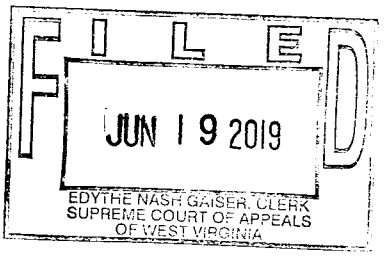
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
No. 19-0298



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

AMICUS CURIAE BRIEF OF THE MACKINAC CENTER FOR PUBLIC POLICY IN SUPPORT OF PETITIONERS' BRIEF AND REVERSAL OF THE CIRCUIT COURT DECISION BELOW

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INTEREST OF AMICUS CURIAE MACKINAC CENTER FOR PUBLIC POLICY IN SUPPORT OF PETITIONERS

The Mackinac Center for Public Policy is a Michigan-based, nonprofit, nonpartisan research and educational institute, advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization, founded in 1988.[1]

Michigan recently became a right-to-work state via legislation passed in 2012, which became effective in March 2013. The Mackinac Center has played a prominent role in studying and litigating issues related to mandatory dues and fees claimed by unions, and its amicus curiae brief was cited in the majority opinion in *Janus v American Federation of State, County, and Municipal Employees, Council 31, et al.,* 586 U.S. __, 138 S. Ct. 2448 (2018), an opinion related to this matter.

I. SUMMARY OF ARGUMENT

The Plaintiffs in the underlying matter ("Respondents") have asserted that right-to-work laws, as authorized by federal law and adopted by West Virginia through its "Workplace Freedom Act," work a taking against them. This, despite the fact that "Right-to-Work" laws have been the federal law of the land for private-sector employees since 1947 with the enactment of the Taft-Hartley Act, and these laws have been in place in many states since that time, and even prior to 1947. No court has found this federal labor law or its state-exercised enactments to constitute a taking. A taking is the government's extraction of valuable property from a specific and distinct

[1] In accordance with Rule 30(e)(5) of the *West Virginia Rules of Appellate Procedure,* Counsel for the Mackinac Center for Public Policy hereby discloses that no other party or counsel for a party to this matter has authored this brief, in whole or in part, nor has any other person other than the amicus curiae or its members made any monetary contribution to such brief. Pursuant to Rule 30(a), all parties have consented to the filing of this amicus curiae brief by the Mackinac Center for Public Policy.

party or parties, and then using that property for a public purpose. Generally, a taking that transfers this property to another private party is not allowed. What the Respondents fail to account for, however, is that under their logic, the entire federal labor law is a kind of taking that transfers valuable property from the employer companies and transfers it to the unions. The 1947 Taft-Hartley Act, which amended the National Labor Relations Act of 1935, allowed states to opt for these right-to-work laws. If this Court is to revisit the Taft-Hartley Act's allowance in the guise of attacking the state implementation as an impermissible taking, then we ought to go back further and also evaluate the original 1935 National Labor Relations Act ("NLRA"), also called the "Wagner Act," which created the current federal private-sector labor law, and evaluate the entirety of the NLRA in the context of takings. In so doing, it becomes apparent that, under the Respondents' definition and analysis, the valuable economic rights that are conferred upon the unions for their benefit constitute a significant taking. Even if the subsequent Taft-Hartley Act and right-to-work laws somewhat reduced the value of what the NLRA originally took and gave to unions, the federal labor law still remains a net benefit to private-sector unions. So, if the Respondents want to return the labor law to pre-1947 because they believe that right-to-work laws constitute a taking of their property, then the courts ought to look back a little further to 1935 and the NLRA and apply the same takings analysis to the Wagner Act as well. Although it is not up to this Court to determine the validity of the Wagner Act or the Taft-Hartley Act, this analysis may inform this Court's decision as to whether the benefits conferred or denied by right-to-work constitute a prohibited taking as the Respondents claim.

