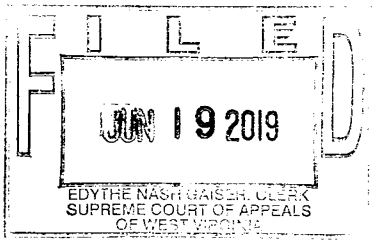
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 19-0298



PATRICK MORRISEY, et al.,
Defendants-Petitioners,
v.

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

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

AMICI CURIAE BRIEF OF THE WEST VIRGINIA CHAMBER OF COMMERCE AND THE WEST VIRGINIA MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITIONERS AND REVERSAL OF THE DECISION BELOW

The amici curiae, the West Virginia Chamber of Commerce and the West Virginia Manufacturers Association, appear in support of the State of West Virginia and support reversal of the Decision and Order of the Circuit Court of Kanawha County below:

WV AFL-CIO, et al. v. Governor James C. Justice, Governor of West Virginia, et al., Civil Action No. 16-C-959

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June 19, 2019

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I.
STATEMENT OF IDENTITY, INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE

The amici are the West Virginia Manufacturers Association ("WVMA") and the West Virginia Chamber of Commerce ("WVCC"). The amici represent businesses in the State of West Virginia who employ the majority of the private sector employees within the state. As such, the amici are interested in the subject matter of this case to preserve the reservation of First Amendment rights of their members' employees, to promote commerce, and to enhance employment opportunities within our state. The amici have received the consent of the Petitioners and the Respondents to file the instant brief consistent with W. Va. R.A.P. 30(a).[1]

II.
INTRODUCTION

The WVCC is a nonpartisan advocacy association of employers that seeks to facilitate the continued operation and expansion of business in the State of West Virginia. The WVCC's members come from every county in the state and employ more than half of West Virginia's workforce. Collectively, the WVCC's members constitute a major portion of the engine which drives West Virginia's economy. In facilitating the continued operation and expansion of existing businesses, and while also pursuing new businesses to locate in our state, the WVCC consistently advocates for public policies that improve West Virginia's economic environment. The WVCC's objective is to build a business climate that promotes development that is sufficient to sustain employment in West Virginia, while simultaneously allowing certainty for employers.

[1] Consistent with W. Va. R.A.P. 30(e)(5), the amici represent that no counsel for any party authored any portion of this brief and that no party, nor the undersigned counsel, made a financial contribution to fund the preparation or submission of this brief.

Established in 1915, the WVMA is a trade association dedicated to supporting the interests of manufacturing. With nearly 200 members statewide, the WVMA represents the quality and diversity of manufacturing in the Mountain State. Through policy development, advocacy, a focus on workforce preparedness, and providing a strong industry network, the WVMA works to improve the health and well-being of manufacturing in West Virginia.

The amici jointly supported the passage of the West Virginia Workplace Freedom Act ("Act").[2] The Act passed in both chambers of the state legislature in 2016, was vetoed by then Governor Earl Ray Tomblin, and the Governor's veto was overridden by the legislature. The Act took effect on July 1, 2016. However, in August 2016, the Circuit Court of Kanawha County enjoined the Act concluding it was likely unconstitutional. In September of 2017, this Court vacated the lower court's injunction and encouraged the lower court to promptly enter a final order in conformance with its opinion. In February of 2019, the lower court did enter a final order, which found that portions of the Act were in violation of the West Virginia Constitution. The order does not conform with this Court's 2017 opinion, the West Virginia Constitution, federal law, or the United States Constitution; and as such, the lower court's order should be reversed.

[2] The Act (W. Va. Code § 21-5G-1, *et seq.)* is referred to by the circuit court as "S.B. 1" which is the style of the Senate Bill offered by its sponsors in the 2016 legislative session.

III.
ISSUES

1. Did the circuit court err when it concluded that Senate Bill 1, or, the Act, infringes, violates or abrogates rights secured by Article III of the West Virginia Constitution, including, but not limited to, the right of free association, the prohibition on takings without due process and just compensation, and the requirement that restraints on liberty not be arbitrary?

