRACTORS, INC.,  
WEST VIRGINIA CHAPTER  
IN SUPPORT OF REVERSING THE CIRCUIT COURT**

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**INTEREST OF *AMICUS CURIAE***  
**ASSOCIATED BUILDERS AND CONTRACTORS, INC., WEST VIRGINIA CHAPTER**  
**IN SUPPORT OF PETITIONERS**

The Associated Builders and Contractors, Inc., West Virginia Chapter, by counsel, files this *Amicus Curiae* Brief on its behalf and in support of the State of West Virginia and Attorney General Patrick Morrissey, Petitioners/Appellants in the above-referenced Appeal, with the consent of all parties.<sup>1</sup> The Associated Builders and Contractors, Inc., is a national construction industry trade association representing more than 21,000 members. The West Virginia Chapter of the Associated Builders and Contractors, Inc. (hereinafter “ABC”) is similarly a non-profit trade association based on the “Merit Shop” Philosophy. This philosophy promotes the betterment of the individual, the construction industry, and the nation through the principles of free enterprise and open competition. ABC believes that employees and employers should have the right to determine wages and working conditions through either individual or collective bargaining, as they freely choose, and within the boundaries of the law. An employer should value its employees, while providing fair compensation for the work performed. Similarly, the employee should have the obligation to satisfactorily perform the work assigned. Simply, everyone—employers and employees alike—should be judged and rewarded according to his or her own merit.

ABC supports reversal of the circuit court because the order uses the incorrect scrutiny to analyze the constitutionality of the West Virginia Workplace Freedom Act<sup>2</sup> (the “Workplace Freedom Act”) and thus ignores the rational basis for the Legislature’s enactment of the law. West

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<sup>1</sup> Pursuant to Rule 30(e)(5) of the West Virginia Rules of Appellate Procedure, the Associated Builders and Contractors, Inc., West Virginia Chapter, represents that no counsel for any party in this appeal authored any part of this brief. Moreover, no party or counsel in this appeal made a monetary contribution to fund the preparation or submission of this brief. The Associated Builders and Contractors, Inc. did make a monetary contribution to the preparation of this brief.

<sup>2</sup> The Workplace Freedom Act has been commonly referred to as the “Right to Work” law. These names address the same type of law, namely prohibiting compelled membership in a union.

Virginia became a right-to-work state via legislation passed in 2016. In February 2019, portions of the Workplace Freedom Act were held to be unconstitutional. ABC has played a significant role nationwide, advocating for open competition and free enterprise for America’s business community and specifically the construction industry. Guided by these principles, ABC believes that Right to Work in West Virginia will benefit the state’s economy, boost the state’s employment, and allow the state to attract and retain college graduates and a more highly-qualified workforce. Simply, the order of the circuit court should be reversed because the Workplace Freedom Act passes muster under rational basis review, which is the correct standard to be applied in this case.

## **I. ARGUMENT**

This Court should reverse the finding of the circuit court and declare that the Workplace Freedom Act is constitutionally valid using the “rational basis” standard of review. When faced with a constitutional challenge to a statute, courts must presume the law is constitutional until the party challenging proves, beyond a reasonable doubt, that the law violates the Constitution. Syl. Pt. 2, in part, *State ex rel. Frazier v. Meadows*, 193 W. Va. 20, 454 S.E.2d 65 (1994) (“Acts of the Legislature are presumed to be constitutional, and courts will interpret legislation in any reasonable way which will sustain its constitutionality.”). Beginning with this fundamental rule of governance, this Court should review the constitutionality of the Workplace Freedom Act—specifically the prohibition on agency fees in W. Va. Code § 21-1A-3, § 21-5G-2(2) and the associated penalties in §§ 21-5G-4 and 21-5G-5—under the rational basis standard of review because the statute does not encroach on any fundamental rights. *See Appalachian Power Co. v. State Tax Dep’t of West Virginia*, 195 W. Va. 573, 594, 466 S.E.2d 424, 445 (1995); *Sweeney v. Pence*, 767 F.3d 654, 670 (7th Cir. 2014). Under the “rational basis test,” a statute will be upheld



“so long as it is rationally related to a legitimate state interest.” *Appalachian Power Co.*, 195 W. Va. at 594, 466 S.E.2d at 445 (internal quotations omitted).

