In the West Virginia Supreme Court of Appeals
No. 19-0298

Patrick Morrisey, in his official 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.

BRIEF OF *AMICI CURIAE* DONNA HARPER, THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, THE CARDINAL INSTITUTE FOR WEST VIRGINIA POLICY, AND AMERICANS FOR PROSPERITY IN SUPPORT OF THE PETITIONERS AND ARGUING FOR REVERSAL OF THE CIRCUIT COURT'S DECISION

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INTEREST OF *AMICI CURIAE*[1]

Donna Harper is a West Virginia private-sector employee currently employed by the Tygart Center in Fairmont, West Virginia ("the Tygart Center") within a bargaining unit exclusively represented by Chauffeurs, Teamsters & Helpers Local Union No. 175 ("Local 175"). Under S.B. 1, the West Virginia Workplace Freedom Act, W. Va. Code § 21-5G-1 *et seq.*, Local 175 cannot force Harper to pay "agency fees" as a condition of her employment. *See* W. Va. Code § 21-5G-2 (2). Harper is not a member of Local 175, and does not wish to support it financially. Without the West Virginia Workplace Freedom Act's protection, Harper would be compelled by the current collective bargaining agreement—even as a nonmember of Local 175—to pay forced fees to Local 175 in order to keep her job at the Tygart Center.

The National Right to Work Legal Defense and Education Foundation, Inc. ("Foundation") is a charitable, legal aid organization formed to protect the rights of ordinary working men and women from infringement by compulsory unionism. Through its staff attorneys, the Foundation aids individual employees who have been denied or coerced in the exercise of their right to refrain from collective activity. The Foundation has an interest in defending West Virginia workers and their freedom from compulsory union fees.

The Cardinal Institute for West Virginia Public Policy ("Cardinal Institute") is a 501(c)(3) non-profit think tank that was founded in West Virginia in late 2014. The Cardinal Institute is dedicated to researching, developing, and communicating effective free-market economic public policies for West Virginia. The Cardinal Institute has an interest in this proceeding as it has researched and opined on the economic benefits of right-to-work policies.

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[1] Pursuant to Rule 30(e)(5) of the West Virginia Rules of Appellate Procedure, counsel for Harper, the Foundation, Cardinal Institute, and AFP certify that this brief was not authored by a counsel for a party in either whole or part, and no such counsel or party made a monetary contribution specifically intended to fund the preparation or submission of this brief.

Americans for Prosperity ("AFP") recruits, educates, and mobilizes citizens to build a culture of mutual benefit where people succeed by helping others improve their lives. Such a culture can only flourish in a society that honors freedom of speech and association. Right-to-work laws ensure no one is forced to associate with a union and pay for its expression just to be able to secure employment. Giving workers power over their paychecks ensures that union membership is truly voluntary, facilitating more open and mutually beneficial relationships between workers, unions, and employers.

Pursuant to authority granted by the West Virginia Rules of Appellate Procedure, Rule 30(a), *Amici* submit this brief to bring to the Court's attention controlling U.S. Supreme Court and federal authority in support of Petitioners' appeal, and urge this Court to reverse the Circuit Court's decision striking down S.B. 1, because that decision is based on fundamental mistakes in the application of federal law.

INTRODUCTION

The Kanawha County Circuit Court's decision striking down the West Virginia Workplace Freedom Act ("S.B. 1"), W. Va. Code § 21-5G-1 *et seq.*, should be reversed. The Circuit Court's decision contradicts clearly established U.S. Supreme Court, federal court, state court, and National Labor Relations Board ("NLRB") precedent, which allows states to ban all compulsory union fees. The Circuit Court's decision is based on an invalid interpretation of the West Virginia Constitution, construing Article III to guarantee Plaintiffs West Virginia AFL-CIO, *et al.* ("the Unions"), state constitutional ***rights*** to "union security" agreements and agency fees. This interpretation of the West Virginia Constitution is inconsistent with the First Amendment to the U.S. Constitution and preempted by the National Labor Relations Act (the "NLRA"), 29 U.S.C. § 151 *et seq*. The Circuit Court's decision also rests on the invalid proposition that unions have a

right to collect agency fees as compensation for performing their duties as the exclusive representative. That ruling also contravenes U.S. Supreme Court, federal court, and NLRB precedent, which makes clear that state agency fee bans under NLRA Section 14(b) do not "take" union property and that unions are richly compensated by the powers they wield as exclusive representatives.

The Circuit Court's erroneous decision harms West Virginia workers who simply want to go to work and support their families without being compelled to subsidize a union. A right-to-work law secures the right of workers to decide whether or not to support a union financially. With West Virginia's adoption of right-to-work protections, this State achieved what a majority of other states have also done, and what Congress specifically authorized when passing NLRA Section 14(b): The State has banned making support of a union a condition of employment, whether it be through full formal membership, or the payment of agency fees. Each of the nation's twenty-seven right-to-work laws expressly or implicitly prohibits *all* compulsory union fees, even for collective bargaining. *See Sweeney v. Pence*, 767 F.3d 654, 663 (7th Cir. 2014) (listing states that have right-to-work language "substantially identical" to West Virginia's).

ARGUMENT

I. The Circuit Court's decision contradicts clearly established U.S. Supreme Court precedent allowing states to ban all compulsory union agency fees.

Contrary to decades of Supreme Court, other federal court, state court, and NLRB precedent, the Circuit Court concluded that West Virginia cannot ban compulsory union agency fees under NLRA Section 14(b). *See, e.g.*, *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn* (*Schermerhorn II*), 375 U.S. 96, 102-03 (1963); *Retail Clerks Int'l Ass'n, Local 1625 v.*

Schermerhorn (*Schermerhorn I*), 373 U.S. 746, 750-52 (1963).[2]

The U.S. Supreme Court and other courts have long held that Section 14(b) authorizes states to ban all agency fee requirements. *See, e.g.*, *Oil, Chem. & Atomic Workers v. Mobil Oil Corp.*, 426 U.S. 407, 416-17 (1976) ("While [NLRA] § 8(a)(3) articulates a national policy that certain union-security agreements are valid as a matter of federal law, § 14(b) reflects Congress' decision that any State or Territory that wishes to may exempt itself from that policy."). This Court has already affirmed that U.S. Supreme Court precedent is controlling on this issue:

> The United States Supreme Court has examined the interplay between Section 8(a)(3) and Section 14(b) and found that 'Congress left the States free to legislate' and adopt laws 'restricting the execution and enforcement of union-security agreements,' and even free to go so far as to 'outlaw' a union-security arrangement.