2. Did the circuit court err by giving insufficient credence to the comprehensive federal scheme regulating labor relations; specifically by disregarding the express federal reservation to the states of the power and discretion to enact "right to work" statutes that may preclude unions from imposing an agency fee arrangement on non-union workers?

IV.
ARGUMENT

1. The West Virginia Constitution Does Not Provide Unions With The Right To Compel Agency Fees From Employees In Contravention Of Federal Law And The United States Constitution.

While the circuit court appropriately declined in its final order to declare unconstitutional the legislature's authority to enact a law prohibiting agreements between unions and employers requiring *membership* in a labor organization as a condition of employment, the circuit court did seek to resolve the issue of whether the legislature could enact a law prohibiting unions and employers from executing agreements requiring employees' payment of "agency fees" as a condition of employment under the West Virginia Constitution. (Slip Op. at 9). Essentially, the circuit court ruled on the ultimate issue in its decision on the basis of a foundational distinction between "membership" in a union, which it concluded was resolved by the National Labor Relations Act ("NLRA"),[3] and the mandatory payment of "agency fees" to a labor union in order for an employee to keep their job, which does not necessarily require membership in a union, but rather, anticipates an obligation that an employee has to a union by virtue of being employed in a

[3] 29 U.S.C. § 150, *et seq.*

workplace where a labor union is the exclusive representative of the employees. Indeed, the circuit court analogizes this non-membership duty of employees to a labor union as the same obligation a citizen has to the government of a state or the federal government:

> Citizens vote to elect their **rulers**, the **rulers** implement their policies, and all citizens – including those who voted against the prevailing **regime** and who disagree with it – must pay taxes to support the elected government. Meanwhile, they are protected in voicing their disapproval of the **regime** and in seeking to convince the majority at the next election to oust the **regime** and replace it with a different one.
>
> The NLRA and the State's LMRA contemplate the same governance . . . .
>
> In other words, bargaining unit members who disagree with their union stand in the same stead as voters who disagree with their elected leaders. They must pay for their government while they work for a different result at the next election.

(Slip Op. at 30-31) (emphasis added).

This analysis evidences a fundamental misunderstanding of the relationships between public servants, citizens, unions, and employees. First, it is beyond disturbing that a court would describe a group of elected officials as "rulers" who comprise a "regime." In West Virginia, and the United States as a whole, elected officials are public servants who are duty bound to **represent** the people, not **rule** them.[4] Any legal standard built upon this articulation of the relationship between the government and the citizens who control that government is fundamentally flawed.

However, it is instructive to appreciate the basic logical syllogism of the Court's analogy: when an employee accepts work in a workplace that has a collective bargaining relationship between an employer and a union, the union is the **ruler** and the employee has a duty to pay that

[4] "Here, sir, the people govern; Here they act by their immediate representatives." Alexander Hamilton, *New York Ratifying Convention. Remarks (Francis Childs's Version), in* 5 The Papers of Alexander Hamilton 94, 95 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

union tribute or face termination. Finding this monarchial entitlement, the circuit court concludes that the union's, or "ruler's," constitutional rights are violated when the employees are permitted to refuse to pay the union "agency fees".

With regard to association rights, the circuit court concluded that the freedom to consult for common good articulated in Article III, Section 16 of the West Virginia Constitution prohibited the Act's reservation of the right to choose to avoid agency fees by employees. (Slip Op. at 20-22). To reach this conclusion, the circuit court analyzed the United States Supreme Court's constitutional analysis of the First Amendment of the United States Constitution in *NAACP v. Alabama, ex rel. Patterson*, 357 U.S. 449 (1958);[5] *Bates v. Little Rock*, 361 U.S. 516 (1960);[6] *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963);[7] and *Shelton v. Tucker*, 364 U.S. 479 (1960).[8]