The State of West Virginia has a legitimate state interest in improving the economic growth of the state. Right-to-work policies in other states have led to more rapid employment growth; Gross Domestic Product (“GDP”) growth; and stronger growth specifically in the manufacturing, mining, and construction sectors. See John Deskins, *The Economic Impact of Right to Work Policy in West Virginia*, BUREAU OF BUS. & ECON. RESEARCH (Nov. 2015) [http://www.wvlegislature.gov/News\\_release/documents/Right\\_to\\_Work\\_FINAL.PDF](http://www.wvlegislature.gov/News_release/documents/Right_to_Work_FINAL.PDF) [hereinafter *Economic Impact*]. Moreover, the Workplace Freedom Act will serve as a beacon for younger workers in a market where their work and success will be judged solely on their merits, and will provide healthy competition and forward progress for the state and its workforce.

In the following sections, this brief will first address rational basis review and why the circuit court erred in applying strict scrutiny. Once the appropriateness of rational basis review is established, this brief will then examine the legitimate state interest of growing the economy and retaining younger workers, specifically through the lens of a meritocracy-based construction industry. Finally, this brief will conclude that the constitutionality of the Workplace Freedom Act should be upheld for the benefits it will provide the State’s economy and all West Virginians.

**A. The circuit court erred in applying strict scrutiny review because no fundamental rights are implicated; therefore, the appropriate test to be applied is the rational basis test.**

The court below held that the prohibition on agency fees “violates the associational rights of their unions and their members as protected by Article III, §§ 7 and 16 of the West Virginia Constitution.” Order at 21. Further, the circuit court found that the Workplace Freedom Act results in an unconstitutional taking under Article III, § 9 of the West Virginia Constitution, and

finally, violates the unions' individual liberty interests contained in Article III, §§ 3 and 10 of the West Virginia Constitution. Order at 23, 25. The circuit court asserted that, in some instances, the guarantees in the state constitution are protected by higher standards. *Id.* at 12, n.18. Moreover, the circuit court found that the Workplace Freedom Act implicated a fundamental right—the freedom of association—as applied to unions, and therefore examined the statute under a “strict scrutiny” analysis. The circuit court erred, however, in finding that a fundamental right affected unions and, as a result, applied the incorrect standard. Instead, the circuit court should have analyzed the statute under a rational basis review and found that the Workplace Freedom Act passes constitutional muster.

“When the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment.” Syl. Pt. 3, *Willis v. O'Brien*, 151 W. Va. 628, 153 S.E.2d 178 (1967). This Court does not sit as a super-legislative body; rather, when considering the constitutionality of an act passed by the Legislature, “the negation of legislative power must appear beyond reasonable doubt.” See Syl. Pt. 2, *Huffman v. Goals Coal Co.*, 223 W. Va. 724, 725, 679 S.E.2d 323, 324 (2009); *Sale ex rel. Sale v. Goldman*, 208 W. Va. 186, 192, 539 S.E.2d 446, 452 (2000). Even though there is little doubt the Workplace Freedom Act is constitutional,<sup>3</sup> that standard need not even be reached, as the Workplace Freedom Act easily passes the correctly applied rational basis review standard.

**1. The prohibition on agency fees does not implicate fundamental rights of association under the West Virginia Constitution and is therefore not subject to strict scrutiny.**

“There is no doubt that union workers enjoy valuable rights of association and assembly that are protected by the First Amendment.” *Morrissey v. West Virginia AFL-CIO*, 239 W. Va. 633,

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<sup>3</sup> The circuit court order is the *only* current judicial decision to find a right-to-work law unconstitutional.

640, 804 S.E.2d 883, 890 (2017) (quoting *Sweeney*, 767 F.3d 654). Indeed, Supreme Court of the United States and Supreme Court of Appeals of West Virginia decisions have held that the freedom to associate, along with the freedoms of speech and of the press, is a fundamental right accorded to all citizens. See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Woodruff v. Bd. of Trustees of Cabell Huntington Hosp.*, 173 W.Va. 604, 319 S.E.2d 372 (1984). Moreover, labor organizations do enjoy the rights of freedom of speech and expression. *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298 (2012). In the decision below, the circuit court used this reasoning to determine that the Workplace Freedom Act should be subjected to strict scrutiny review. The circuit court, however, incorrectly determined that fundamental rights were at issue concerning labor unions. This is reversible error by the circuit court because fundamental rights were not implicated,<sup>4</sup> and the proper analysis for a reviewing court is rational basis review.