II. REVIEW OF SOME RELEVANT LAW

A. The Wagner Act's "Industrial Democracy" was designed to give unions substantial control over the employer companies.

Although little used now, the term "industrial democracy" was the language used to describe the labor policy that undergirded the 1935 NLRA/Wagner Act, which is named after its architect and sponsor, Senator Robert F. Wagner of New York. Senator Wagner stated the purpose of the Act was to create "democracy in industry as well as in government; that democracy in industry means fair participation by those who work in the decisions vitally affecting their lives and livelihood; and that ... workers ... can enjoy this participation only if allowed to ... bargain collectively through representatives of their choosing."[2] This purpose has been echoed by numerous commentators. Archibald Cox, an authoritative commentator and public official whose labor law text has been one of the most used, described the NLRA's purpose of transferring some controlling authority from the company to the employees through the union. The unions could now exercise many of the powers that had been inherent in the employer companies: "The most important measure of the value of collective bargaining in its governmental aspect, however, is the degree of democracy it introduces into industrial life. It aims ... to establish a rule of law and enable the individual employee to share in industrial government. ... But while the condition is not widespread, there are symptoms of the danger that collective bargaining may, in curtailing the once-unrestricted authority of the employer, substitute a no less arbitrary power on the part of union officials."[3]

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[2] Steven L. Willborn, *Industrial Democracy and the National Labor Relations Act: A Preliminary Inquiry*, 25 Boston College Law Review 4, 725 (1984).

[3] Archibald Cox, *Some Aspects of the Labor Management Relations Act*, 1947, 61 Harv. L. Rev. 274, 276-7 (1948).

The "Findings and Policies" of the NLRA specifically note that its intent included "restoring equality of bargaining power between employers and employees." 29 USC § 151. It did this by transferring powers and rights of the employer companies to the employees through the unions.

B. Control over a company is a valuable property right of the companies' owners, usually exercised through stock ownership.

It is axiomatic that in West Virginia, as with all states, a corporation is controlled by the owners of its shares or stock through its directors and officers acting as fiduciaries for those stockholders.[4] "The law is clear, according to Petitioners, that absent fraud, the majority shareholders of a corporation have the uncontrollable right to manage the affairs of a corporation. We stated this well-recognized tenet of corporate law in syllabus point one of *Smiley v. New River Co.*, 72 W. Va. 221, 77 S.E. 976 (1913)." *State ex rel. Smith v. Evans*, 209 W. Va. 340, 344, 547 S.E.2d 278 (2001). And, of course, our federal court system has followed the states in this obvious point that controlling a company entails buying enough of an interest, usually through shares, to exert control. "Doubtless these stockholders could lawfully acquire, by individual purchases, a majority, or even the whole, of the stock of the reorganized company, and thus possibly obtain its ultimate control ..." *Pearsall v. Great Northern Ry. Co.*, 161 U.S. 646, 672-3 (1896).

The degree of control is, in the end, determined by what someone pays in purchase for such control. This is true nationwide, and especially in West Virginia, where there is a 1958 constitutional amendment on the matter:

> So to interpret the amendment does not deprive any stockholder of any of his voting rights for the reason that ***he has only such voting rights as the kind or class of stock purchased by and issued to him gives him under the charter provisions of the corporation***, and he accepts the stock with knowledge of and subject to such terms and

[4] There are, of course, many forms of company ownership and control—partnerships, LLCs, etc.—yet all come down to ultimate control resting with its owners.

> limitations. No person is required to purchase stock of any kind in any corporation and when he does so voluntarily he accepts the stock subject to the limitation imposed relating to the powers conferred with respect to the election of directors or managers of the corporation.

