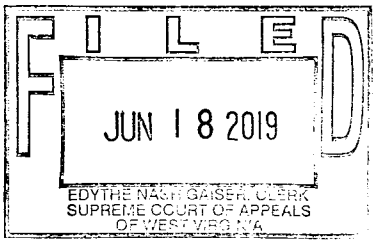
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 19-0298



PATRICK MORRISEY, et al.,
Defendants-Petitioners,

v.

WEST VIRGINIA AFL-CIO, et al.,
Plaintiffs-Respondents.

Appeal from the Order of the Circuit Court of Kanawha County, West Virginia
Civil Action Nos. 16-C-959–69

AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS AND REVERSAL OF THE DECISION BELOW

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest federation of business companies and associations. It directly represents 300,000 members and indirectly represents the interests of over three-million business, trade, and professional organizations of every size, in every business sector, and from every region of the country. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files briefs as *amicus curiae* in cases raising issues of vital concern to the business community.[1]

This case presents a question of significant importance to the Chamber. This Court's holding on the constitutionality of Senate Bill 1 (the "Act")—also known as the Workplace Freedom Act or West Virginia's right-to-work law—will have ramifications not only for West Virginia businesses and associations bound by collective bargaining agreements but also for the business community nationwide. A decision affirming the Circuit Court below would be the first and only appellate decision finding a state right-to-work law unconstitutional. The case is also an important test of this Court's supervisory powers over West Virginia Circuit Courts: Although this Court previously and *expressly* concluded that the Unions' claims were unlikely to succeed on the merits, the Circuit Court on remand rejected that

[1] Pursuant to Rule 30(b) of the West Virginia Rules of Appellate Procedure, the Chamber certifies that it timely notified counsel of record for the parties of its intention to file this brief. All parties consented to the Chamber's filing. The Chamber also certifies, pursuant to Rule 30(e)(5), that no party's counsel authored this brief in whole or in part. Nor did such counsel or any party make a monetary contribution intended to fund the preparation or submission of this brief.

conclusion, *even though the record did not change and the Circuit Court identified no specific error in this Court's reasoning*. Whether this Court permits such a decision to stand is critical to the reliance that the business community in West Virginia and across the country can place in the decisions of this Court.

INTRODUCTION

The Circuit Court's judgment should be reversed because the decision under review fails to identify any persuasive basis for departing from this Court's previous conclusion that "the [U]nions failed to show a likelihood of success in their legal challenge to the [Act]'s constitutionality." *Morrisey v. W. Va. AFL-CIO*, 804 S.E.2d 883, 887 (W. Va. 2017). As the Circuit Court admits, nothing changed in the record following this Court's previous decision, *see* Op. at 7, and there has been no development in the law favorable to the Unions' position. The reasoning in the Circuit Court's decision, moreover, is nearly identical to the Unions' briefing before this Court roughly two years ago. There is simply no reasonable ground for assessing the Unions' claims differently today than this Court did previously, and the Circuit Court's refusal to follow this Court's earlier ruling should be swiftly reversed.

To the extent this Court determines that a more detailed analysis is required, *amicus* submits this brief to highlight three dispositive errors in the Circuit Court's reasoning and the Unions' arguments below.

SUMMARY OF ARGUMENT

I. The Circuit Court's decision is premised on a fundamental misunderstanding of federal law. Although the Circuit Court acknowledged that the outcome of this

case turns principally on what federal law requires, it ignored that any entitlement the Unions have to act as the exclusive bargaining agent and to collect nonmember fees is granted by the National Labor Relations Act ("NLRA"), not by the West Virginia Constitution. That misunderstanding dooms the Unions' three constitutional claims, because any entitlement unions have to collect agency fees is granted and revocable solely as a matter of legislative grace. Indeed, the NLRA specifically reserves to States the authority to pass laws prohibiting the collection of agency fees, just as the West Virginia legislature has done.

II. The Circuit Court made at least two significant legal errors in holding that the Act's ban on agency fees violates the associational rights of unions and their members. *First*, the Circuit Court grossly mischaracterized a series of Civil-Rights-era Supreme Court cases that arose largely out of efforts by Southern states to compel the disclosure of NAACP membership lists and to prohibit NAACP litigation efforts. Those cases do not support the Unions' attempt to manufacture a constitutional right to force nonmembers to subsidize their activities. *Second*, the Circuit Court failed even to acknowledge the Supreme Court's explanation in *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), that federal-employee unions continue to exist and operate without agency fees.