The circuit court opined that the Workplace Freedom Act “unnecessarily and unconstitutionally imposes an excessive burden on [labor unions’] associational rights.” Order at 18. Further, the circuit court asserted that the Workplace Freedom Act “seriously hampers the unions’ ability to recruit new members and to retain old ones.” *Id.* The circuit court additionally voiced its concerns about “free-riders,” stating that workers would have no incentive to join a union, “if workers can get those services for free” due to the federally-imposed duty of fair representation. *Id.* at 18–19. Finally, the circuit court stated that the effect of the Workplace

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<sup>4</sup> Strict scrutiny review also applies when a “suspect classification” is implicated, such as race or religion. See, e.g., *Appalachian Power Co.*, 195 W. Va. at 594, 446 S.E.2d at 445. A suspect classification, however, is not present here and union membership would not satisfy the elements for a constitutionally suspect criterion. See *City of Charlotte v. Local 660, Int’l Ass’n of Firefighters*, 426 U.S. 283 (1976) (“Since it is not here asserted – and this Court would reject such a contention if it were made – that respondents’ status as union members or their interest in obtaining a dues check-off is such as to entitle them to special treatment under the Equal Protection Clause, the city’s practice must meet only a relatively relaxed standard of reasonableness in order to survive constitutional scrutiny.”).

Freedom Act on those associational rights “imposes every bit as much of a burden on their ability to recruit and retain members as did the disclosure requirement in the NAACP cases.” *Id.* at 19.

The circuit court erred in applying “the strictest of judicial scrutiny” when reviewing this statute because the freedom of association does not apply in this context. First, the Taft-Hartley Act expressly *permits* states to pass laws like the Workplace Freedom Act. *See, e.g., Zuckerman v. Bevin*, 565 S.W.3d 580, 595 (Ky. 2018) (“Rational basis review is appropriate for evaluating [Right to Work] since the Act is expressly permitted by the Taft-Hartley Act § 14(b).”). Moreover, unions simply do not have any “constitutional entitlement to the fees of non-member employees.” *Sweeney*, 767 F.3d at 668 (quoting *Davenport v. Washington Educ. Ass’n*, 551 U.S. 177, 185 (2007)). While freedoms of speech and association are constitutionally protected, those protections do not require the government “to assist others in funding the expression of particular ideas, including political ones.” *Id.* (quoting *Ysura v. Pocatello Educ. Ass’n*, 555 U.S. 353 (2009)). As the U.S. Supreme Court stated in *Ysura*, “A legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right and is thus not subject to strict scrutiny.” *Ysura*, 555 U.S. at 358. Furthermore, as to West Virginia’s Constitution, this Court has held that “[t]he protections inherent and explicit in [Article III, § 16] parallel associational, assemblage, and petition protection found under the first amendment [sic].” *Woodruff*, 173 W. Va. at 609, 319 S.E.2d at 378.

Perhaps more importantly, the circuit court has ignored—or at best, discounted—the competing First Amendment interests of the so-called “objecting employees” or those nonmember employees who do not wish to pay agency fees. In *Harris v. Quinn*, the Supreme Court of the United States reasoned that these fees “unquestionably impose a heavy burden on the First Amendment interests of objecting employees.” 573 U.S. 616, 655 (2014). And, despite the

reasoning of the circuit court, “free-rider arguments . . . are generally insufficient to overcome First Amendment objections.” *Id.* at 627 (quoting *Knox v. Service Emps.*, 567 U.S. 298, 311 (2012)). Simply put, the circuit court ignored decades of well-settled constitutional law to conclude that the Workplace Freedom Act unconstitutionally interferes with the rights of unions.

Yet, no matter how the circuit court attempted to frame the issues, nothing in the appellees’ arguments implicates fundamental rights. In fact, the circuit court correctly identified that all the Workplace Freedom Act has done is “made it more difficult for the [unions] to collect as many funds as [they are] used to collecting.” *Sweeney*, 767 F.3d at 669. However, the “burden” imposed by the Workplace Freedom Act does not impair any of the fundamental rights accorded to unions or their members whatsoever. The circuit court went to great lengths to describe other unconstitutional acts, such as stopping or punishing speakers advocating union membership, and prohibiting the solicitation of union members. *See* Order at 17. Nothing in the Workplace Freedom Act, though, prevents unions from engaging in the same activities they do now, despite the trial court’s opinion that it “unnecessarily and unconstitutionally imposes an excessive burden” on those activities.

In fact, the opposite may be true: requiring payment of union fees as a term and condition of employment imposes a heavy burden on the associational rights of nonmember employees. It is axiomatic that the freedom of association necessarily includes the freedom to not associate. The State of West Virginia is “under no obligation to aid the unions in their political activities. And the State’s decision not to do so is not an abridgment of the unions’ speech; they are free to engage in such speech as they see fit.” *Ysura*, 555 U.S. at 359. *See also Zuckerman*, 565 S.W.3d at 595 (“Rational basis review is appropriate for evaluating [Right to Work] since the Act is expressly permitted by the Taft-Hartley Act § 14(b).”). Accordingly, because no fundamental rights are

implicated on the part of labor unions in this case, the appropriate standard of review to be applied is rational basis.