The circuit court briefly discussed the constitutional analysis employed just last year by the United States Supreme Court in an opinion where the Court held that an employee's First Amendment association rights were violated when the State of Illinois required its employees to pay membership dues, or, agency fees, to a union as a condition of employment. *Janus v. AFSCME. Council 31*, 138 S.Ct. 2448 (2018). At issue in *Janus* was an Illinois law that requires public employees to subsidize a union even if they choose not to join the union and object to the positions the union takes in collective bargaining and related activities. The Supreme Court concluded that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize public speech on matters of public concern. *Id.* at 2459-2460. In *Janus*, as here, the union argued that it is the exclusive bargaining representative for a designated unit of

[5] (Slip Op. at 14).
[6] (Slip Op. at 15).
[7] (Slip Op. at 16).
[8] *Id.*

employees and it was obligated to represent the interests of all employees including nonmembers of the union. *Id.* at 2466. The union and their amici argued that "agency fees are needed to prevent nonmembers [or "free-riders"] from enjoying the benefits of union representation without shouldering the costs." *Id.* The petitioner rebutted that he was not a "free rider on a bus headed for a destination that he wishes to reach but is more like a person shanghaied for an unwanted voyage." *Id.*

Regardless of the purported property interest or the liberty interest of the shanghaied "free-rider", the court resolved the merit of the "free-rider" argument advanced by the union in the *Janus* litigation and the current appeal. First, the court broadly held that "avoiding free riders is not a compelling interest. As we have noted, 'free-rider arguments . . . are generally insufficient to overcome First Amendment objections.'" *Id.* (quoting *Knox v. SEIU, Local 1000*, 567 U.S. 298, 311 (2012)). Second, the court recognized that while "private speech often furthers the interests of non-speakers . . . that does not alone empower the state to compel the speech to be paid for." *Id.* at 2466-2467 (alteration and internal quotation marks omitted). In simple terms, 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. *Id.* The Court concluded this holding was not impacted because unions are statutorily required to represent the interests of all public employees in the unit whether or not they are union members. *Id.* The Court expressly rejected the argument that "it would be fundamentally unfair to require unions to provide fair representation for nonmembers if nonmembers were not required to pay [agency fees]." *Id.* at 2467. First, unions are not compelled to be the exclusive representatives of all employees – both members and nonmembers – in a bargaining unit. *Id.* This is because designation as the exclusive

representative of a unit results in a tremendous increase in the power of a union and concomitantly special privileges, such as obtaining information about employees and having dues and fees deducted directly from employee wages. *Id.* "These benefits greatly outweigh any extra burden imposed by the duty of providing fair representation for nonmembers." *Id.*

Thus, unions have a choice. They may voluntarily choose to be the exclusive representative of all employees, thereby incurring all of the benefits of the designation, as well as the burden of so-called "free-riders." Alternatively, they may choose to represent only members. As the United States Supreme Court has previously held, "'[m]embers only' contracts have long been recognized." *Retail Clerks International Ass'n v. Lion Dry Goods, Inc.*, 369 U.S. 17, 29 (1962). The oft repeated argument from organized labor that they are not able to obtain certification to represent a unit consisting of **only members** under the National Labor Relations Act is simply not true as a matter of law. *Id.* The circuit court agreed with this argument framing the issue to be resolved as

> S.B.1 violates Article III §9 of the West Virginia Constitution by depriving the Plaintiffs and other unions of their property without just compensation and due process because it prohibits the Plaintiffs and other unions from charging nonmembers for representation services that the Plaintiffs and other unions are **required** by federal and state law to provide to nonmembers.

(Slip Op. at p. 11) (emphasis added).

In another portion of the decision, the circuit court recognizes that "[t]he only Court the Supreme Court of this state is bound to follow is the Supreme Court of the United States . . ."[9] yet the circuit court nonetheless concludes, in direct contravention of the U.S. Supreme Court, that unions are obligated to provide representation to nonmember employees. They do not. Unions assume this duty voluntarily when they seek and receive certification as the **exclusive**

[9] (Slip Op. p. 13).

bargaining agent of a unit of employees. Unions have a choice; and, under the Workplace Freedom Act, employees now have a choice as well.