Diamond v. Parkersburg-Aetna Corp., 146 W. Va. 543, 557; 122 S.E.2d 436 (1961) (emphasis added). And, so, again, control of a corporation—even partial control—is something of value that must be purchased for value given. Our United States Supreme Court notes that this is a key characteristic that makes an instrument a "stock" such that it is covered under federal securities laws: "We identified those characteristics usually associated with common stock as (i) the right to receive dividends contingent upon an apportionment of profits; (ii) ***negotiability***; (iii) the ability to be pledged or hypothecated; (iv) ***the conferring of voting rights in proportion to the number of shares owned***; and (v) ***the capacity to appreciate in value***." *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 686 (1985). (Emphasis added.)

C. Control is given to unions through the provisions of the NLRA and the interpretive opinions.

Although control of a company is a valuable commodity, and the purchase of stock is how someone typically acquires an interest in controlling a company, the NLRA was designed to give a certified union a substantial amount of control over a company without making commensurate payment to the shareholders of the company. An entire treatise would be required to fully describe the ways in which the NLRA cedes elements of control of private-sector companies to the unions, but the following are some of the key provisions that allow the unions to step into the shoes of companies' owners and exercise the control that had been previously reserved for the shareholders alone:

1. Once a union is certified, the employer loses a key ability to choose whom it does business with. Sec. 9(a) of the NLRA provides that the employer must bargain with the certified

union, and only with the certified union. Furthermore, the employer cannot decline to bargain with the certified union. Refusal to bargain with the certified union is an unfair labor practice under Sec. 8(a)(5). Deciding when, where, and whom to bargain with is an inherent power of the owners of a company, and a degree of this right has been taken and transferred to the union.

2. Once a collective bargaining agreement is reached, the employer cannot deal with any other labor representative for three years. This "contract-bar" rule states that once a contract is reached, the union has three years to bar another labor representative from trying to represent the employees. *General Cable Corp. and United Electrical, Radio & Machine Workers of America*, 139 NLRB 1123 (1962). That this right conferred upon the unions is a valuable asset can be seen by comparing it to a hypothetical where another supplier to the employer company sought such an exclusive arrangement. Compare, for instance, if a hypothetical information technology ("IT") supplier were given such power by statute. Not just that their contract would be of a set duration—as most contracts are—but that the employer could not even meet or discuss matters with another IT supplier during the terms of the contract. Such exclusivity is possible and might be considered reasonable by the parties, but the exclusivity would have to be bargained and paid for by the IT supplier that sought to block all its competitors. Here, the exclusivity is given to the unions by law at the employer's expense.

3. The employer must surrender part of its ability to make large and impactful decisions. To cite just two instances: (1) It cannot relocate plants without first bargaining with the union unless the new location would operate in what the courts deem to be a substantially different manner. *United Food & Commercial Workers, Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993). (2) It cannot contract out for tasks, such as maintenance, if such tasks were once performed by its employees. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964).

These are just two examples of powers inherent to the owners of the business, which the unions have been given at least partial control over at the expense of the owners.

4. A union's ability to force the employer to bargain over terms and conditions of employment is so broad that it has been found by the courts to cover not just the major decisions discussed in the preceding paragraph, but also virtually every minutiae of the workplace. Even questions of how to stock vending machines and what foods the cafeteria serves have been found to be an item that the employer must bargain over. *See Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979). While the employer is not forced to agree with the union, it cannot avoid bargaining over these matters. The owners cannot simply manage the company without first placating the union. Even if it is a matter that the union does not really care a great deal about, it is leverage in bargaining over other matters that are of importance to the union.

5. Upon the expiration of a collective bargaining agreement, the employer must act as though the agreement were still in effect. It must maintain the status quo in terms of work conditions until a new collective bargaining agreement has been reached or the parties are at an impasse that the courts and the National Labor Relations Board ("NLRB") will recognize. *Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539 (1988).

Again, compare this situation to contracting with our hypothetical IT supplier. Even upon the expiration of their contract, the employer company must continue to honor the terms of the expired contract and, at the same time, cannot contract with anyone else. A very valuable economic right has been transferred to the IT supplier, and it has come at the expense of the employer company.