Morrisey v. West Virginia AFL-CIO, 239 W. Va. 633, 639, 804 S.E.2d 883, 889 (2017).

The Circuit Court's reasoning is based on a false distinction between state right-to-work laws that prohibit compulsory union "membership" and state right-to-work laws that ban compulsory "agency" fees. There is no such distinction. The U.S. Supreme Court interprets NLRA Section 8(a)(3)'s language allowing agreements that require union "membership" as a condition of employment to mean those agreements requiring "the payment of fees and dues." *Marquez v. Screen Actors Guild*, 525 U.S. 33, 36 (1998) (citing *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 742 (1963)); *see also Schermerhorn I*, 373 U.S. at 751.

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[2] *See Sweeney*, 767 F.3d at 660-61; *Local 514 Transp. Workers Union of Am. v. Keating*, 358 F.3d 743, 751 (10th Cir. 2004); *Plumbers Local 141 v. NLRB*, 675 F.2d 1257, 1260-62 (D.C. Cir. 1982); *Amalgamated Ass'n of St. Elec. Ry. Emps. v. Las Vegas-Tonopah-Reno Stage Line, Inc.*, 319 F.2d 783, 786-87 (9th Cir. 1963); *Mich. State AFL-CIO v. Callaghan*, 15 F. Supp. 3d 712, 720 (E.D. Mich. 2014); *Zuckerman v. Bevin*, 565 S.W.3d 580, 594-605 (Ky. 2018); *Fla. Educ. Ass'n v. PERC*, 346 So. 2d 551, 552 (Fla. Dist. Ct. App. 1977); *Indep. Guard Ass'n, Local No. 1 v. Wackenhut Servs., Inc.*, 522 P.2d 1010, 1012-13 (Nev. 1974); *Hughes Tool Co.*, 104 N.L.R.B. 318, 329 (1953); *Machinists Local 697 (Canfield Rubber Co.)*, 223 N.L.R.B. 832, 835 (1976); *Am. Postal Workers Union (U.S. Postal Serv.)*, 277 N.L.R.B. 541 (1985); *Furniture Workers, Local 282 (Davis Co.)*, 291 N.L.R.B. 182, 183 (1988).

U.S. Supreme Court precedent also makes clear that "fees and dues" means those fees that West Virginia prohibited in the Act, i.e., fees "used for collective bargaining, contract administration, and grievance adjustment activities." *Marquez*, 525 U.S. at 36 (citing *Commc'ns Workers of Am. v. Beck*, 487 U. S. 735, 745, 762-63 (1988)). Furthermore, the U.S. Supreme Court has explained: "[T]he agreements requiring 'membership' in a labor union [under Section 8(a)(3)] . . . are the same 'membership' agreements expressly placed within the reach of state law by § 14(b)." *Schermerhorn I*, 373 U.S. at 751; *accord id.* at 755 ("[Section] 14(b) subjects to state law the membership agreements, or their equivalent, which are permitted by § 8(a)(3)."); *Schermerhorn II*, 375 U.S. at 102-03; *Sweeney*, 767 F.3d at 659-61.[3] Accordingly, the Circuit Court is mistaken that the Supreme Court has "never addressed and certainly not upheld a ban on agency fees for private sector unions." Order at 13.

Thus, the Circuit Court's decision must be overturned because it disregards clear binding precedent from the U.S. Supreme Court and this Court, upholding state agency fee bans under Section 14(b).

II. The Circuit Court's interpretation of the West Virginia Constitution is inconsistent with the First Amendment to the U.S. Constitution.

The Circuit Court's decision is an invalid and unsupported interpretation of the West Virginia Constitution that impermissibly conflicts with the First Amendment to the U.S. Constitution. The West Virginia Constitution, Article I, Section 1, makes the U.S. Supreme Court's

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[3] The symmetry between Sections 8(a)(3) and 14(b) is apparent from the NLRA's text itself. Specifically, Section 14(b) states:

> Nothing in this subchapter shall be construed as authorizing the execution or application of *agreements 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.

29 U.S.C. § 164(b) (emphasis added).

First Amendment precedent binding on all West Virginia courts' interpretations of state constitutional provisions:

> We consider it unquestionable that if a provision of the Constitution of West Virginia is in conflict or inconsistent with one or more provisions of the Constitution of the United States, ***it is both the right and duty of this Court, when such a case is presented, to declare the provision of the state constitution to be invalid and unenforceable.***

Lance v. Bd. of Educ., 153 W. Va. 559, 563-64, 170 S.E.2d 783, 786 (1969), *rev'd on other grounds*, 403 U.S. 1 (1971) (emphasis added).[4]

The Circuit Court's interpretation of West Virginia Constitution, Article III creates affirmative union ***rights*** to "agency fees" under Sections 7, 9, 10, and 16. That interpretation is clearly inconsistent with the First Amendment and U.S. Supreme Court precedent.[5] *See also infra* at 11 n.12. The U.S. Supreme Court has definitively upheld state right-to-work laws like S.B. 1 against claims that they violate union speech, association, and due process rights, under the First and Fourteenth Amendments. *Lincoln Fed. Labor Union No. 19129 v. Nw. Iron & Metal Co.*, 335 U.S. 525, 530 (1949) ("Nothing in the language of the [Nebraska and North Carolina right-to-work] laws indicates a purpose to prohibit speech, assembly, or petition."); *Am. Fed'n of Labor v. Am. Sash & Door Co.*, 335 U.S. 538, 540-42 (1949). Consequently, the U.S. Supreme Court's decision in *Lincoln Federal* precludes the Circuit Court's construction of the West Virginia Constitution because a union's freedom of association does not guarantee that individual workers must associate with or support the union financially. *See Lincoln Fed.*, 335 U.S. at 530, 536-37;

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[4] *See also City of Fairmont v. Schumaker*, 180 W. Va. 153, 155, 375 S.E.2d 785, 787 (1988); *Pushinsky v. W. Va. Bd. of Law Examiners*, 164 W. Va. 736, 744, 266 S.E.2d 444, 449 (1980).