III. Finally, the Circuit Court ignored the many rational explanations that might have motivated the West Virginia Legislature to pass the Act's ban on agency fees. The Circuit Court found the Act's ban on agency fees to be "arbitrary" and

without any possible rational basis. But studies have shown that numerous benefits flow from such legislation. By eliminating compulsory agency fees, right-to-work laws lead to more employment opportunities, higher levels of personal income, and population growth, placing States with right-to-work laws on better economic footing than those without such laws.

ARGUMENT

I. The Decision Below Is Premised On A Fundamental Misunderstanding Of Controlling Federal Labor Law.

The lower court's decision is predicated on an erroneous legal premise—namely, that the Unions are *constitutionally* entitled to act as the exclusive representative for all employees in a workplace and to collect agency fees from those employees who do not wish to be union members. That incorrect premise permeates each of the three theories advanced by the Unions below. The takings challenge, for example, depends entirely on whether the Act deprives the Unions without just compensation of property to which they are constitutionally entitled. The due process claim likewise turns on whether the Unions have a substantive right under the West Virginia Constitution to exclusive agency and nonmember fees. And the associational claim hinges, too, on whether the West Virginia Constitution demands that nonmembers financially support the Unions' activities. The lower court answered each of these constitutional inquiries incorrectly because the claimed entitlements are, in fact, statutory and exist purely as a matter of federal legislative grace.

While claiming fidelity to the federal labor scheme, the decision below ignores that any entitlement the Unions have to act as the exclusive bargaining agent and to

collect nonmember fees is granted by the NLRA, not by the West Virginia Constitution. A union has the option to organize as the exclusive representative at a workplace, with the substantial power that comes with such an arrangement, only because Congress created that artificial construct. That power and the ability to collect agency fees from nonmembers are strictly a matter of legislative grace, and a union accepts them knowing full well that they may be revoked at any time. Indeed, the NLRA specifically reserves to States the authority to pass laws prohibiting the collection of agency fees, just as the West Virginia legislature has done. The Circuit Court overlooked these basic principles of federal labor law in concluding, among other things, that unions barred from collecting agency fees are required to "provide expensive services *for nothing*." Op. at 25.

A. The NLRA Establishes a Highly Reticulated Regulatory Regime Applicable to This Case.

Over eighty years ago, Congress created through the NLRA a nationwide set of rules for unionization. While many States in more recent years have enacted their own labor laws, several of those laws, including West Virginia's, track the NLRA and make clear that administrative and judicial interpretations of the NLRA are authoritative. *See, e.g.*, Ky. Rev. Stat. § 336.132(4); Mich. Comp. Laws § 423.1; Wis. Stat. § 111.04(3)(b). West Virginia Code § 21-1A-1(c) expressly states that West Virginia's labor management regime "is patterned after the provisions of the 'National Labor Relations Act.'" And "except insofar as the provisions of this article differ from the provisions of [the NLRA], as amended, the decisions of the national labor relations board and of the courts with respect to said act, as amended, shall be

authoritative." W. Va. Code § 21-1A-1(c); *see also Farrie v. Charles Town Races, Inc.*, 901 F. Supp. 1101, 1108 (N.D. W.Va. 1995) ("The West Virginia statute regarding unfair labor practices, W. Va. Code § 21-1A-1 et seq. is expressly patterned after the National Labor Relations Act.") (citations omitted).

No party has identified any material differences between the federal and state statutes for purposes of this case. For example, the NLRA affords employees the right "to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. West Virginia law includes identical language. *See* W. Va. Code § 21-1A-3 (providing that employees "have the right . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection").

Thus, the outcome of this case turns principally on what federal law requires. As even the Circuit Court acknowledged, federal law provides "the context in which a 'right to work' law like S.B. 1 has been enacted." Op. at 8. The Circuit Court failed, however, to understand federal labor law correctly.

B. The NLRA Grants Unions the Substantial and Artificial Power to Organize as the Exclusive Bargaining Agent in a Workplace.

It is the NLRA, not the West Virginia Constitution, that grants unions the unique power to serve as the "exclusive representatives of all [ ] employees," if elected by a simple majority of the work force, "for the purposes of collective bargaining in respect to . . . conditions of employment." 29 U.S.C. § 159(a). Such an arrangement

entitles a union to substantial benefits, imposed by federal statute, that the union would not otherwise enjoy. As the Supreme Court recently explained in the context of public-employee unions, an exclusive-agency union enjoys "a privileged place in negotiations over wages, benefits, and working conditions." *Janus*, 138 S. Ct. at 2467 (citations omitted). "Not only is the union given the exclusive right to speak for all the employees in collective bargaining, but the employer is *required* . . . to listen to and to bargain in good faith with only that union." *Id.* at 2467 (emphasis added and citations omitted). For private-employee unions, these significant privileges are found in various provisions of the NLRA. *See* 29 U.S.C. § 159(a) (granting private-sector, exclusive-agency unions the sole right to negotiate "in respect to rates of pay, wages, hours of employment, or other conditions of employment"); *id.* §§ 158(a)(5), (b)(3) (requiring employers to negotiate with private-sector exclusive-agency unions).