6. Even when bargaining on a particular mandatory[5] issue has reached an impasse, the employer cannot unilaterally make a change to that issue in the workplace. It must, absent extenuating circumstances, first reach an impasse on *all* issues. Furthermore, the employer not only must bargain when, where, with whom, and over what—whether or not it wants to—but it must, by law, strengthen the union's bargaining position. The employer must bargain so as to not make the union look like "a paper tiger" in front of the employees. "If by deadlocking on a particular issue the employer is free to implement his proposal with regard to that issue, he signals to the workers that the union is a paper tiger." *Duffy Tool & Stampings v. NLRB*, 233 F.3d 995, 998 (2000). Again, any other supplier or business contracting with the employer company would have to pay dearly for such rights as are provided to the union, by law, at the employer's expense.

7. The employer's bargaining is subject to scrutiny for "bad faith" by the NLRB. While most contractual arrangements require good faith,[6] the NLRA requires more than the UCC's "honesty in fact and the observance of reasonable commercial standards of fair dealing." W. Va. Code § 46-1-201(b)(20). The NLRA's Sec. 8(d) requirement to bargain in good faith has been interpreted by the courts to mean that the employer must engage in give-and-take, and where it does not "give" it can be found to be bargaining in bad faith. The courts will look to the bargaining proposals, and not just the party's conduct, to make its determination. "[S]ometimes, especially if the parties are sophisticated, the only indicia of bad faith may be the proposals advanced and adhered to." *NLRB v. Wright Motors, Inc.*, 603 F.2d 604, 609 (7th Cir. 1979). The entire concept

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[5] There are different categories of bargaining subjects—mandatory, permissive, and prohibited. Most items involved in bargaining fall into the "mandatory" category that encompasses any subjects that "settle an aspect of the relationship between the employer and employee." *Allied Chem. & Alkali Workers Local I v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971).

[6] See, for example, the Uniform Commercial Code, West Virginia Code § 46-1-101 et seq., which has been incorporated in West Virginia. *Public Citizen, Inc. v. First Nat. Bank in Fairmont,* 198 W. Va. 329, 334, 480 S.E.2d 538, 543 (1996).

of "good faith" in the NLRA is intended to require that the employer strengthen the union's position at the employer's own expense. As Archibald Cox described the evolution of the NLRA's interpretation: "It was not enough for the law to compel the parties to meet and treat without passing judgment on the quality of the negotiations. ... As long as there are unions weak enough to be talked to death, there will be employers who are tempted to engage in forms of bargaining without the substance. ... [In shaping the interpretation of the NLRA] both the NLRB and the courts were seeking primarily to advance the policies protecting unions and compelling recognition. ... We are drawn to the conclusion, therefore, that the conventional definition of good-faith bargaining as a sincere effort to reach an agreement goes beyond the statute."[7]

Again, this requirement can be compared to the employer company's duties to our hypothetical IT supplier or other business partner. While the employer company must always adhere to the "honesty in fact and observance of reasonable commercial standards," it is not required to strengthen the IT supplier's position or compensate for the IT supplier's weakness by giving up its own prerogatives or bargaining positions.

D. Transferring control away from a company is a taking.

Normally, transferring ownership control away from the owners of a company constitutes a taking. "To say that a railroad corporation must continue its operations indefinitely, regardless of the consequences to the stockholders, would in effect, in a case like this, permit the entire exhaustion of the property by its use. ***It would be a taking of the private property of the company for public use without compensation.***" *Moore v. Lewisburg & R.E. Ry. Co.*, 80 W. Va. 653; 93 S.E. 762 (1917) (emphasis added).

[7] Archibald Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1412-6 (1958).