[5] For example, the Circuit Court held that S.B. 1's ban on the collection of agency fees from nonmember employees "violates the associational rights of unions and their members as protected by Article III, §§ 7 and 16 of the West Virginia Constitution." Order at 20-21.

see also Harris v. Quinn, 573 U.S. 616, 654 (2014) (recognizing a First Amendment interest for those who do *not* wish to support a union).

The Circuit Court attempts to evade the U.S. Supreme Court's holding in *Lincoln Federal* by arguing that the case "did not address the issues raised by a ban on agency fees." Order at 20. Despite the Circuit Court's supposition, unions have no constitutional right to guarantee that nonmembers associate with them, whether "membership" is used in the financial sense or in the most literal sense of forced affiliation. *See supra* at 4-5.[6] To the contrary, the U.S. Supreme Court has declared, "it is uncontested that it would be constitutional for [a state] to eliminate agency fees entirely." *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 184 (2007).[7] Furthermore, this Court has already recognized that "the constitutional freedom of association argument proffered by the Unions is nearly identical to the one rejected by the United States Supreme Court almost seven decades ago." *Morrisey*, 239 W. Va. at 640, 804 S.E.2d at 890 (citing *Lincoln Fed.*, 335 U.S. at 531).

The U.S. Supreme Court has repeatedly held that arrangements requiring nonmember employees to pay agency fees covering the costs of union services "represent[s] an 'impingement' on the First Amendment rights of nonmembers." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 302 (2012) (citing *Teachers v. Hudson,* 475 U.S. 292, 307, n.20 (1986). Most recently,

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[6] The Circuit Court misapplied precedent, ignoring the U.S. Supreme Court's definition of "membership" in the context of federal labor law and the NLRA, and, as a result, improperly limited the Supreme Court's holding in *Lincoln Federal*, which upheld state right-to-work laws banning compulsory "membership" requirements and emphatically rejected union arguments that such bans violated their constitutional rights. 335 U.S. at 536-37. The Circuit Court incorrectly concluded that *Lincoln Federal* had nothing to do with banning agency fees. *See* Order at 19-20, 28.

[7] S.B. 1's elimination of compulsory agency fees cannot violate the Unions' constitutional rights because the State is "under no obligation to aid the unions" in their political activities. *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009); *see also id.* at 358 (The First Amendment does not require the government "to assist others in funding the expression of particular ideas"); *see also Regan v. Taxation with Representation*, 461 U.S. 540, 549 (1983) ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right[.]").

the U.S. Supreme Court has held that "the First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay." *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2467 (2018) (footnote omitted); *see Knox,* 567 U.S. at 309 ("The government may not prohibit the dissemination of ideas that it disfavors, ***nor compel the endorsement of ideas that it approves.***") (emphasis added). And yet that is exactly what the Circuit Court does—it finds a state constitutional mandate for nonmember employees to pay compulsory agency fees to unions.

Not only is the Circuit Court's interpretation of Article III of the West Virginia Constitution inconsistent with the U.S. Constitution, but its decision forces the State of West Virginia to violate nonmembers' First Amendment rights. West Virginia cannot compel employees to subsidize the speech of private-sector unions by judicial fiat, constitutional interpretation, or by other state action. *See Janus*, 138 S. Ct. at 2464 ("Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns.") (emphasis in original) (citations omitted); *United States v. United Foods, Inc.*, 533 U.S. 405, 415 (2001) (striking down a provision compelling the subsidization of commercial speech).[8] By adopting the Circuit Court's ruling, this Court would do exactly that—hold that the West Virginia Constitution compels nonmember employees to subsidize unions through payment of agency fees in violation of their First Amendment rights.

The Circuit Court misunderstands the proposition that the West Virginia Constitution protects rights more vigorously than does the U.S. Constitution, and misapplies speech and

[8] Thus, it makes no difference that the instant matter does not involve public-sector unions bargaining with the government. West Virginia cannot force individuals to subsidize private speech.

association principles.[9] The Circuit Court turns the First Amendment on its head, giving unions rights under Article III of the West Virginia Constitution to force nonmember employees to support unions financially in clear violation of those employees' First Amendment rights. *See* Order at 20-21. The Circuit Court's decision should be reversed because it is inconsistent with the First Amendment.

III. The Circuit Court's interpretation of the West Virginia Constitution is preempted by the National Labor Relations Act.

The Circuit Court's decision also is preempted by the NLRA because it guarantees unions an affirmative state constitutional right to collect agency fee payments in contravention of federal law. As a general matter, "States may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986); *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 243 (1959) (footnote omitted) ("When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting."); *see Mobil Oil Corp.,* 426 U.S. at 417 (citing *Algoma Plywood Co. v. Wisc. Bd.*, 336 U.S. 301, 314 (1949)).[10]

In other words, any state action is preempted if it "either frustrates the purpose of the national legislation or impairs the efficiency of those agencies of the Federal government to discharge the duties, for the performance of which they were created," or stands "as an obstacle to

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[9] The Circuit Court observed that the U.S. Constitution "provide[s] a floor for interpretation of the Article III protections in §§ 7 and 16," and "'the West Virginia Constitution offers limitations on the power of the state' to curtail the rights of association and speech 'more stringent than those imposed on the states by the Constitution of the United States.'" Order at 17-18 (quoting *Pushinsky*, 164 W. Va. at 745, 266 S.E.2d at 449) (citations omitted).

[10] West Virginia courts have also held that "[w]hen a dispute is subject to NLRB jurisdiction, a state is preempted from acting to enforce private or public rights." *United Maint. & Mfg. Co. v. United Steelworkers of Am.*, 157 W. Va. 788, 798, 204 S.E.2d 76, 83 (1974); *Woodruff v. Bd. of Trs. of Cabell Huntington Hosp.*, 173 W. Va. 604, 607 n.2, 319 S.E.2d 372, 375 n.2 (1984).

the accomplishment and execution of the full purposes and objectives of Congress." *Nash v. Fla. Indus. Comm'n*, 389 U.S. 235, 240 (1967) (citations and internal quotation marks omitted); *see also Local Transp. Workers v. Keating*, 212 F. Supp. 2d 1319, 1325 (E.D. Okla. 2002).