**2. Because the Workplace Freedom Act does not implicate any fundamental rights on the part of unions, rational basis review should be the proper standard.**

In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and *any reasonable doubt must be resolved in favor of the constitutionality* of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear *beyond reasonable doubt*.

Syl. Pt. 1, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965) (emphasis added).

Under rational basis review, a law will be upheld so long as it is “rationally related to a legitimate state interest.” *Appalachian Power Co.*, 195 W. Va. at 594, 446 S.E.2d at 445 (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985)). Under this “highly deferential standard,” economic and social legislation must be found constitutional “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. *Id.* (quoting *Federal Commc’ns Comm’n v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993)).

Not surprisingly, when the Indiana and Kentucky right-to-work laws recently faced similar legal challenges, the reviewing courts in those cases determined that the rational basis test was appropriate. *Sweeney*, 767 F.3d at 670; *Zuckerman*, 565 S.W.3d at 598. In *Sweeney*, the Seventh Circuit affirmed the district court’s finding that a “belief that the passage of Right to Work legislation contributes to a business-friendly environment that can attract companies and encourage job growth provides a legitimate governmental objective that may have been (and was

in fact claimed to be) a reason for the passage of Indiana's Right to Work legislation.” *Sweeney*, 767 F.3d at 670–71. Under rational basis review, no further information was needed. *Id.* at 671 (“We need look no further for a rational basis.”). *See also Zuckerman*, 565 S.W.3d at 598 (“The legislature clearly established a rational basis for the [Right-to-Work legislation]: to promote economic development, to promote job growth, and to remove Kentucky’s economic disadvantages in competing with neighboring states.”).

Similarly, under the rational basis test, West Virginia’s Workplace Freedom Act should also be upheld. First, the circuit court identified that “West Virginia has legitimate and substantial interests in protecting workers from being forced to support political and ideological messages with which they disagree or to join an organization they do not support.” Order at 19. This reason alone is sufficient to uphold the legislation as constitutional. *See Syl. Pt. 2, Huffman*, 223 W.Va. at 725, 679 S.E.2d at 324. Yet, the fundamental rights of workers protected and guaranteed by the First Amendment and the West Virginia Constitution were not the only reasons the Legislature passed the Workplace Freedom Act.

Following the passage of the legislation, State Delegate Scott Cadle stated that the Workplace Freedom Act was adopted to “boost economic growth” and “substantially boost overall employment and output growth” based on studying other states’ right-to-work laws and various economic studies on the expected outcomes. *See Scott Cadle, Member’s Press Release: Right-To-Work and Prevailing Wage Votes Will Improve West Virginia*, Feb. 23, 2016. When the State Senate voted to enact the Workplace Freedom Act, Senate President Bill Cole stated that he believed “[The Workplace Freedom Act] is a critical step toward bringing about the kind of change in West Virginia that is desperately needed to jump start our struggling economy.” President Cole, *Press Release: Senate Passes West Virginia Workplace Freedom Act*, Jan. 21, 2016. State Senator

and Chairman of the Senate Judiciary Committee Charles Trump also expressed his belief that “[the Workplace Freedom Act] will increase employment opportunities in this state.” *Id.* Similarly, Senate President Mitch Carmichael stated, in relation to the original injunction in this case, that “[West Virginia has] already lost too many plentiful job opportunities.” Mitch Carmichael, *Press Release: Statement from Senate President Mitch Carmichael Regarding the Supreme Court of Appeals Decision on the West Virginia Workplace Freedom Act*, Sept. 15, 2017.

The State of West Virginia’s economy has been lagging behind that of the rest of the country, and the State Legislature has a legitimate interest in jumpstarting the state’s economy. As the next section will show, right-to-work laws in other states have led to a growth in numerous industries, including construction, and nothing indicates the same will not happen to West Virginia once this litigation is put to rest. Simply, this Court should reverse the trial court and find the Workplace Freedom Act constitutional because the Act is rationally related to a legitimate state interest, namely stimulating a stagnant economy.

**B. The Workplace Freedom Act Would Substantially Boost Overall Employment and Output Growth in West Virginia.**

West Virginia’s economy has seen an uneven recovery in the years since the 2008 recession, with much of the growth focused in the North-Central and Eastern Panhandle regions. Jeff McCullough, *Experts say West Virginia’s economic woes have strong long-term solutions*, WVNEWS (Jan. 27, 2019) [https://www.wvnews.com/news/wvnews/experts-say-west-virginia-s-economic-woes-have-strong-long/article\\_99bccfda-c3bb-5172-9f3f-d11cbde4ed1e.html](https://www.wvnews.com/news/wvnews/experts-say-west-virginia-s-economic-woes-have-strong-long/article_99bccfda-c3bb-5172-9f3f-d11cbde4ed1e.html). Despite the growth in these areas, the rest of the state has suffered, with one of the prominent issues being the state’s failure to attract and retain qualified workers. *Id.* High unemployment rates have been consistently tied to the nationwide opioid epidemic, the increased need of higher education, and changing industries. *Id.* West Virginia has also been unable to retain its college graduates or