E. The Taft-Hartley Act allows states to choose to implement right-to-work laws.

In 1947, the 1935 NLRA was substantially amended by the Labor Management Relations Act, more commonly called the Taft-Hartley Act. Of importance here is the fact that this federal labor law grants, to states, the ability to become a right-to-work state. Or, rather, explicitly does not prohibit them from doing so. Section 14(b), being 29 U.S.C. § 164(b), provides:

> (b) [Agreements requiring union membership in violation of State law] Nothing in this Act 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.

That is, a state may prohibit agreements requiring that an employee join or support a union. West Virginia took advantage of this federal law and became a right-to-work state in 2016 via Senate Bill 1, now codified as West Virginia Code §§ 21-1A-3, 21-1A-4 and 21-5G-1 to -7.

F. Unions are required to represent all bargaining unit members equally.

The crux of the Respondents' argument is that they are required by law to serve and represent all employees who are included within the bargaining units represented by the union—both dues-paying members, as well as those who choose not to join and pay dues or fees. This "duty of fair representation" was first recognized by the United States Supreme Court in *Steele v. Louisville & NPR,* 323 U.S. 192 (1944). There, a railroad union, which was predominantly white and, by its constitution, banned African-American members, sought "to amend the existing collective bargaining agreement in such manner as ultimately to exclude all Negro firemen from the service." *Id.* at 195. This change would have prevented African-American members of the bargaining unit from being in line for any promotions. *Id.* The union also bargained other proposals that were racially discriminatory. *Id.* at 195-96. When layoffs occurred, the union replaced more senior African-American firemen with less senior white ones. *Id.* at 196.

The Supreme Court indicated that if the railroad union were allowed to discriminate based on race, constitutional issues could arise. This was because:

> [T]he representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights.

Id. at 198. However, the Supreme Court held that the language of the Railway Labor Act prevented the need to address any constitutional issues. It held that under the terms of the act, a "labor organization chosen to be the representative of the craft or class of employees ***is thus chosen to represent all of its members, regardless of their union affiliations or want of them***," *id.* at 200 (emphasis added), and, further, that a designated representative is "***responsible under the law to act for all employees . . . those who are not members of the represented organizations, as well as those who are members***." *Id.* at 201 (internal citations omitted, emphasis added).

Eventually, the duty of fair representation was also recognized under the NLRA. "Their statutory obligation to represent all members of an appropriate unit requires them to make an honest effort to serve the interests of all of those members, without hostility to any." *Ford Motor Co. v. Huffman,* 345 U.S. 330, 337 (1953).

In another case where a railroad union was discriminating against African-American employees, *Conley v Gibson,* 355 U.S. 41 (1957), the Supreme Court indicated that the duty of fair representation was not merely limited to bargaining a fair collective bargaining agreement, but, rather, to all aspects of employment that the employee had lost control over by virtue of the union's representation:

> The bargaining representative's duty not to draw 'irrelevant and invidious' distinctions among those it represents does not come to an abrupt end ... with the making of an agreement between union and employer. Collective bargaining is a continuing process. Among

> other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. ***The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement.*** A contract may be fair and impartial on its face yet administered in such a way, with the active or tacit consent of the union, as to be flagrantly discriminatory against some members of the bargaining unit.

Id. at 46 (footnote omitted and emphasis added).

In *Humphrey v Moore,* 375 U.S. 335 (1964), the Supreme Court again discussed the union's duty of fair representation and its obligations to all employees in the bargaining unit, and not just those who pay dues or fees:

> The undoubted broad authority of the union as exclusive bargaining agent in the negotiation and administration of a collective bargaining contract is accompanied by a responsibility of equal scope, the responsibility and duty of fair representation. ***By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially.*** The exclusive agent's obligation to represent *all* members of an appropriate unit requires (it) to make an honest effort to serve the interests of *all* of those members, without hostility to any * * * and its powers are subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Id. at 342 (internal citations and quotation marks omitted and emphasis added).