The Circuit Court's decision—predicated on rulings that the West Virginia Constitution grants unions state constitutional rights to compulsory agency fee payments—is preempted by federal law because it expands Section 8(a)(3), exceeds state authority under Section 14(b) (which only allows states to enact ***more restrictive*** regulations of "union security" agreements), and otherwise interferes with the NLRA's overall regulatory scheme.

A. The Circuit Court's decision impermissibly expands NLRA Section 8(a)(3) and exceeds NLRA Section 14(b) authority by establishing that private-sector unions have state constitutional rights to compulsory agency fee payments.

Contrary to the Circuit Court's decision, Section 14(b) of the NLRA does not give states the broad power to legislate in the field of private-sector labor law, or allow states to otherwise "qualify," modify, or expound on Section 8(a)(3) in any way they see fit. *See* Order at 37; *see also Schermerhorn II*, 375 U.S. at 104-05.[11] Section 14(b) only authorizes states to ban "union security" agreements "requiring membership in a labor organization as a condition of employment." 29 U.S.C. § 164(b). To that extent, Section 14(b) is a one way street, allowing states to create fewer "union security" obligations than federal law allows, but not more:

> The Court has made clear, however, that under Section 14(b), 'the States are left free to pursue their own *more restrictive* policies in the matter of union-security agreements'.... Section 14(b) does not permit the States to sanction a more expansive union-security arrangement than permitted by federal law.

Local Union No. 435 of the Int'l Bhd. of Teamsters (Mercury Warehouse & Delivery Serv.), 327 N.L.R.B. 458, 460 (1999) (quoting *Algoma Plywood*, 336 U.S. at 313-14) (emphasis in *Mercury*

[11] *See also Mich. State AFL-CIO v. Callaghan*, 15 F. Supp. 3d 712, 718 (E.D. Mich. 2014) (citing *Stricker v. Swift Bros. Constr. Co.*, 260 N.W.2d 500, 503 (S.D. 1977)).

Warehouse); *see Albertson's/Max Food Warehouse*, 329 N.L.R.B. 410, 411 (1999) (footnote omitted) ("We think it is evident that through Section 14(b), Congress intended to authorize only those state laws that are more restrictive of union-security agreements than Federal law, and thus, Federal law will take precedence over any less restrictive state law.").

The Circuit Court's decision guarantees unions a state constitutional right to execute "union security" agreements and to extract compulsory agency fees from nonmembers, which *is* undoubtedly more than "what § 8(a)(3) authorizes." Order at 37. In doing so, the Circuit Court insists that its decision does not interfere with federal labor law because Section 8(a)(3) allows unions and employers to agree to "union security" requirements. Order at 37–38. However, the Circuit Court misunderstands the effect of its ruling, as it incorrectly rules that unions have an *entitlement* to fees under West Virginia's Constitution. The decision cannot be read in any other coherent way. The Circuit Court considers that unions' state constitutional rights are deprived whenever unions are prohibited from collecting agency fees.[12] Under the Circuit Court's interpretation, guaranteeing that unions can always collect compensation for their labor and services is a necessary condition to safeguarding unions' purported state constitutional rights.[13]

This interpretation that unions must be able to collect compensation for their labor and services is preempted because it promises more than Section 8(a)(3) allows. Section 8(a)(3) merely

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[12] *See, e.g.*, Order at 21, 24-26, 28 (ruling that preventing unions from demanding forced fees "severely burdens the union's associational rights and those of its members," "constricts a union's ability to recruit and retain members," and "assesses a penalty on members for joining because their dues will include a premium to pay for the services provided to the freeloaders"); *id.* at 21 ("[p]rohibiting a union from collecting appropriate fees from nonmembers effects a taking of property; it takes money from the union and derivatively, from its members, and essentially gives it to the free riders."); *id.* at 24-25 ("[t]he new law will require unions and union officials to work, to supply their valuable expertise, and to provide expensive services *for nothing*."); *id.* at 26 (unions "cannot, consistently with Article III, § 9, be forced to expend their services and resources on behalf of individuals who do not pay for them").

[13] For example, merely assuring that unions have the opportunity to negotiate for agency fees does not satisfy that condition because employers could still reject union demands for agency fees and prevent them from getting compensation for their services, even after lengthy, good faith negotiations.

allows "union security" agreements and agency fees. Nothing in the NLRA—not even Section 8(a)(3) itself—establishes a union's *right* to "union security" agreements or compulsory fees. To the contrary, the NLRA's statutory text makes it clear that "union security" agreements and compulsory fees are the *exception* rather than the rule.[14] The NLRA expressly gives *employees* Section 7 rights to refrain from supporting unions with compulsory agency fees. Section 8(a)(3) provides a limited exception to employees' Section 7 right to refrain, allowing unions and employers to negotiate "union security" clauses only where they are not otherwise prohibited. It is *illegal* to require employees to support a union financially unless an employer agrees to a forced dues clause. 29 U.S.C. §§ 157, 158(a)(3), 158(b)(2).

Even when a union and employer negotiate a "union security" clause, unions are not guaranteed fees under the NLRA. Employees can deauthorize a "union security" clause through a deauthorization election, thereby removing the ability of a union to collect compulsory fees. 29 U.S.C. § 159(e).[15] Thus, the Circuit Court's decision establishing union state constitutional entitlements to compulsory fees from non-members is preempted because it creates a direct conflict between the West Virginia Constitution and the NLRA.

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[14] NLRA Sections 7, 8(a)(3), 8(b)(2), and 14(b), also demonstrate that "union security" clauses and agency fees are the exception rather than the rule. NLRA Section 7 provides employees the right to "refrain" from "assist[ing]" a union "*except to the extent* that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in [Section 8(a)(3)]." 29 U.S.C. § 157 (emphasis added). Section 8(a)(3) makes it unlawful for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization," except as provided for in a contractual forced dues clause. 29 U.S.C. § 158(a)(3). An employer denies an employee's Section 7 rights, and violates Section 8(a)(3)'s prohibition, if it requires the employee to assist a union financially in the absence of a valid forced dues clause in the collective bargaining agreement. *See Radio Officers' Union v. NLRB*, 347 U.S. 17, 39-42 (1954). Section 8(b)(2) also makes it unlawful for a union to cause an employer to violate Section 8(a)(3)'s prohibition. And Section 14(b) provides states with the explicit authority to ban any such forced fees altogether. *See* 29 U.S.C. § 164(b).