The Court in *Janus* concluded by employing a broad brush: "In sum, we do not see any reason to treat the free-rider interest any differently in the agency-fee context than in any other First Amendment context. We therefore hold that agency fees cannot be upheld on free-rider grounds." *Id.* at 2469 (internal citation omitted).[10] Here, the circuit court relying upon First Amendment analysis from the same court concluded the opposite; that a state law that protects the constitutional rights of employees by protecting their right not to subsidize speech they do not support must be **unconstitutional** based on the First Amendment analysis of the United States Supreme Court. Rather, the circuit court simply concluded that because *Janus* treated the First Amendment rights of a public sector employee, none of its analysis was applicable or relevant to the instant litigation.

> [T]he highest Court in this country has determined that an agency fee ban on public sector unions is lawful. However, Janus only applies to public sector unions and not to private sector unions. While the First Amendment restricts government action, it cannot restrict private conduct.

(Slip Op. at 43).

The circuit court goes on to recite a law review article and a United States District case arguing that the *Janus* decision, on its own, does not prohibit private sector unions from agreeing to contractual language mandating union membership, dues, and/or agency fees as a condition of employment. *Id.* This is plainly true as Congress preserved that right in Section 8(a)(3)[11] of the NLRA, **unless**, a state prohibited such agreements pursuant to the exemption evidenced in

[10] This holding makes it clear that in the public sector no state may compel a public sector employee to pay dues or agency fees to a labor organization and no contract requiring such an obligation as a condition of employment should be enforceable.

[11] 29 U.S.C. § 158(a)(3).

Section 14(b)[12] of the NLRA. What the circuit court fails to consider is why its own First Amendment analysis – portrayed as West Virginia Constitutional analysis – regarding the entitlements of unions to agency fees from employees can be viable and dispositive in the face of antithetical analysis from the highest Court in the country.

The amici affirmatively recognize that *Janus* involved a state law which required public employees to pay agency fees to a certified union as a condition of employment. As such, the employer was a state actor and the First Amendment application was directly in issue. The Workplace Freedom Act expressly does not apply to federal or state employees and is limited to application to private sector employees. However, *Janus* is profoundly important to this case for three reasons. First, the circuit court wrongfully holds that the West Virginia Constitution by its articulation of association rights premised on First Amendment rights, guarantees unions the right to contract for mandatory agency fees from employees. The *Janus* decision makes it irrefutable that the association rights of employees trumps in this analysis and their right is supreme as a matter of constitutional jurisprudence. Second, the Court broadly held that the "government" was prohibited from compelling a citizen to pay for private speech under the First Amendment. Here, the Act protects employees from having that right abridged. It is the circuit court – a principle of the West Virginia state government – which is seeking to abridge employees' rights by declaring that constitutional right of employees' void, and thereby acting contrary to the First Amendment. Finally, the Supreme Court wrote in broad and unmistakable terms that agency fees cannot be upheld on the "free-rider" argument.

The holding of the United States Supreme Court is in perfect harmony with the law of the State of West Virginia as articulated by this Court. In September of 2017, this Court considered **all** of the constitutional infirmities relied upon by the circuit court to support its decision below

[12] 29 U.S.C. § 164(b)

and rejected all of them. *Morrisey v. West Virginia AFL-CIO*, 239 W. Va. 633, 804 S.E.2d 883 (2017). That decision arose out of an appeal by the Petitioner here when the circuit court entered an order enjoining the application of the Act in its entirety. This Court wrote:

> The unions maintained that Senate Bill 1 violates the West Virginia Constitution because it impairs the associational rights of unions to consult for the common good; it takes the unions' property without just compensation; and it violates the unions' liberty interests, by requiring the unions to expend their labor for nonunion employees without the ability to charge a fee for that labor.

Id., 239 W. Va. at 637, 804 S.E.2d at 887. This Court accurately held that "[t]o ultimately succeed in this case, the unions must show **beyond reasonable doubt** that Senate Bill 1 violates constitutional bounds." *Id.*, 239 W. Va. at 638, 804 S.E.2d at 888 (emphasis added).

At the time of this Court's decision in 2017, the *Janus* decision had not been issued. Even so, this Court's opinion is in complete harmony with that of the United States Supreme Court in *Janus*.