otherwise attract a more highly-qualified workforce, which only compounds the problem of not being able to attract companies and investments in the state. *Id.* For instance, despite adding 8,700 jobs since 2017, all but 300 of those jobs have been in the North-Central and Eastern Panhandle regions, while the southern areas of the state continue to struggle. *See* John Deskins, *West Virginia Economic Outlook 2019–2023*, W. VA. U. COLLEGE OF BUS. & ECON. (2018), <https://business.wvu.edu/files/d/4d848394-4a30-4166-ab4a-1e5ae33ff730/wv-economic-outlook-2019-2023.pdf> [hereinafter *Economic Outlook*]. Indeed, even with the addition of jobs, West Virginia’s labor market participation rate ranks dead last among states, and it has since the 1970’s. *Economic Outlook* at 15.

West Virginia’s GDP growth has also trailed its neighbors for much of the past decade, with states like Kentucky, Ohio, Pennsylvania, and Virginia seeing growth at a faster rate than West Virginia.<sup>5</sup> *Economic Outlook* at 12. In fact, when it comes to labor markets, West Virginia is the *only* state in the region to experience “an outright loss in payrolls.” *Id.* The same generally holds true for the construction industry, though the recent uptick in the natural gas industry has admittedly led to more gains for the industry. In fact, between 2012 and 2016, the construction industry saw a decline for almost 20% in payrolls. *Id.* at 13. This trend changed in 2017, as the energy sector saw significant improvements, especially concerning the construction of several pipelines and infrastructure to support the pipelines. *Id.* at 13–14. Still, this has not been painless, as the industry saw multiple stoppages due to legal challenges and funding problems with the pipelines and uneven growth in other areas around the state. *Id.*

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<sup>5</sup> Both Kentucky and Virginia have right-to-work laws, while Pennsylvania and Ohio do not. *Right-To-Work Resources*, NAT’L CONF. OF STATE LEGISLATORS, <http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx> (last visited May 20, 2019). As explained more thoroughly *infra*, given West Virginia’s economic and population decline, it becomes even more imperative that right-to-work be established in the state to further capitalize on expected economic growth in the region.

The Workplace Freedom Act will contribute substantially to solutions to these problems, including attracting businesses, retaining highly-qualified workers, and lowering the unemployment rate. *See generally Economic Impact*. Several industries present promising outlooks, including natural gas, construction, and manufacturing. *Economic Outlook* at 3. Specifically, and largely due to the growth of the natural gas industry, the construction industry will show the fastest employment growth. *Id.* Yet, despite forecasted growth, West Virginia's growth is still expected to lag behind the rest of the nation, over half of which has enacted right-to-work laws. *Id.* Therefore, it is crucial that the Workplace Freedom Act be upheld so that the growth anticipated in these sectors can be fully realized and spread to the areas of the state where growth has been stagnant.

ABC is founded on the "Merit Shop philosophy" which is grounded in free enterprise principles within the free market. This philosophy is, intuitively, that a person's success is based on one's own merit, that a person will be evaluated or awarded based on his or her skills and work product. The merit shop philosophy is not based on pro-union or anti-union sentiments, but rather promotes free choice within the boundaries of the law. It is this belief that leads ABC to conclude that the Workplace Freedom Act will benefit the State and the people of West Virginia, by contributing to economic growth, both in gross domestic product and employment rates, while also positioning the state and its workers to be more competitive.

**1. The Workplace Freedom Act will lead to faster and more substantial economic growth in West Virginia.**

States that have enacted right-to-work legislation have typically enjoyed multiple economic benefits, including growth in their Gross Domestic Product ("GDP") and employment rates. In right-to-work states, GDP has typically grown 2.5 times faster than those of states with no right-to-work legislation. *Economic Impact* at v. Similarly, employment growth in right-to-

work states has been nearly double the rate employment has grown in non-right-to-work states. *Id.* While other factors can admittedly influence these statistics, estimates place employment growth and GDP growth in all right-to-work jurisdictions at approximately 0.4 percentage points and 0.5 percentage points higher respectively than in non-right-to-work states when those factors are accounted for. *Id.* Perhaps most importantly, no factors were identified that would lead one to doubt that the Workplace Freedom Act would “substantially boost overall employment and output growth in the long-run” in West Virginia. *Id.* at vi.