[15] Moreover, even with a valid "union security" clause, a union cannot lawfully collect fees unless it complies with a host of procedural requirements required by *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), and its progeny.

B. The Circuit Court's decision interferes with the NLRA's regulatory scheme.

The Circuit Court's rulings giving unions state constitutional rights to agency fees create an untenable situation in which it is unconstitutional under the West Virginia Constitution for the *United States* Congress to: (1) prohibit unions from receiving compensation for their duties under the NLRA as an exclusive representative; (2) allow employers to reject "union security" agreements; and (3) give employees rights to remove forced dues clauses through a deauthorization election. This absurd result would clearly run afoul of the Supremacy Clause.

1. The Circuit Court's decision interferes with federal labor law principles establishing that unions are not always entitled to compensation for performing their duties as exclusive representatives.

The Circuit Court's determination that exclusive representatives cannot be forced to carry out their duty of fair representation to nonmember employees without compensation interferes and conflicts with federal pronouncements regarding exclusive representatives and the duty of fair representation. *See* Order at 18-19, 26. Federal law mandates that unions, as exclusive representatives, must fulfill their duty of representation to nonmembers—even when unions cannot exact agency fees from them—and unions do not have any right to compensation from nonmembers for carrying out those duties. *See, e.g.*, *Hughes Tool Co.*, 104 N.L.R.B. 318, 324-25 (1953) (finding that "a union could not assess nonmembers for costs arising from contract negotiations for the latter are the exclusive duty and prerogative of the certified representative which the nonmember minority is both entitled to and bound under.").[16] For the Circuit Court to hold otherwise contradicts established federal labor law principles.

[16] *See also Furniture Workers, Local 282 (Davis Co.)*, 291 N.L.R.B. 182, 183 (1988); *Am. Postal Workers Union (U.S. Postal Serv.)*, 277 N.L.R.B. 541, 543 (1985); and *Machinists Local 697 (Canfield Rubber Co.)*, 223 N.L.R.B. 832, 835 (1976).

In *NLRB v. North Dakota*, 504 F. Supp. 2d 750 (D.N.D. 2007), the U.S. District Court for the District of North Dakota decided that a provision of North Dakota law requiring nonmember employees to pay unions for any expenses incurred in representing them in grievance procedures was preempted.[17] The federal district court recognized the law, like the Circuit Court's decision here, as an attempt "to inject an agency fee requirement into every collective-bargaining agreement negotiated in the state." *Id.* at 757. The court held the law preempted because "[c]harging non-union members the cost of providing a service which union members get for free (even though they pay dues) has a coercive effect on non-members in the exercise of their [Section 7] right . . . to refrain from joining a union" protected by NLRA Sections 7 and 8(b)(1)(A), 29 U.S.C. §§ 157, 158(b)(1)(A). *Id.* at 757-58.

Federal labor law governs whether unions are entitled to receive compensation for fulfilling the duty of fair representation they owe to nonmembers. "[I]t is *federal* law that provides a duty of fair representation . . . " *Int'l Union of Operating Eng'rs Local 370 v. Wasden*, 217 F. Supp. 3d 1209, 1223 (D. Idaho 2016) (quoting *Sweeney*, 767 F.3d at 666) (emphasis in *Sweeney*); *see also Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149, 1158 (10th Cir. 2000) ("Where a plaintiff's allegations fall within the scope of the duty of fair representation, federal labor law governs and ordinarily preempts any state-law claims based on those allegations.") (citations omitted). The Circuit Court's unilateral pronouncement that unions are entitled under the West Virginia Constitution to receive compensation from nonmembers for performing their duties as the exclusive bargaining representative directly contradicts federal labor law, and is a similar

[17] In challenging the provision, the NLRB argued that the fee requirement was in "actual conflict" with the NLRA in that it required unions to charge fees to nonmember employees "outside the scope of state action allowed under Section 14(b) of the NLRA, 29 U.S.C. § 164(b)." *Id.* at 753.

attempt to "inject an agency fee requirement" that is beyond the scope of the State's authority. *See North Dakota*, 504 F. Supp. 2d at 757-59.

The U.S. Supreme Court has rejected the so-called "free rider" theory adopted by the Circuit Court and has agreed, as a general principle of federal labor law, that unions are not entitled to agency fees as compensation for representing nonmember employees. *Janus*, 138 S. Ct. at 2467 ("[A]voiding free riders is not a compelling interest" justifying agency fees.); *see also id.* at 2466-67 (quoting *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in judgment in part and dissenting in part) ("'[P]rivate speech often furthers the interests of nonspeakers,' but 'that does not alone empower the state to compel the speech to be paid for.'").[18]

In ruling as it did, the U.S. Supreme Court in *Janus* considered whether it mattered that unions are statutorily required to represent nonmember employees' interests, and concluded that unions are already adequately compensated by virtue of their exclusive representation. *See id.* (quoting *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 401 (1950)) ("Even without agency fees, designation as the exclusive representative confers many benefits...[and] 'results in a tremendous increase in power' of the union."'). The U.S. Supreme Court recognized that the exclusive representative's "benefits greatly outweigh any extra burden imposed by the duty of providing fair representation for nonmembers." *Id.* at 2467. Thus, "the [U.S.] Supreme Court's analysis of the 'free-rider problem' in its recent decision in *Janus* . . . conclusively refutes . . . the Unions' claim that they will be compelled to provide services without compensation." *Zuckerman v. Bevin*, 565 S.W.3d 580, 601-02 (Ky. 2018) (citation and footnote omitted).

[18] Congress was fully aware of what the Circuit Court pejoratively refers to as the "free rider" problem when it established Section 14(b), and yet it did so anyway. The *Sweeney* and *Wasden* courts both rejected "free rider" arguments, saying "If the [unions] believe that [the state's right-to-work law] will create a new or unexpectedly severe free-rider problem, they may address those views to Congress." *Wasden*, 217 F. Supp. 3d at 1222 (quoting *Sweeney*, 767 F.3d at 664-65).