III. ARGUMENT

The discussion of the law above shows how the NLRA and the interpretive decisions take control away from the owners of private-sector companies. We need not decide here whether this is a good public policy, nor whether the employer company receives value in return from the NLRA's structure and provisions. All we need to consider is whether the law transfers to Respondents and other unions valuable economic rights and property at the expense of the employer companies and their owners. A review of the literature shows that the commentators

appear to be in full agreement that the NLRA does just that in order to level the playing field. While the unions still may not have as much economic power as the company, their hands have been strengthened considerably by the NLRA at the employer companies' expense. Consider the previous abbreviated list of valuable rights that are transferred from the employer companies' owners to the unions: The ability to bargain with the party of one's choosing; The ability to withdraw from bargaining at will; The ability to even speak with any other representative; The ability to block or alter management decisions large and small; The ability to bind the company to terms of the expired contract until bargaining reaches an impasse; and, The ability to use its bargaining power without transferring some of that power to an adversarial party.

Consider the previously discussed hypothetical IT supplier and if those rights, which the NLRA transfers to the unions, were obtainable for the IT supplier—would those be valuable to the supplier? The right to exclude all other suppliers of that service. The right to prevent the employer company from disengaging in bargaining with it. The right to block or alter crucial management decisions. The ability to make the employer company abide by the terms of an expired contract. All bargaining subject to second-guessing by a body designed to be favorable to the IT supplier under a standard of good-faith bargaining that is more stringent than what is generally applicable to commercial dealings. Any objective observer would say that valuable economic rights have been taken and transferred to the IT supplier.

It is highly unlikely that any employer company would ever agree to cede such control to an outside private entity. But if it did agree to any of these things, it would only do so for compensation. And that is the point—the rights given to the unions under the NLRA are something that an outside party, without help from the NLRA, could only acquire in one of two ways. First, by paying to obtain it from the employer company in a bargain for which it would give value. Or,

second, by buying a quantity of stock sufficient to have a voice in the governance of the company. All these rights have economic value and constitute a property right which our courts enforce. That economic value was taken from the employer companies' owners and transferred to the private-party unions. This was the purpose and structure of the NLRA—to give unions a "vote" in industrial democracy and equalize the power balance between the employer and employees by transferring the employers' economic and legal rights to the employees through the unions.

The Respondents here maintain that the West Virginia law, which adopted the right-to-work provisions of the Taft-Hartley Act, coupled with the duty to represent all members of the bargaining unit equally—both union members and non-members alike—constitutes a taking because the Respondents will be required to expend money to represent those non-members. But this is not the proper way to consider the question: If we are using a takings analysis, the NLRA works as a taking from the employer companies, which transfers valuable economic rights to unions. The Taft-Hartley Act and the West Virginia adoption of its right-to-work provisions slightly alters the original structure of the Wagner Act, but it still remains a net benefit for the unions. In exchange for the valuable benefits and rights discussed in this brief, all the unions have to do is demonstrate that it represents the workers in a bargaining unit and represents them equally. What the Respondents here are seeking to do is to get all the benefits and rights of the Wagner Act without the corresponding duty of fair representation to all unit members.

Even if the value of the benefits conferred upon unions by the NLRA is reduced by the right-to-work provisions, these benefits remain something of substantial value. A majority of the states are now right-to-work states. Nevertheless, unions operate in all 50 states. A recent survey found that unions collected annual dues of $8,595,485,222.00 and had assets of

$9,095,293,630.00.[8] Unions can quite obviously exist under the structure set up by the NLRA as currently modified by the Taft-Hartley Act.