The choice to form an exclusive-agency union thus "results in a tremendous increase in the power" of the union that is "closely akin, in some respects, to . . . Government itself." *Am. Commc'n Ass'n v. Douds*, 339 U.S. 382, 401 (1950). Put another way, Congress has put its "thumb on the scales," and "individual employees are required by law to sacrifice rights" to the exclusive-agency union. *Id.* Through the NLRA, "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202 (1944).

Because these are statutory entitlements, Congress can and has imposed conditions on the grant of such sweeping power. One such condition is that an exclusive-agency union must represent all employees—members *and* nonmembers—fairly. This duty of fair representation is not expressly articulated in any federal statute, but the U.S. Supreme Court has made clear that the duty "arises [ ] from the grant under § 9(a) of the NLRA, 29 U.S.C. § 159(a) [ ], [which gives] the union[ ] exclusive power to represent all employees in a particular bargaining unit." *Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 87 (1989). As the Court explained, when Congress empowered unions to bargain exclusively for affiliated and unaffiliated workers—and thereby subordinated the interests of the individual to the interests of the bargaining unit as a whole—it also "imposed on unions a correlative duty . . . to exercise that authority fairly." *Int'l Broth. of Elec. Workers v. Foust*, 442 U.S. 42, 46 (1979) (citations omitted). Indeed, the Court has suggested that such a duty may be "constitutional[ly]" required. *Steele*, 323 U.S. at 198; *see also Janus*, 138 S. Ct. at 2469 ("That duty is a necessary concomitant of the authority that a union seeks when it chooses to serve as the exclusive representative.").

Contrary to the Circuit Court's conclusion, there is no constitutional entitlement at stake here. The power of exclusive representation is a substantial and "avidly sought" benefit statutorily granted by, and subject to terms set by, the government. *Janus*, 138 S. Ct. at 2467. As the Circuit Court was forced to admit, unions are "neither required to seek, nor entitled to, the benefit of exclusivity." Op.

at 28; *see also Janus*, 138 S. Ct. at 2467 (noting that "[n]o union is ever compelled to seek th[e] designation" of exclusive representation). Unions that do not wish to accept the government's terms or the risk of regulatory change may forego the powers of exclusive representation by instead representing only those employees who opt to become members. *See Retail Clerks Int'l Ass'n v. Lion Dry Goods*, 369 U.S. 17, 29 (1962) ("'Members only' contracts have long been recognized.") (citation omitted). Unsurprisingly, most unions opt for the "tremendous" benefits of exclusive agency, *Douds*, 339 U.S. at 401, but it is undisputed that members-only unions can and do exist, *see, e.g.*, May 5, 2017 Pet'rs' Reply Br. at 5 (No. 17-0187) (noting the Unions' stipulation that "there are unions that only work on behalf of their members").[2]

C. The NLRA Specifically Reserves to States the Authority to Revoke an Exclusive-Agency Union's Power to Collect Nonmember Fees.

1. Any remaining doubt as to the government's power over exclusive-agency unions and nonmember fees is put conclusively to rest by 29 U.S.C. § 164(b). As a default, federal law allows employers to enter into "an agreement with a labor organization . . . to require as a condition of employment membership therein." 29 U.S.C. § 158(a)(3). But consistent with the fact that this power is granted solely as a matter of legislative grace, federal law also specifically reserves to States the authority to prohibit such agreements. Under § 164(b), "[n]othing in th[e] [NLRA] shall be construed as authorizing the execution or application of agreements

[2] Contrary to the Circuit Court's unsupported assertion that private-sector employers simply "do not negotiate" with members-only unions, Op. at 25, there is evidence in the record that in recent years Volkswagen entered into discussions with a members-only union at a plant in Tennessee, *see* May 5, 2017 Pet'rs' Reply Br. at 5 (No. 17-0187).

requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

Under controlling Supreme Court precedent, § 164(b) allows States to enact legislation prohibiting agreements that require not only formal membership in a union but also agency fees from nonmembers. The concept of "membership" under these provisions has been interpreted broadly. It covers not only formal membership but also payments "support[ing] union activities . . . germane to collective bargaining, contract administration, and grievance adjustment," *i.e.* agency fees. *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 745 (1988) (interpreting the "financial core" that constitutes union "membership"). Thus, as this Court previously held, "under federal law, states may decide whether to allow or prohibit employers and unions to negotiate agreements requiring compulsory union membership, *or requiring nonunion employees to pay dues or fees to the union.*" *Morrisey*, 804 S.E.2d at 890 (emphasis added).