In evaluating the right-to-work policies and the effect on GDP, Dr. Deskins found that right-to-work states enjoyed growth that was approximately 0.55 percentage points higher than those of non-right-to-work states. *Id.* at 34. The study also identified that GDP growth was lower in states that had higher rates of unemployment. *Id.* Because right-to-work legislation spurs growth in both the GDP and employment rates of states that enact them, the benefits it will provide West Virginia becomes increasingly clear. West Virginia has lagged behind the rest of the country for economic growth, and people continue to leave the state in droves. *See generally* Scott Cohn, *In an economic death spiral: West Virginia is America’s worst state for business in 2017*, CNBC (July 12, 2017) <https://www.cnbc.com/2017/07/11/west-virginia-americas-worst-state-for-business-in-2017.html>; *West Virginia population drops by more than 11,000*, WSAZ NEWSCHANNEL 3 (Dec. 20, 2018) <https://www.wsaz.com/content/news/West-Virginia-population-drops-by-more-than-11000-503258441.html>.

Dr. Deskins’ findings are not unique: in 2015, NERA Economic Consulting, Inc. (“NERA”) examined the economic effects of right-to-work laws by analyzing the impacts of those laws on economic growth, employment, investment, and innovation. Jeffrey A. Eisenach, *Right-to-Work Laws: The Economic Evidence*, NERA ECONOMIC CONSULTING (June 2015)

[https://www.nera.com/content/dam/nera/publications/2015/PUB\\_Right\\_to\\_Work\\_Laws\\_0615.pdf](https://www.nera.com/content/dam/nera/publications/2015/PUB_Right_to_Work_Laws_0615.pdf)  
f. NERA then updated the report with additional data in 2018. Jeffrey A. Eisenach, *Right-to-Work Laws: The Economic Evidence*, NERA ECONOMIC CONSULTING (May 2018) [https://www.nera.com/content/dam/nera/publications/2018/PUB\\_Right\\_to\\_Work\\_Laws\\_0518\\_web.pdf](https://www.nera.com/content/dam/nera/publications/2018/PUB_Right_to_Work_Laws_0518_web.pdf) (hereinafter *Economic Evidence 2018*). This report concluded that private sector employment grew by 27 percent in right-to-work states, as compared to 15 percent in non-right-to-work states. *Id.* at 2. The study also showed that economic output grew faster in right-to-work states from 2001 to 2016 by almost ten percentage points. *Id.* In addition, the study found that these growth rates translated directly to higher personal incomes in right-to-work states, this time representing a 13 percent difference between right-to-work and non-right-to-work. *Id.*

Specific to the construction industry, employment has grown significantly more in right-to-work states than it has in non-right-to-work states. Since 1950, right-to-work states have experienced a growth in construction employment about 4.5 times above its 1950 levels, as compared to only 2.5 times in non-right-to-work states. *Economic Impact* at 18. Dr. Deskins has forecasted significant growth in the construction industry, due in large part to the natural gas pipeline construction, with further growth sustained by improvements and investments in infrastructure. *Economic Outlook* at 3. These findings by Dr. Deskins are substantiated by NERA: Between 2001 and 2016, employment growth in the construction sector grew by 6.3 percent in right-to-work states, as compared to a paltry 0.2 percent in non-right-to-work states. *Economic Evidence 2018* at 13. With the projected growth spurred by the natural gas industry in West Virginia, it is imperative to capitalize on this growth by ensuring West Virginia is “open for business” by upholding the Workplace Freedom Act.

Dr. Deskins has projected that the construction sector is poised to be one of the fastest growing industries in the state through the year 2023, with much of the growth happening in the immediate future. *Economic Outlook* at 19. As the energy sector continues to expand, more and more investments should be expected to come into West Virginia, which could potentially alleviate some of the downward pressure at the end of this timeframe. *Id.* (discussing the Memorandum of Understanding between West Virginia and China Energy). As previously discussed, considering the growth in North-Central and the Eastern Panhandle regions, nonresidential development is also poised to contribute to the surge in the construction sector. *Id.* However, construction costs may begin posing a risk to this development, especially concerning the energy sector. Labor shortages, tariffs, and legal delays could all contribute to an increase in costs, which could serve to tamper whatever growth does occur. *Id.* Therefore, it is imperative to support the growth of the construction industry now, so that West Virginia may continue to capitalize on and reap the benefits of an expanding energy sector, and to weather additional economic, legal, and global factors that may influence this growth.