Even if right-to-work laws took something of value from Respondents by requiring them to represent all bargaining unit members equally, this 'taking' is only a regulatory reduction of the benefits conferred upon unions. These benefits conferred upon unions remain substantial. Proof of this can be found in the fact that it is perfectly legal for the unions to avoid the duty of fair representation for all and organize and operate as "members-only" unions, which are not required to represent non-union member employees in the bargaining unit.[9] The disadvantage for the unions, if they become members-only unions, is that they then can no longer claim the NLRA duty-to-bargain benefits that they obtain from being the certified representative of *all* bargaining unit members. Clearly, the unions prefer the full net benefits conferred upon them by the NLRA, even with the requirement to represent all—for that is the path they choose. The imposition of representing all bargaining unit members does not outweigh the many benefits. No major union chooses to be a members-only union.

Further evidence that unions exist and thrive, even with the right-to-work impositions, is evident from the fact that unions continue to operate effectively in right-to-work states. Amicus curiae Mackinac Center researched the rate of private-sector union membership in right-to-work

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[8] *See* https://www.unionfacts.com/cuf/vitals (last accessed June 6, 2019).

[9] See, for instance, the Advice Memorandum of the NLRB Office of Legal Counsel dated June 22, 2006. "In the early enforcement of the Act, the Board held that an employer may recognize and bargain with a minority, members-only union, as long as the employer does not extend that union exclusive status. However, nothing in the statutory language, legislative history of the Act, or decisions interpreting the Act, establish an employer's duty to do so. To the contrary, it is firmly established under Board and Supreme Court cases that the duty to bargain under the Act is based on the principle of majority representation, to the exclusion of compulsory minority union recognition." This Advice Memo can be accessed here through the case page for the relevant case, *Dick's Sporting Goods*, 6-CA-34821: https://www.nlrb.gov/case/06-CA-034821.

states that allow employees to opt out of paying dues or fees to unions. This research was done for an amicus curiae brief to the U.S. Supreme Court in the case of *Janus v. American Federation of State, County, and Municipal Employees, Council 31, et al.*, 586 U.S. __, 138 S. Ct. 2448 (2018), supporting the petitioner, Mr. Janus.[10] As presented in amicus curiae's *Janus* amicus brief:

> [The dissenters in the Supreme Court's decision in *Harris v. Quinn*, 573 U.S. ___ (2014)] asserted that agency fees were necessary to adequately fund unions and provide the state with viable collective bargaining partners. Amicus Curiae's CPS-based calculations in *Friedrichs* [*v. California Teachers Association*, 578 U.S. ___ (2016)] indicated that agency fees were not necessary to adequately fund unions because state and local public sectors employees maintained a union membership rate of 80% in right-to-work environments. Such unions would presumably be viable bargaining partners no matter how the *Harris* minority might define viability.
> ***
> [Using the right-to-work state of Florida as one of several examples, which has only 10.5% of state employees using payroll deduction to pay union dues.] Yet Florida is hardly without public-sector unions. The Florida state employee union representing the most workers is Florida Public Employees Council 79 of the American Federation of State, County and Municipal Employees (AFSCME). In 2015, AFSCME Council 79 represented 47,653 state employees in its collective bargaining, and 1,369 of those employees had their dues withdrawn by the state.
> ***
> Thus, this union has been able to serve as an exclusive bargaining agent for tens of thousands of workers for around four decades without an agency fee. Nor is Council 79 unique. Florida's second largest union was Teamsters Local Union No. 2011, which represented 17,909 state employees, 4,436 of whom paid dues through payroll deductions. ...
> ***
> Florida has a number of smaller state employee unions as well. The Federation of Physicians and Dentists' physician unit was certified in 1989, and the union's nonprofessional unit was certified in 2002. The Florida Nurses Association was certified in 1977. The Florida State Fire Association became an exclusive bargaining agent in 2002. The Police Benevolent Associations' highway patrol, law

[10] The Mackinac Center for Public Policy's brief in support of the petitioner in *Janus* can be accessed here: https://www.mackinac.org/archives/2017/2017-12-06FinalBriefToSupremeCourt.pdf.

> enforcement, and special agent units were certified in 2007, 2000, and 1998 respectively. The State Employees Attorneys Guild was certified in 2004. All of these unions still represent state employee bargaining units.