The States' expressly reserved authority to enact such legislation, as the West Virginia Legislature has done here, is well-established and widely respected. It has existed since the Taft-Hartley Act of 1947 and been exercised by 27 other jurisdictions that have passed right-to-work laws. None of those other laws is currently enjoined, and most have been on the books since at least the 1960s. *See Right to Work States Timeline*, NAT'L RIGHT TO WORK COMM., https://tinyurl.com/y3pzeufx (last visited

May 29, 2019).[3] In short, when unions elect to operate under—and thus reap the benefits of—an exclusive-agency model, they do so knowing and accepting that a State can limit (or already has limited) the unions' ability to require membership or extract agency fees.

Section 164(b) conclusively undermines the Circuit Court's overriding view that the Workplace Freedom Act requires "unions and union officials to work, to supply their valuable expertise, and to provide expensive services *for nothing*." Op. at 24–25. As noted, the decision to seek and accept the mantle of exclusive representation comes with substantial benefits, which are granted and revocable as a matter of legislative grace. Section 164(b) expressly spells out that risk by reserving to States the authority to revoke the power to compel membership or collect agency fees from nonmembers. It is thus incorrect to say, as the Circuit Court has, that the Act newly deprives the Unions of anything to which they are entitled under the West Virginia Constitution. The Act is merely the realization of a condition on exclusive-agency status that has long existed under the NLRA: that the government may someday prohibit the collection of agency fees. If anything, it is the Unions and the Circuit Court that seek to get something for nothing. They would turn an act of

[3] *See also* Ala. Code § 25-7-34; Ariz. Const. Art. XXV, § 23 8(1); Ark. Code § 11-3-303; Fla. Const. Art. I, § 6; Ga. Code § 34-6-22; Guam Code Ann. §§ 4101–14; Idaho Code § 44-2003; Ind. Code § 22-6-6-8; Iowa Code § 731.4; Kan. Const. Art. 15, § 12; Ky. Rev. Stat. § 336.130(3)(a); 23 La. Rev. Stat. § 983; Mich. Comp. Laws § 423.14; Miss. Code § 7-1-47(d); Neb. Rev. Stat. § 48-217; Nev. Rev. Stat. §§ 613.130–300; N.C. Gen. Stat. §§ 95-81–82; N.D. Cent. Code § 34-01-14; Okla. Const. Art. 23, § I A(B); S.C. Code § 41-7-30; S.D. Const. Art. VI, § 2; Tenn. Code § 50-1-203; 3 Tex. Labor Code § 101.111; Utah Code § 34-34-10; Va. Code § 40.1-62; Wis. Stat. § 111.04(3)(a); Wyo. Stat. § 27-7-111.

legislative grace into a new, inalienable, and constitutional entitlement to agency fees.

2. The Circuit Court failed not only to recognize that exclusive representation is a revocable statutory benefit, *see supra* at 8, but also that the NLRA specifically reserves to States the authority to pass laws revoking the power of exclusive-agency unions to collect agency fees from nonmembers. The Circuit Court acknowledged that § 164(b) gives States "absolute authority" to bar agreements that compel *formal membership* in exclusive-agency unions. Op. at 9 ("This section of federal law clearly and unequivocally authorizes a part of the enactment of [the Act], that is, the prohibition on requiring employees covered by a collective bargaining contract to be members of the labor union representing them."). But it concluded that this statutory limitation does not include state laws prohibiting agreements that compel *agency fees*, reasoning that there is a "fundamental" "distinction" between membership and agency fees. *Id.* at 28. That conclusion is out of step with Supreme Court precedent and uniform case law from the lower federal courts.