Indeed, even considering the influence of the natural gas and energy sector, payrolls are expected to fall in 2019 with the anticipated volatility in growth. *Id.* at 36. Much of this volatility is due to the challenges faced with the construction of the natural gas pipelines, but can also be traced to price fluctuations in steel, tariffs and retaliatory tariffs between the United States and major trade partners, and uncertainty in funding from the state and federal governments concerning infrastructure. *Id.* at 37. The Workplace Freedom Act would serve as a bulwark against that volatility by providing economic flexibility in ensuring that other options are available to help lower overhead costs on construction projects, as will be addressed in the next section. Further, the Workplace Freedom Act would serve to attract more opportunities for employers and investors,

especially with the forecasted diversity of projects in the North-Central and Eastern Panhandle regions of the state. Finally, the Workplace Freedom Act represents an opportunity for younger workers to stay within West Virginia, where they will be incentivized to utilize and sharpen their skills in a competitive, merit-based market. These considerations will be more thoroughly addressed in the next section.

**2. The Workplace Freedom Act will allow West Virginia to retain younger workers, attract more highly-qualified workers, and lead to greater economic flexibility.**

Dr. Deskins also identified several issues regarding demographics that could hamper West Virginia's economic outlook in the coming years in his report. First, West Virginia has experienced a significant decline in population, which is expected to continue. *Economic Outlook* at 3. Relatedly, West Virginia's population is significantly older than the nation as a whole, and the inability to attract or retain younger workers will ensure that the population remains this way in the near future. *Id.* Finally, economic strategies need to consider ways that will improve health, drug abuse, and education outcomes, as a way to improve West Virginia's overall business climate and attract new companies to the state. The Workplace Freedom Act will be a large step in that direction, as it will provide economic flexibility, retain younger workers, and attract more highly-qualified workers.

In his study on the economic impact of right-to-work laws, Jeffrey Eisenach noted that "there is broad consensus in the academic literature that [right-to-work] laws are associated with lower union density." *Economic Evidence 2018* at 4. What follows is critical: "[N]umerous studies show that higher union density is associated with higher labor costs to businesses and reduced economic performance." *Id.* Many of these costs resurface in places you may not expect, such as the cost of living. See William T. Wilson, *The Effect of Right-to-Work Laws on Economic Development*, MACKINAC CENTER FOR PUBLIC POLICY at 8 (June 2002) (identifying approximately

25 percent higher costs of living in non-right-to-work states). In today's national and global marketplace, businesses and economies need to be flexible and able to respond to fluctuations and variances in the market environment. As evidenced in preceding sections and everyday life in West Virginia, fostering economic flexibility is crucial in retaining workers, attracting employers, and growing the state's economy. The Workplace Freedom Act will contribute significantly to those effects in West Virginia, leading to accelerated and sustained economic growth.

**i. The Workplace Freedom Act will increase labor market flexibility, which will lower costs and increase competition in West Virginia.**

Specifically, labor market flexibility is more important than ever moving forward. West Virginia's economic performance is often tied to the energy sector, with the recent comeback fueled by the coal and natural gas industries. *Economic Outlook* at 12–13. As evidenced, these industries can drastically affect other industries, as well, and particularly the construction industry. *Id.* While coal may not last forever, the natural gas industry is expected to continue to grow. *Id.* at 19–20. Considering the current volatility in the global market, especially as global and national consumption of energy and resources continues to change, labor market flexibility will be a key component moving forward.

Practically, right-to-work legislation allows for flexibility in a variety of industries, as it can lower costs, increase competition, and increase innovation. Simply, union contracts hinder competition by raising costs on projects. See James Sherk, *How Unions and Right-to-Work Laws Affect the Economy*, THE HERITAGE FOUNDATION (Mar. 3, 2015) <https://www.heritage.org/testimony/how-unions-and-right-work-laws-affect-the-economy> [hereinafter *Sherk Testimony*]. Indeed, advancements in information technology and greater capital mobility make it increasingly difficult for businesses to pass on higher costs to suppliers and customers, which incentivizes these businesses to seek out locations with lower cost structures.

Wilson at 3. Right-to-work provides those lower cost structures by increasing competition, whereas compelled unionism only serves the opposite: inflexibility by passing these higher labor costs on to businesses and citizens.

This is evidenced by the more immediate and practical effects of right-to-work legislation. Right-to-work legislation does not prohibit unions or union membership; rather, the legislation encourages unions to take better care of their members and encourages a leaner, more effective union. *Sherk Testimony*. This serves to lower costs on projects, encourage competition, and increase innovation, while simultaneously protecting customers and businesses from the increased costs. In fact, the evidence shows that the economic effects of lower costs in right-to-work states are passed directly on to citizens, as evidenced in the nearly 25-percent higher costs paid for food, housing, health care, utilities, and property in non-right-to-work states. Wilson at 8. While unions may cry foul over less revenue, none of this constitutes an unnecessary burden; in fact, this legislation will benefit everyone by providing flexibility which will lower costs for businesses and citizens alike through increased competition.