The Circuit Court's real objection is not with the right-to-work law passed by the West Virginia legislature, but rather with Congress's overall federal regulatory scheme, which contemplates that states can and will ban compulsory agency fees while also requiring unions to fulfill their duty of fair representation to nonmembers, as West Virginia did here. *See Davenport*, 551 U.S. at 184-85, 187. Because federal law envisions this very result, the Circuit Court erred in intruding into the exclusive province of the NLRA and deciding to the contrary that unions are always entitled to compensation for performing their duties to nonmembers.[19]

2. The Circuit Court's decision conflicts with NLRA Sections 8(a)(5) and 8(d) by compelling employers to agree to every union demand for "union security."

The Circuit Court's decision also interferes with NLRA Sections 8(a)(5) and 8(d), because it effectively prohibits employers from ever refusing to enter into a collective bargaining agreement without a "union security" clause. Sections 8(a)(5) and 8(d) allow employers to reject a "union security" clause during bargaining and refuse to enter into contracts that require employees to support a union financially. 29 U.S.C. §§ 158(a)(5) and 8(d); *see NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937) (the NLRA "does not compel agreements between employers and employees. It does not compel any agreement whatever."); *Nat'l Steel & Shipbuilding Co.*, 324 N.L.R.B. 1031 (1997); *see also Erie Brush & Mfg. Corp. v. NLRB*, 700 F.3d 17 (D.C. Cir. 2012) (holding employer bargained to a lawful impasse when it refused to agree to a "union security" clause).[20] However, under the Circuit Court's interpretation of the West Virginia Constitution, unions have a state constitutional right to compel employers to incorporate "union

[19] Notably, an "actual conflict between state and federal law exists…when state law '***stands as an obstacle*** to the accomplishment and execution of ***the full purposes and objectives*** of Congress.'" *North Dakota,* 504 F. Supp. 2d at 754 (quoting *Brown v. Hotel & Rest. Emps. & Bartenders*, 468 U.S. 491, 501 (1984)) (emphasis added).

[20] Moreover, where a state adopts a right-to-work law under Section 14(b), the law converts "union security" into a "non-mandatory" subject of bargaining. *See Plumbers Local 141*, 252 N.L.R.B. 1299, 1299 n.1 (1980).

security" clauses into their agreements. Contrary to the Circuit Court's characterizations, its decision does not "leave a union and management free to decide whether to assess agency fees." Order at 38.

3. The Circuit Court's decision conflicts with NLRA Section (9)(e) by overriding employees' right to rid themselves of "union security" requirements.

The Circuit Court's decision also interferes with NLRA Section 9(e), which allows employees, whose union and employer have agreed to a "union security" clause, to rid themselves of the clause and pay *nothing* to their exclusive representative through deauthorization elections. 29 U.S.C. § 159(e); *see Great Atl. & Pac. Tea Co.*, 100 N.L.R.B. 1494 (1952). In holding that a prohibition on collecting agency fees from nonmember employees "effects a taking of property," the Circuit Court effectively prevents employees from voting "union security" requirements out of their contracts and brings the West Virginia Constitution in direct conflict with the NLRA's deauthorization procedures. *See* Order at 21.

The Circuit Court's "house of cards" must fall under the weight of federal preemption. Constitutional provisions guaranteeing unions the right to impose "agency fees" create a union entitlement inconsistent with and contradictory to federal law. The Circuit Court's decision unwinds the NLRA's statutory framework, which in Sections 14(b), 9(e), 8(a)(5) and 8(d) specifically contemplates that states, employees, and employers can completely divest unions of any claim to agency fees. Although states can decide to adopt or not adopt right-to-work laws, their state courts cannot re-write the federal law under the guise of applying their own constitutions. Thus, the Circuit Court's decision should be overturned as preempted.

IV. The West Virginia Workplace Freedom Act does not "take" property from unions in violation of Article III, Section 9 of the West Virginia Constitution.

The Circuit Court erred in deciding that S.B. 1 takes union property without just compensation because: (A) S.B. 1 does not "take" any property at all; (B) the Unions are not entitled to the "property" they claim; and (C) the Unions receive just compensation as a matter of federal law for performing their duties as exclusive bargaining representative. The Circuit Court's ruling that West Virginia's right-to-work law is an unconstitutional taking under Article III, Section 9 of the West Virginia Constitution is a legal outlier devoid of any legal support whatsoever.[21] *See* Order at 21.

A. S.B. 1 does not "take" any property at all.

1. Federal law establishes that prohibiting unions from collecting costs for performing their duties as exclusive bargaining representatives does not "take" union property.

The Circuit Court mistakenly concluded that S.B. 1 "takes" union property in labor and services performed as part of the exclusive representative's statutory duties. The Circuit Court recognizes that "unions have a choice not to assume the mantel of exclusive bargaining representative," but the court adds, "once they do, they cannot, consistently with Article III, § 9, be forced to expend their services and resources on behalf of individuals who do not pay for them." Order at 26. Federal precedent resoundingly rejects that proposition: Prohibiting unions from collecting costs they incur for representing nonmembers as exclusive bargaining representatives does not constitute a taking of private property. *See, e.g., Plumbers Local 141 v. NLRB*, 675 F.2d 1257, 1262 (D.C. Cir. 1982) (rejecting the suggestion that unconstitutional takings questions are

[21] As this Court has previously noted, neither the Unions nor the Circuit Court have offered any "authority that any other appellate court in this country has examined a taking challenge to a right to work law and accepted a similar argument." *Morrisey,* 239 W. Va. at 642, 804 S.E.2d at 892.

raised by a state prohibiting a union from collecting costs it incurs for nonmembers whom it represents by virtue of its exclusive bargaining status); *see also supra* at 13-16.

2. Any purported "taking" is done by the NLRA's regulatory regime and the federal duty of representation, not the West Virginia legislature's enactment.