As explained above, although the federal statutory provision refers to "agreements requiring *membership* in a labor organization," 29 U.S.C. § 164(b) (emphasis added), longstanding Supreme Court precedent requires reading the term "membership" broadly. In *Retail Clerks Int'l Ass'n v. Schermerhorn*, 373 U.S. 746, 751 (1963), the Court held that "membership" has the same meaning in 29 U.S.C. § 164(b) as it does in 29 U.S.C. § 158(a)(3). And in a series of other cases, the Court expressly rejected efforts to interpret narrowly "membership" in § 158(a)(3). In

NLRB v. General Motors Corp., 373 U.S. 734 (1963), the Court refused the argument that the term "membership" contemplates only "actual membership," *id.* at 741, explaining that the term also encompasses the requirement of "fees and dues," which are the "practical equivalent" and "financial core" of union membership, *id.* at 742. Then in *Beck*, the Court further reduced the "financial core" of union membership to agency fees—those fees that "support union activities . . . germane to collective bargaining, contract administration, and grievance adjustment." 487 U.S. at 745. Together, these cases make indisputably clear that "membership" in § 164(b) covers agency fees, and that the provision therefore reserves to States the authority to ban agreements compelling agency fees.

Every federal court to address this issue has read the Supreme Court's holdings this way. For example, the Seventh Circuit relied on *General Motors* and *Beck* in concluding that § 164(b) "necessarily permits state laws prohibiting agreements that require employees to pay Representation Fees." *Sweeney v. Pence*, 767 F.3d 654, 663 (7th Cir. 2014). Similarly, the D.C. Circuit relied on those cases in concluding that § 164(b) "permit[s] states to ban representation fees." *Int'l Union of the United Ass'n of Journeyman & Apprentices of the Plumbing & Pipefitting Indus. of the U.S. & Canada v. NLRB*, 675 F.2d 1257, 1260 (D.C. Cir. 1982).

This broad understanding of § 164(b) also comports with the legislative history of the 1947 Taft-Hartley Act. When Congress enacted that statute, "[t]he House report listed each" of the seven States that had already included bans on compulsory fees in their right-to-work laws. *Id.* Congress was thus "well aware" of those right-

to-work States, and enacted § 164(b) "to preserve the efficacy of their laws." *Sweeney*, 767 F.3d at 663.

The Circuit Court offered two arguments to support its claimed distinction between "membership" and agency fees, but neither is availing. It first reasoned that *General Motors* was only an interpretation of § 158(a)(3). *See* Op. at 29. But as explained above, the Supreme Court held in *Schermerhorn* that "membership" has the same meaning in § 164(b) as it does in § 158(a)(3). The Circuit Court then reasoned that agency fees are like "taxes" in a "democracy," which all must pay. *Id.* at 30–31. But this is a false analogy that merely assumes that § 164(b) does not allow States to ban agency fees. The very point is that § 164(b) specifically reserves to States the power to prohibit agency fees, making agency fees nothing at all like taxes in a democracy.

II. The Decision Below Erred in Holding That the Act Violates the Right to Free Association.

In addition to its fundamental misunderstanding of federal law, the Circuit Court made at least two significant legal errors in holding that the Act's ban on agency fees violates the associational rights of unions and their members. *First*, the Circuit Court erred in torturing from several Supreme Court decisions the principle that "the freedom of association imposes an extremely heavy burden on the state to justify measures that discourage membership in lawful organizations and that impair their lawful missions." Op. at 14. Those decisions do not support the Unions' attempt to manufacture a constitutional right to force nonmembers to subsidize their activities. *Second*, the Circuit Court's holding that the Act's ban on agency fees

"seriously hampers the [U]nions' ability to recruit new members and retain old ones," *id.* at 18, cannot be squared with the Supreme Court's analysis in *Janus* of exclusive-agency unions for federal employees.

A. The Circuit Court Grossly Misinterpreted U.S. Supreme Court Precedent.

In finding that the Act violates the Unions' freedom of association under the West Virginia Constitution, the Circuit Court attributes to a series of U.S. Supreme Court cases a principle that those cases plainly do not support. As described below, these Civil-Rights-era decisions primarily rejected attempts by southern States to obstruct NAACP activities through the compelled disclosure of the organization's membership. In each of those cases, the Supreme Court found that forced disclosure of the NAACP's membership resulted in economic reprisals, loss of employment, threats of physical harm, and other manifestations of public hostility, thereby significantly interfering with the rights of the disclosed members to associate freely. Here, of course, the Unions have not presented any such evidence, nor is there any plausible claim that the Act's ban on agency fees compels disclosing the identities of any union members and thus implicates the "vital relationship between freedom to associate and privacy in one's associations." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).