**ii. Increased economic flexibility will attract new businesses and investments, which will spur growth in related and connected industries.**

Another important factor identified by NERA was the attraction of new businesses to states that have enacted right-to-work laws. *Economic Evidence 2018* at 17. As mentioned, these businesses seek out lower cost structures with high rates of labor participation. Wilson at 11. From 2001 to 2015, the change in the number of firms in right-to-work states grew by 10.2 percent, as compared to 1.5 percent in non-right-to-work states. *Economic Evidence 2018* at 17. Similarly, the change in “establishments” in right-to-work states grew by 13.3 percent over the same time period, as compared to only 4.1 percent in non-right-to-work states. *Id.* Indeed, businesses often



consider right-to-work laws when deciding where to locate, with many addressing right-to-work as a major factor or at least a secondary factor. *Sherk Testimony*.

In construction specifically, from 1970 to 2000, construction grew at a rate of three percent in right-to-work states, almost one full percentage point more than non-right-to-work states. Wilson at 16–17. From 2001 to 2016, these figures changed even more drastically, with employment growth in construction in right-to-work states outpacing growth in non-right-to-work states by six percent. *Economic Evidence 2018* at 13. This is particularly crucial in West Virginia, as construction is expected to experience the fastest growth in all industries in the next few years, particularly because of the natural gas industry. This growth, both in in construction and natural gas, will spill over to further needs, including infrastructure investments. *Economic Outlook* at 2.

With the forecasted economic and population growth in major counties and population centers in West Virginia over the next few years, it is critical to capitalize on these opportunities, particularly with construction. Attracting new businesses into a competitive and flexible market will serve to help everyone involved: the economy of West Virginia, the workers of West Virginia, and the state of West Virginia. This expected growth in these regions will lead to further opportunities and investments, as infrastructure, residential developments, and nonresidential developments will grow as a result. The Workplace Freedom Act will act as a stimulant to that growth, as it will attract new businesses to the state. In circular fashion, the economic growth will then attract more businesses and employers, which will then lead to further growth, and so on. The Legislature clearly wanted to facilitate that growth as much as possible by introducing the economic flexibility to lower costs and provide a more business-friendly environment in the state.

The Workplace Freedom Act will also serve as a buttress against West Virginia's aging population, allowing the state to attract and retain younger workers. West Virginia's median age

is now 42.5 years old, more than 4 years older than the nation as a whole, and placing it in the oldest five states in the country. *Economic Outlook* at 18. West Virginia has also struggled to retain younger college graduates. While many college graduates may remain a short time in West Virginia following graduation, many leave for greener pastures after only a few years. Eric Bowen, *From Higher Education to Work in West Virginia, 2013*, BUREAU OF BUS. & ECON. RESEARCH at 1 (2015) <http://busecon.wvu.edu/bber/pdfs/BBER-2015-05.pdf>. Coupled with lower rates of labor force participation, particularly in rural areas, these statistics present a “serious impediment to economic progress” and could strain “the public safety net.” *Economic Outlook* at 50.

The Workplace Freedom Act offers the state some reprieve from these sobering statistics. Simply, the Workplace Freedom Act offers West Virginia an opportunity to allow for meaningful work for prime working-age workers by providing them the opportunity to prove their worth based on merit, and not their seniority in a union. Again, this follows naturally from the previously discussed considerations: Lower costs through competition improve economic flexibility which attracts new business which increases innovation and opportunities. The Workplace Freedom Act is simply the key needed to unlock these opportunities and jumpstart West Virginia’s economic growth.

## II. CONCLUSION

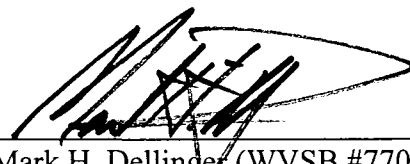
This Court should reverse the circuit court because it incorrectly applied a higher standard of review. This flawed analysis led to incorrectly declaring the Workplace Freedom Act to be unconstitutional. Rather, because no fundamental rights were infringed, the correct standard to be applied is rational basis. Under the rational basis review, a statute will be upheld so long as it is rationally related to a legitimate state interest. Here, the Legislature had a simple, rational basis: The Workplace Freedom Act was passed with the basis of helping grow West Virginia’s economy.

The Workplace Freedom Act will accomplish this by lowering costs, increasing competition, improving economic flexibility, and attracting new businesses and opportunities for West Virginia's workforce, leading to accelerated and sustainable economic growth.

For the foregoing reasons, this Court should reverse the order of the trial court and uphold the constitutionality of the West Virginia Workplace Freedom Act.

Respectfully submitted this 18th day of June, 2019.

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