Id. at 27-28 (footnotes removed).

The United States Supreme Court cited amicus curiae's brief in its *Janus* opinion, finding:

> The federal employment experience is illustrative. Under federal law, a union chosen by majority vote is designated as the exclusive representative of all the employees, but federal law does not permit agency fees. See 5 U. S. C. §§7102, 7111(a), 7114(a). Nevertheless, nearly a million federal employees—about 27% of the federal work force—are union members. The situation in the Postal Service is similar. Although permitted to choose an exclusive representative, Postal Service employees are not required to pay an agency fee, 39 U. S. C. §§1203(a), 1209(c), and about 400,000 are union members. Likewise, millions of public employees in the 28 States that have laws generally prohibiting agency fees are represented by unions that serve as the exclusive representatives of all the employees.[3]
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>
> [3]See National Conference of State Legislatures, Right-to-Work States (2018), http://www.ncsl.org/research/labor-and-employment/right-towork-laws-and-bills.aspx#chart; see also, *e.g.*, Brief for Mackinac Center for Public Policy as *Amicus Curiae* 27–28, 34–36.

Id., at 12 (footnotes except footnote three omitted.) The *Janus* court continued:

> First, it is simply not true that unions will refuse to serve as the exclusive representative of all employees in the unit if they are not given agency fees. As noted, unions represent millions of public employees in jurisdictions that do not permit agency fees. No union is ever compelled to seek that designation. On the contrary, designation as exclusive representative is avidly sought.
>
> Why is this so?
>
> Even without agency fees, designation as the exclusive representative confers many benefits. As noted, that status gives the union a privileged place in negotiations over wages, benefits, and working conditions. See §315/6(c). Not only is the union given the exclusive right to speak for all the employees in collective bargaining, but the employer is required by state law to listen to and to bargain in good faith with only that union. §315/7. Designation as exclusive representative thus "results in a tremendous increase in

> the power" of the union. *American Communications Assn.* v. *Douds*, 339 U. S. 382, 401 (1950).
>
> In addition, a union designated as exclusive representative is often granted special privileges, such as obtaining information about employees, see §315/6(c), and having dues and fees deducted directly from employee wages, §§315/6(e)-(f). The collective-bargaining agreement in this case guarantees a long list of additional privileges. See App. 138-143.
>
> ***These benefits greatly outweigh any extra burden imposed by the duty of providing fair representation for nonmembers.***

Janus, slip copy at 14-15 (footnotes omitted, emphasis added). Although *Janus* dealt only with public-sector unionization, as outlined in this brief, the benefits conferred upon unions in the private sector are likely even greater in value.

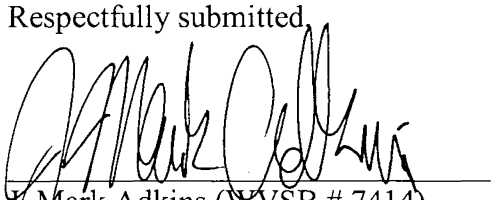
The continued existence of unions in right-to-work states shows that unions can operate and be effective under these conditions, and a substantial number of employees choose to remain dues-paying union members.

V. CONCLUSION

Any imposition placed on the Respondents to represent all bargaining unit members—including those who choose to refrain from supporting the union—is obviously slight and only a small, fractional reduction in the net benefits conferred upon unions by the NLRA. However, if these slight impositions are to be considered a taking, and we are going to look back to 1947 and revisit the duties imposed by the Taft-Hartley Act under a takings analysis, then we should go back only a few years further to 1935 and analyze all the benefits transferred under the NLRA from employer companies to the unions under the same takings analysis.

In so doing, it becomes apparent that unions are provided with substantial benefits, and even a slight reduction in these benefits under the federal regulatory scheme still favors the unions who continue to be given valuable property at the employer companies' expense.

Respectfully submitted,



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