In *Patterson*, the Supreme Court held "that freedom to engage in association . . . is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." 357 U.S. at 460–61 (citations omitted). Recognizing that the "[i]nviolability of *privacy in group*

association may in many circumstances be indispensable to the preservation of freedom of association, particularly where a group espouses dissident beliefs," *Patterson* reversed an order requiring the NAACP to produce the names and addresses of its Alabama membership. *Id.* at 462 (emphasis added). In so holding, the Court credited the NAACP's "uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members ha[d] exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* "Under these circumstances," the Court opined, "compelled disclosure of [the NAACP's] Alabama membership [wa]s likely to affect adversely the ability of [the NAACP] and its members to pursue their collective effort . . . , in that it may [have] induce[d] members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs" and "of the consequences of this exposure." *Id.* at 462–63.

Patterson was the first in a string of cases involving NAACP challenges to state-mandated disclosure of membership as violative of free association. In *Bates v. Little Rock*, 361 U.S. 516 (1960), the Court similarly struck down on free-association grounds an Arkansas tax ordinance requiring the disclosure and publication of local NAACP membership lists. *Id.* at 527. Likewise, in *Gremilion v. NAACP*, 366 U.S. 293 (1961), the Court upheld the NAACP's First Amendment challenge to a Louisiana statute mandating that the organization publicly file the names and addresses of its members and officers in the State. *Id.* at 297. And two years later in *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963), the Court enjoined

enforcement of a Florida legislative committee's subpoena seeking the NAACP's in-state membership records. *Id.* at 558. In each of those cases, the NAACP presented, as it had done in *Patterson*, "substantial [ ] evidence" that: (1) "public identification of persons in the community as members of the [NAACP] had been followed by harassment and threats of bodily harm"; and (2) "fear of community hostility and economic reprisals [ ] follow[ing] public disclosure of the membership lists had discouraged new members from joining." *Bates*, 361 U.S. at 524; *see also Gremilion*, 366 U.S. at 296–97; *Gibson*, 372 U.S. at 548 n.3. On those specific facts, the Court concluded in all three cases that the disclosure mandates at issue "would work a significant interference with the freedom of association of [the NAACP's] members." *Bates*, 361 U.S. at 523; *see also Gremilion*, 366 U.S. at 296 ("And where it is shown . . . that disclosure of membership lists results in reprisals against the hostility to the members, disclosure is not required."); *Gibson*, 372 U.S. at 557.

In sum, these cases vindicate the "protection of privacy of association" and "[t]he strong associational interest in maintaining the privacy of membership lists of groups." *Gibson*, 372 U.S. at 544, 555. Contrary to the Circuit Court's conclusion, these cases do not stand for the nebulous principle that "the freedom of association imposes an extremely heavy burden on the state to justify measures that discourage membership in lawful organizations and that impair their lawful missions." Op. at 14. Nor does any Supreme Court case of which *amicus* is aware, as such a sweeping principle would call into question all manner of laws. Indeed, the Supreme Court has squarely rejected the assertion that the right to associate is implicated simply

because a policy "tends to impair or undermine . . . the effectiveness of [a] union." *Smith v. Ark. State Hwy. Emp., Local 1315*, 441 U.S. 463, 465 (1979).

The final two Civil-Rights-era cases discussed in the lower court opinion—*Shelton v. Tucker*, 364 U.S. 479 (1960), and *NAACP v. Button*, 371 U.S. 415 (1963)—also do not support the Unions and Circuit Court's sweeping theory of associational rights. *See* Op. at 16–17. *Shelton* is yet another compelled disclosure case. The Supreme Court invalidated an Arkansas law requiring public-school teachers to disclose, as a condition of their employment, the organizations to which they had belonged or contributed within the preceding five years. *Shelton*, 364 U.S. at 480. Once again, the NAACP furnished extensive "evidence to indicate that fear of public disclosure [wa]s neither theoretical nor groundless." *Id.* at 488. The Supreme Court also emphasized that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Id.* at 487. The case does not articulate a broad prohibition of laws that might "hinder" the "effectiveness" of an organization. Op. at 19.

Button is equally distinguishable. That case involved a Virginia statute that flatly prohibited the NAACP's longstanding practices of recruiting plaintiffs to challenge school segregation and of hiring attorneys to litigate the cases. *See* 371 U.S. at 426. In light of the "intense resentment and opposition of the politically dominant white community of Virginia" to the Civil-Rights movement, the Court determined that the statute's broad-form "curtail[ment of] group activity leading to litigation may easily become a weapon of oppression" against racial minorities. *Id.*

at 436. The Court specifically held that the NAACP's litigation practices "are modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit." *Id.* at 428–29. Again, the case does not broadly condemn any law that might "discourage membership in lawful organizations and that impair their lawful missions." Op. at 14.