> "There is no doubt that union workers enjoy valuable rights of association and assembly that are protected by the First Amendment." However, we see nothing in Senate Bill 1 that prevents a person from making a voluntary choice to associate with a union or to pay union dues. Additionally, the constitutional freedom of association argument proffered by the unions is nearly identical to one rejected by the United States Supreme Court almost seven decades ago. The Supreme Court stated:
>
> > The constitutional right of workers to assemble, to discuss and formulate plans for furthering their own self interest in jobs cannot be construed as a constitutional guarantee that none shall get and hold jobs except those who will join in that assembly or will agree to abide by the assembly plans.
>
> The Supreme Court plainly held that the constitutional right to assemble and associate does not entitle a union to compel nonmembers to "participate in union assemblies" as a condition of employment. Likewise, "unions have no constitutional entitlement

> [under the First Amendment] to the fees of nonmember-employees.

Id., 239 W. Va. at 640-641, 804 S.E.2d at 890-891 (footnotes omitted) (alteration in original).

Recognizing that neither the unions nor the circuit court had recited **any** state or federal appellate decision accepting their constitutional freedom of association argument and disapproving of a right to work law on similar grounds, this Court found the Respondents here had not established a likelihood that they will ultimately succeed on the merits. Indeed, the circuit court offered no such precedent in its final opinion. Rather, the only relevant decision which issued subsequent to this Court's 2017 opinion that the circuit court identified was the United States Supreme Court decision in *Janus*.[13]

The circuit court's holding that the constitutional rights of the Respondents are infringed by the Act are unsupportable. The circuit court's decision is supported by no direct precedent because all direct precedent on the issues is contrary to the circuit court's decision, including the holdings of this Court and the Supreme Court of the United States. Rather, the holding betrays a subscription to the notion that employees within the State of West Virginia are subjects to "rulers" whom they must pay in order to keep their jobs and those rulers are the Respondents. That is not the law of this State and it betrays the constitution of this State and this nation to order a contrary result. Montani Semper Liberi ("*Mountaineers are always free*") is not merely a motto on a seal. Our law and our constitution safeguard that status from all presumptive rulers.

[13] In the succeeding pages of this Court's 2017 opinion it similarly concluded that the Respondents had shown no likelihood of success regarding the unions' argument that the Act would result in an unconstitutional taking of their property or that the Act would unconstitutionally infringe upon their liberty interests. *Id.*, 239 W. Va. at 640-642, 804 S.E.2d at 890-892.

2. The Circuit Court's Decision Elevating Illusory State Constitutional Analysis Over Mandatory Federal Law Is Preempted And, Therefore, Barred By The Supremacy Clause of the United States Constitution.

The circuit court held that the fact that the NLRA permits states to enact right to work laws, some of which bar mandatory agency fees as a condition of employment, does not prohibit West Virginia courts from ignoring the federal law. (Slip Op. at 37-38). The circuit court reasoned that because the West Virginia Constitution mandated that mandatory agency fee requirements could be contracted for and enforced, the federal law permitting state laws that prohibited such agreements and enforcement must yield. *Id.* To reach this conclusion, the circuit court described Section 8(a)(3) of the NLRA which permits employers and unions to negotiate, *inter alia.*, for collective bargaining agreements that require the payment of agency fees as a condition of employment. *Id.* Amici agree that Section 8(a)(3) of the NLRA does permit such agreement. However, it is the following holding that is unsupportable: "Thus, a ruling for the Plaintiffs in this case would be precisely what § 8(a)(3) authorizes. Section 14(b) of the Act allows the states to qualify the 8(a)(3) proviso, but has no preemptive effect on the Plaintiffs' constitutional claims." *Id.* at 37.

Section 14(b) of the NLRA permits states to enact Right to Work laws and this Court has so held:

> Although Section 8(a)(3) of the Taft-Hartley Act permitted the adoption of such less restrictive union-security agreements, a provision of the Act also left states free to ban them altogether. Section 14(b) of the Act creates an exception to Section 8(a)(3), and provides that states may pass laws that prohibit "agreements requiring membership in a labor organization as a condition of employment[.]" 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 as far as to "outlaw'" a union-security arrangement.