The Circuit Court's ruling ignores the fact that the purported "taking" of the Unions' labor and services is done by the federal duty of representation, not by S.B. 1. Right-to-work laws do not "take" property from unions—they merely preclude unions from taking fees from employees to cover the costs of performing the duty of fair representation. *See IUOE v. Schimel*, 863 F.3d 674, 679 (7th Cir. 2017) (citing *Sweeney*, 767 F.3d at 665-66) (holding that because the NLRA, not state law, requires the duty of fair representation, the right-to-work law did not "take" property from the union by merely banning compulsory fees); *Wasden*, 217 F. Supp. 3d at 1223; *Zoeller v. Sweeney*, 19 N.E.3d 749, 753 (Ind. 2014).

Similarly, S.B. 1 does not require unions to provide labor and services for nonmember employees without compensation. Rather, S.B. 1 merely states, "[a] person may not be required, as a condition or continuation of employment, to ... [p]ay any dues, fees, assessments or other similar charges, however denominated, of any kind or amount to any labor organization." W. Va. Code § 21-5G-2. The duty of fair representation—and the corresponding duty to represent nonmember employees even absent agency fee payments—arises out of the exclusive representation regime provided for in the NLRA. *See Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 86-87 (1989).

Thus, the proper target for the Circuit Court and Unions' objections is the NLRA, which authorizes both a union's exclusive representation privilege and its concomitant duty to represent nonmembers. *See Wasden*, 217 F. Supp. 3d at 1223 (quoting *Sweeney*, 767 F.3d at 666) ("[T]he 'proper remedy' would be to strike down the federal law imposing on all unions the duty of fair

representation, 'in right to work states and non-right to work states alike,' rather than striking down Idaho's right to work law."). Forcing nonmember employees to pay for an NLRA-mandated duty of fair representation cannot remedy the fundamental issue that the Unions allege violates their constitutional rights—their duty of fair representation under federal law. Only by striking down *exclusive bargaining* would unions be relieved of the alleged "burden" of representing all employees in a unit, thus ending the purported constitutional violations of which the Unions complain.[22]

3. Voluntary participation in a regulatory scheme is not a "taking."

The Circuit Court's decision disregards the important fact that the purported "taking" arises from the Unions' *voluntary* participation in the NLRA's regulatory scheme. Obligations arising from voluntary participation in a regulatory scheme are not takings under Article III, Section 9 of the West Virginia Constitution. *State ex rel. Lambert v. Cty. Comm'n*, 192 W. Va. 448, 459, 452 S.E.2d 906, 917 (1994). The Unions acquire the federal duty to provide labor and services to nonmember employees only after voluntarily participating in the NLRA's regulatory scheme and successfully *competing* to become certified as exclusive bargaining representatives. *See Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 202 (1944).

Contrary to the Circuit Court's representations, unions may choose to decline exclusive representative status. The Circuit Court rebukes federal principles, arguing—without citing any legal authority for support—that a union's decision to decline exclusive representative status is tantamount to a decision to "cease its existence." Order at 25. This is nonsense. Nothing forbids a

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[22] Apart from enjoining and striking down NLRA Section 9(a), the Circuit Court's only other proper recourse would have been to require the *government* to compensate the Unions. *See Burch v. Nedpower Mount Storm, LLC*, 220 W. Va. 443, 454, 647 S.E.2d 879, 890 (2007) (quoting *Sexton v. Pub. Serv. Comm'n*, 188 W. Va. 305, 310, 423 S.E.2d 914, 919 (1992) ("Equitable relief is not available to enjoin an alleged taking of private property for a public use ... when a suit for compensation can be brought against the sovereign subsequent to the taking.").

union from seeking to negotiate only for those employees who choose to become union members and pay union dues. *See Consol. Edison Co. of N.Y., Inc. v. NLRB*, 305 U.S. 197 (1938) (acknowledging that under the NLRA, unions can enter into "members only" agreements with employers and represent only their voluntarily paying members.).

Unions have no right to become exclusive representatives[23] nor must they do so to exist. Rather, federal law allows unions to undertake *voluntarily* a process to seek certification for exclusive representative status.[24] And it is common knowledge that employees band together in unions for purposes other than collective bargaining, such as lobbying, even when they do not become exclusive representatives.

4. West Virginia's agency fees ban does not "take" property because a Section 14(b) ban is an accepted condition of the exclusive representation scheme and part of the Unions' "property" entitlement.

The Circuit Court's conclusion that the Unions' labor and services are "taken" is also a misunderstanding of what the Unions' "property" actually is. "Property" is correctly viewed as a bundle of rights, and must be viewed as a whole. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 327 (2002). Exclusive representation is a package of extraordinary legal powers, which comes complete with other obligations and conditions integral to the NLRA's regulatory scheme, such as the duty of fair representation and states' authorizations to ban compulsory fees under Section 14(b). The Unions' so-called "property" is the exclusive

[23] The Circuit Court's decision incorrectly assumes that unions are entitled to become exclusive representative. "The Union[s'] . . . obligation to represent all employees in a bargaining unit is optional; it occurs only when the union[s] elect[] to be the exclusive bargaining agent ...." *Zoeller*, 19 N.E.3d at 753.

[24] The Circuit Court also complains that this decision to forego exclusive representation is a false "choice." Order at 25-26. Whatever complaints the Circuit Court might have with Congress's design of the NLRA's regulatory regime, the court has no legal basis or authority to re-write federal law with respect to a union's powers, privileges, and concomitant duties as an exclusive bargaining representative.

representation entitlement in its entirety, including the extraordinary legal powers unions acquire and wield when they become an exclusive representative.