B. The Circuit Court Failed To Address *Janus*.

The Circuit Court concluded that the Act's ban on agency fees "seriously hampers the [U]nions' ability to recruit new members and retain old ones," *id.* at 18, but that conclusion is at odds with the Supreme Court's analysis in *Janus* of exclusive-agency unions for federal employees. For federal employees, "a union chosen by a majority vote is designated as the exclusive representative of all employees, but federal law does not permit agency fees." *Janus*, 138 S. Ct. at 2466 (citing 5 U.S.C. §§ 7102, 7111(a)). Nonetheless, "nearly a million federal employees—about 27% of the federal work force—are union members." *Id.* (citing *Labor Force Statistics from the Current Population Survey*, BUREAU OF LABOR STATISTICS (Table 42) (2017)). With respect specifically to the Postal Service, whose employees are not required to pay an agency fee, *see* 39 U.S.C. §§ 1203(a), 1209(c), over 400,000 employees are union members. *See Union Membership and Coverage Database from the Current Population Survey*, UNIONSTATS.COM, https://tinyurl.com/y5drqtod (last visited May 29, 2019). The Circuit Court asserted that *Janus* supported its conclusion that "the agency fee ban on private sector unions is unlawful," Op. at 44, but nowhere addressed or attempted to reconcile the Supreme Court's conclusion that federal-employee unions continue to exist and operate even without agency fees.

III. The Decision Below Ignored The Many Reasons That Might Have Rationally Motivated The West Virginia Legislature To Pass The Act.

In holding that the Act violates the Unions' due process rights under the West Virginia Constitution, the Circuit Court found the Act's ban on agency fees to be "arbitrary" and without any possible rational basis. Op. at 25. That holding, too, misses the mark.

The West Virginia Legislature had more than enough justification for passing the Act. One reason is to vindicate their constituents' rights to free association by prohibiting exclusive-agency unions from forcing nonmembers to subsidize union activities. Yet another reason is the virtuous cycle of benefits that flow from such legislation. Studies have shown that by eliminating compulsory agency fees, right-to-work laws lead to more employment opportunities, higher levels of personal income, and population growth.

Employment opportunities. The principal benefit of right-to-work laws is greater in-state employment opportunity. Firms in non-right-to-work States "earn lower profits," "invest less," and have less flexible workplace schedules. J. Sherk, *Right to Work Increases Jobs & Choices*, HERITAGE FOUND. (2011), https://tinyurl.com/yxg5fkju (last visited May 29, 2019). In contrast, "[r]ight-to-work [S]tates are much more attractive for business investment." *Id.* Consistent with the basic economic principle that "States that attract more investment should create more jobs," *id.*, "[e]mployment has grown more rapidly in [right-to-work S]tates compared to non-[right-to-work S]tates," *The Economic Impact of Right to Work Policy in West Virginia*, W. VA. UNIV. COLLEGE OF BUS. & ECON. at v (2015); *see also*

B. Collins, *Right to Work Laws: Legislative Background & Empirical Research*, CONGRESSIONAL RESEARCH SERV. at 11 (2014) ("Aggregate employment growth [i]s clearly greater in states with RTW laws.").

In fact, aggregate employment growth in States with right-to-work laws has not simply outpaced the growth in States without them—it is roughly double. According to one study, "employment grew by a factor of 5.7 in RTW states between 1950 and 2014, nearly double the rate in non-RTW states." *The Economic Impact of Right to Work Policy in West Virginia* at v. According to another, "aggregate employment growth in the 22 states that had still not adopted Right to Work legislation as of [2018] grew by just 4.2 percent [since 2007], or less than half the Right to Work average." S. Greer, *Right to Work States Hold 2:1 Job-Growth Advantage Over Forced Union States*, CNS NEWS (2018), https://tinyurl.com/yxwd5y8e (last visited May 29, 2019). Yet another found that private-sector employment in particular "grew by 27 percent in RTW states between 2001 and 2016, compared to 15 percent in non-RTW states." J. Eisenach, *Right-to-Work Laws: The Economic Evidence*, NERA ECON. CONSULTING at 2 (2018); *see also Job Growth Twice as Fast in Right to Work States*, NAT. RIGHT TO WORK COMM. (2015), https://tinyurl.com/y5tdnqfq (last visited May 29, 2019) (describing similar figures for 2004 to 2014 private-sector payroll employment).

Correspondingly, States with right-to-work laws have consistently enjoyed lower unemployment rates. "On average, the annual unemployment rate in RTW states was 0.4 percentage points lower than in non-RTW states. In concrete terms, if

non-RTW states had had the same unemployment rate as RTW states in 2017, approximately 249,000 more people would have been employed." Eisenach, *Right-to-Work Laws* at 2.