Morrisey, 239 W. Va. at 639, 804 S.E.2d at 889 (footnote omitted).

This Court found that in 1947 when Section 14(b) was passed 12 states had right to work laws on the books. This Court cited *Sweeney v. Pence*[14] with approval writing:

> "These laws fell into two different categories. The first broadly disallowed compulsory union membership. The second included specific provisions outlining compulsory payment of dues **or fees** to labor organizations." "Congress knew precisely what state laws it was validating when it passed § 14(b). The House [of Representatives'] report listed each state which had passed a right-to-work law or constitutional provision." The clear purpose of Section 14(b) "was to preserve the efficacy of laws like these – statutes that allowed states to place restrictions of their choosing on union-security agreements[.]"
>
> In sum, under federal law, states may decide whether to allow or prohibit employers and unions to negotiate agreements requiring compulsory union membership, or requiring nonunion employees to pay dues **or fees** to the union.

Id., 239 W. Va. at 639-640, 804 S.E.2d at 889-890 (footnotes omitted) (alterations in original) (emphasis added).

The circuit court plainly disagrees with this Court and has rejected its holding. Indeed, the circuit court concludes that "(Plaintiffs have not argued that federal law preempts S.B. 1). The Court therefore sees no need to address the issue. *But see Sweeney v. Pence*, *supra* (Woods, C.J., dissenting))." (Slip Op. at 37-38).[15] The circuit court's decision should be overruled as it refused to conform to the law as stated by this Court and to the United States Constitution.

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[14] 767 F.3d 654, 662 (7th Cir. 2014).

[15] The Court's summary determination that it need not consider this issue is wrong on two accounts. First, the state did raise all of the elements of the argument that federal law permitted the passage of the Act. (*See* Def.'s Mot. for Summ. J. at 14-15). Second, any court may and must consider a constitutional infirmity argument whenever it is raised and potentially deprives the state court of subject matter jurisdiction. Indeed, "any decree made by a court lacking jurisdiction is void." *State ex rel. Universal Underwriters Ins. Co. v. Wilson*, 239 W. Va. 338, 346, 801 S.E.2d 216, 224 (2017).

The circuit court never acknowledges its rejection of this Court's findings in its analysis. Rather, it curtly "rejects the argument" of an amicus that its ultimate conclusion would be preempted by virtue of the Supremacy Clause in Article VI of the United States Constitution. (Slip Op. at 36-37). While the circuit court does not accurately capture the argument of the amicus in this holding, that inaccuracy pales when compared to the circuit court's indifference to the application of the Supremacy Clause.

In *Sweeney v. Pence*, the Seventh Circuit concluded that the Indiana Right to Work law was constitutional. In the appeal the appellants argued that the Indiana law was "preempted" by federal labor law as an exemption to Section 14(b) of the NLRA. *Sweeney*, 767 F.3d at 665. The appellants made similar arguments to those relied upon by the circuit court, *e.g.*, the law affected an unconstitutional taking. *Id.*; and the law deprived appellants of associational and free speech rights under the First Amendment. *Id.* at 668-670. The statutes themselves are also similar. Any cursory comparison demonstrates the Workforce Freedom Act is modeled in nearly identical fashion upon the Indiana Right to Work law. *See* Ind. Code § 22-6-6-1, *et seq*. The court in *Sweeney* adopted the finding of the district court that the Indiana law was not preempted by the NLRA by facilitating "free-riders" or by making violations of the law criminal acts. *Sweeney*, 767 F.3d at 665. The court made these findings, necessarily, because the Indiana law, like the West Virginia law, was consistent with the exemptions identified in Section 14(b) of the NLRA.

> The first assertion, that federal labor law preempts the Indiana law's criminal penalties, clashes squarely with the language in *Retail Clerks II*, where the Supreme Court stated that
>
> > In light of the wording of § 14(b) and this legislative history, we conclude that Congress in 1947 did not deprive the States of any and all power to enforce their laws restricting the execution and enforcement of union-security agreements. Since it is plain that Congress left the States free to legislate in that field, we can only assume that it

> intended to leave unaffected the power to enforce those laws.