The possible Section 14(b) ban on compulsory union fees is nothing more than an accepted condition of the regulatory scheme, and a strand of the "property" entitlement that a union acquires as exclusive representative. *See also Tahoe-Sierra Pres. Council*, 535 U.S. at 327 ("[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking.") (quoting *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979)); *see Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978) (similar holding). Thus, the Circuit Court's reliance on *Jewell v. Maynard*, 181 W. Va. 571, 383 S.E.2d 536 (1989), and *State ex rel. Partain v. Oakley*, 159 W. Va. 805, 227 S.E.2d 314 (1976), is unfounded because one component of a union's "property" rights is that states can ban compulsory fees altogether.[25]

B. The Unions have no entitlement to the "property" they claim.

The Circuit Court's reasoning is also flawed because it fails to recognize that the Unions are improperly claiming a "vested" property interest in *future* fees from nonmembers that will result from *future* contracts. The Unions have no vested claim to future fees performed for future labor. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) (where disputed "property" interests are not even "part of [the property owner's] title to begin with," there can be no taking.); *see also Morrisey*, 239 W. Va. at 641, 804 S.E.2d at 891 (quoting *Davenport*, 551 U.S. at 185

[25] The Circuit Court's finding that the Unions "demonstrated that it costs money to negotiate and administer a contract," Order at 21, is irrelevant. Under well-established principles of federal labor law, the Unions must show that they incurred additional "costs" from representing nonmembers. To make this showing, they must prove that their approach to negotiating and administering a collective bargaining agreement "would be ... different if [they] were not required to negotiate on behalf of the nonmembers as well as members." *Harris*, 573 U.S. at 645 n.18. The Unions never made that showing. Even if the Unions expend time and resources to benefit their members, that nonmembers are also affected by those activities is not an adequate justification for an agency fee that impinges on workers' rights. *Id.* at 643 ("The mere fact that nonunion members benefit from union speech is not enough to justify an agency fee. . . .").

("unions have no constitutional entitlement [under the First Amendment] to the fees of nonmember-employees.")); *see also Lincoln Fed.*, 335 U.S. at 529-33.

The West Virginia Constitution also requires that "[a] [constitutionally protected] property interest . . . must derive from private contract or state law, and must be more than the unilateral expectation [.]" Syl. Pt. 3, *Orteza v. Monongalia Cty. Gen. Hosp.*, 173 W. Va. 461, 462, 318 S.E.2d 40, 41 (1984) (quoting *Major v. DeFrench*, 169 W. Va. 241, 251, 286 S.E.2d 688, 695 (1982)). This Court has expressly held that no such property right exists because, "[i]n the absence of a collective bargaining agreement, unions have only a 'unilateral expectation' of receiving fees from nonunion employees." *Morrisey*, 239 W. Va. at 641-42, 804 S.E.2d at 891-92. The Circuit Court's ruling that unions have a constitutional property right to agency fees defies this Court's prior holding in this very case.[26]

C. The Unions receive ample compensation for their services.

The Circuit Court similarly fails to recognize that unions, as a matter of law, are richly compensated for performing their duties as exclusive representatives. Contrary to the Circuit Court's characterizations, the exclusive representative's compensation from the substantial benefits accruing to it from NLRA Section 9's grant of exclusive bargaining power is a well-established principle of federal labor law, not merely "some ephemeral claim."[27] As the Seventh

[26] In doing so, the Circuit Court incorrectly analogizes union labor and services to the interest on IOLTA accounts in *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 172 (1998), where the interest "taken" belonged to the *owners* of the principal. Unions have no vested interest in future fees: Employers may lay off employees, move, go out of business, or refuse to sign a contract with a "union security" clause, thereby depriving unions of nonmembers' fees. Employees could vote to decertify and remove the union as exclusive representative or vote out the "union security" clause from the collective bargaining agreement in a deauthorization election. *See* 28 U.S.C. §§ 159 and 159(e). There is no basis for any union to believe that exclusive representative status guarantees it a perpetual flow of compulsory fees from unwilling employees.

[27] No evidentiary showing at the Circuit Court level could have changed the analysis, which is controlled by legal precedent. This was not a question of fact for which the State must proffer evidence. *See* Order at 34-36.

Circuit stated in *Sweeney*, it "seems disingenuous not to recognize that the Union's position as a sole representative comes with a set of powers and benefits as well as responsibilities and duties." 767 F.3d at 666.

Exclusive representative status vests a union with extraordinary legal authority to speak and contract for all bargaining unit employees, whether they support the union or not. *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). As the U.S. Supreme Court stated over sixty-five years ago: "[t]he loss of individual rights for the greater benefit of the group results in a tremendous increase in the power of the representative of the group—the union." *Douds*, 339 U.S. at 401.[28]

"Even without agency fees, designation as the exclusive representative confers many benefits. . . . These benefits greatly outweigh any extra burden imposed by the duty of providing fair representation for nonmembers." *Janus*, 138 S. Ct. at 2467; *see Schimel*, 863 F.3d at 676 (quoting *Sweeney*, 767 F.3d at 666) ("Although the NLRA requires unions to provide fair representation to non-paying members of the bargaining unit, the unions are 'justly compensated by federal law's grant to [unions] the right to bargain exclusively with ... employer[s].'"); *Zuckerman*, 565 S.W.3d at 602-03 ("exclusive designation fully and adequately compensates unions for free-riders"); *Zoeller*, 19 N.E.3d at 753 (unions, as exclusive bargaining representatives, are "justly compensated by the right to bargain exclusively with the employer."). The NLRB has affirmed the same principle:

> [A union] has a duty of fair representation because it gains a thing of value by being allowed the power of exclusive representation

[28] Whatever burden the Unions sustain by virtue of the duty of fair representation is more than offset by the benefits they receive as exclusive bargaining representative, a status which unions have willingly sought despite the risk that states might enact right-to-work laws under Section 14(b) that prohibit them from extracting forced fees from all employees within their grasp. *See Janus,* 138 S. Ct. at 2467 (noting that "designation as exclusive representative is avidly sought" by unions even when "they are not given agency fees.").

> over all employees in the bargaining unit whether the employees agree or not, and that value is sufficient compensation for whatever services the [union] perform[s] for employees.

Int'l All. of Theatrical Stage Emps., 363 N.L.R.B. No. 148, at *2 (2016).

Thus, the Circuit Court erred in disregarding federal labor law principles establishing that unions are richly compensated for performing duties acquired as exclusive bargaining representatives.

CONCLUSION

For the foregoing reasons, the Circuit Court's decision should be reversed and vacated, and S.B. 1 should be upheld. The Circuit Court rejected seventy years of U.S. Supreme Court, other federal court, state court, and NLRB precedents which uniformly allow states to ban all compulsory union agency fees. Moreover, the Circuit Court's central premise—that unions have state constitutional rights to "union security" agreements and agency fees—is preempted under the NLRA and cannot be reconciled with First Amendment precedent.

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