Higher personal incomes. The accelerated growth in employment experienced by right-to-work States has, in turn, translated into higher incomes. There is considerable "evidence that RTW laws have a direct, positive effect on . . . personal income." *Id.* According to one study, from 1971 through 1990 "right-to-work laws boosted . . . real personal income annual growth by 0.9 percentage points." M. Hicks & M. LaFaive, *Economic Growth & Right-to-Work Laws*, MACKINAC CTR. FOR PUB. POLICY at 6 (2013); *see also* R. Vedder, M. Denhart, & J. Robe, *Right to Work & Indiana's Economic Future*, IND. CHAMBER OF COMMERCE at 13–14 (2011) (finding a roughly one percent increase in the growth rate of per capita personal income since 1977 for states passing right-to-work laws). These economic gains have been no less pronounced in recent years, with "[p]ersonal income in RTW states r[i]s[ing] over ten percentage points more than in non-RTW states [in the 15 years] between 2001 and 2016, 39 percent versus 26 percent." Eisenach, *Right-to-Work Laws* at 2. In terms of raw dollars, scholars have estimated that "residents of states that still lacked Right to Work protections as of 2012 had a [personal] income that year $2,500 to $3,500 lower than would have been the case had forced unionism been prohibited in their state since 1977." S. Greer, *Research Bolsters Economic Case for State Right to Work Laws*, NAT'L INST. FOR LABOR RELATIONS RESEARCH (2017), https://tinyurl.com/y3vb4cft (last visited May 29, 2019).

Population growth. Finally, commentators have noted that the greater employment opportunities and personal incomes resulting from right-to-work laws have had a positive impact on state population growth, an oft-cited measure for overall economic health. *See, e.g.*, M. Hicks, M. LaFaive, & S. Devaraj, *New Evidence on the Effect of Right-to-Work Laws on Productivity & Population Growth*, 36 CATO J. 1, 114 (2016) ("These results indicate that RTW legislation has a positive and statistically significant influence on population growth."); Hicks & LaFaive, *Economic Growth* at 6 (same); R. Vedder & J. Robe, *An Interstate Analysis of Right to Work Laws*, COMPETITIVE ENTER. INST. at 14 (2014) ("Right to work states have experienced above-average population growth.").

Specifically, growth rates in right-to-work States have been approximately one percent higher since 1970 than the growth rates in States without such legislation. *See* Hicks, LaFaive, & Devaraj, *New Evidence* at 115. As a result, the population in right-to-work States doubled during the same period, as compared to the modest population increase of 25.7 percent in non-right-to-work jurisdictions. *See* R. Vedder, *Right-to-Work Laws: Liberty, Prosperity, and Quality of Life*, 30 CATO J. 1, 172–73 (2016); *see also* Hicks & LaFaive, *Economic Growth* at 4 (reporting 39.8 percent population growth in right-to-work States and only 16.7 percent growth in non-right-to-work States from 1990 to 2011). From 1970 to 2008, the total percentage of Americans living in right-to-work states increased from 28.5 percent to nearly 40 percent. *See* Vedder, *Right-to-Work Laws* at 172.

The benefits flowing from relatively stronger population growth have long been documented. "From more job opportunities and higher incomes, to better social mobility and improved quality of life, states with growing populations have substantial advantages over those without." A. Laffer, S. Moore, & J. Williams, *Rich States, Poor States*, AM. LEG. EXCH. COUNCIL at 3 (2016); *see also id.* ("This growth [ ] folds back into the economy, further enhancing the opportunities that businesses and entrepreneurs are able to offer in the market."). Increased state political power—in terms of congressional seats and electoral votes—also follows. *See id.* And States with higher levels of population growth are more likely to avoid, in the long term, "a slowing down of the economic system, reduced opportunities for investment, . . . fewer new schools, increasing disproportion between savings and investment, [ ] fewer opportunities for youth . . . , and [ ] increased unemployment." A.H. Feller, *Population—A Problem for Democracy*, 50 YALE L.J. 949, 949–50 (1941).

In sum, a right-to-work law can be highly beneficial to state economies, providing the West Virginia Legislature more than a reasonable basis for passing the Act and its ban on compulsory agency fees. The Circuit Court's holding that the Act is an "arbitrary" law that lacks any rational basis fails even the slightest scrutiny.

CONCLUSION

For the foregoing reasons, and those advanced by Petitioners, this Court should reverse the judgment below.

Respectfully submitted,

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