Id. (quoting *Retail Clerks International Asso. v. Schermerhorn*, 375 U.S. 96, 102 (1963)).

The corollary is obvious: if the NLRA permits the language of the Indiana and West Virginia right to work laws by the terms of Section 14(b), then court action to restrain the execution and enforcement of these laws is preempted by Section 14(b) of the NLRA. A court action invalidating a properly constructed state law which conflicts with a grant of the power to enact the law by Congress violates the Supremacy Clause of the United States Constitution.

The Supremacy Clause states, in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. It is well established that the Supremacy Clause renders state law ineffective to the extent it interferes with or is contrary to federal law. *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712-713 (1985). This includes the West Virginia Constitution. *See Harbert v. County Court*, 129 W. Va. 54, 61-62, 39 S.E.2d 177, 184 (1946) ("The Constitution of this State is the supreme law of West Virginia; it is subject only to the Constitution of the United States and the laws of the United States which shall be made in pursuance thereof.").

Although the NLRA contains no express preemption provision, the United States Supreme Court has held that Congress implicitly mandated that the NLRA preempts state laws directed at conduct actually or arguably prohibited or protected by the NLRA or conduct Congress intended to leave unregulated. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959); *Machinists v. Wisconsin Emp. Rel. Commission*, 427 U.S. 132, 140–48 (1976).

Section 14(b) protects the states' right to prohibit agreements requiring membership in a labor organization as condition of employment that are otherwise permissible under Section 8(a)(3). The Supremacy Clause is clear; Laws made pursuant to the United States Constitution are the supreme law of the land "and the Judges in every State shall be bound thereby." U.S. Const. art. VI, cl. 2.

Even if this Court were to conclude that the West Virginia Constitution prohibits enforcement of the Act it would still be duty bound to permit the enforcement of the right to work law as the United States Constitution prohibits any state from impeding the enforcement of federal law by virtue of the Supremacy Clause of the United States Constitution. Congress empowered states to prohibit the creation or enforcement of union-security agreements and the state of West Virginia has done so through the Act. The circuit court's prohibition of the enforcement of this law under the state constitution is directly contrary to the exemption articulated in Section 14(b) of the NLRA which expressly empowered our legislature to act as it has. No state may restrain or impede the will of the United States Congress as expressed under federal law under the auspices of state law including its constitution. Here, the circuit court has attempted to extinguish the impact of Section 14(b) of the NLRA, a federal law, by an inaccurate interpretation and application of a state constitution. That act directly violates the United States Constitution's Supremacy Clause. Moreover, the United States Supreme Court has completely preempted the states from enacting, interpreting or applying any state law which contravenes or impedes the enforcement of the NLRA so as to deprive the state courts from **asserting jurisdiction** to do so. As such, even if the circuit court were correct that the constitution of our state prohibited the legislature from enacting the right to work law that restricted or prohibited a prohibition of the requirement of the payment of agency fees in collective bargaining agreements

pursuant to Section 14(b) of the NLRA, that constitutional prohibition would and must necessarily yield to the enforcement of Section 14(b) under the Supremacy Clause of the United States Constitution. Effectively, such a state constitutional prohibition would be unconstitutional under the United States Constitution.

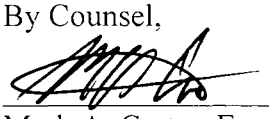
V.
CONCLUSION

The circuit court's ruling is in error. The West Virginia Constitution, as this Court has previously determined, does not prohibit enforcement of any portion of the Workforce Freedom Act. Even if the state constitution did prohibit enforcement of the Act, and thereby Section 14(b) of the NLRA, that provision of the state constitution would be unenforceable by application of the Supremacy Clause of the United States Constitution.

The circuit court should be overruled, its mandate to continue to oversee this litigation withdrawn, and the law should be enforced. The circuit court did not merely reject the law as articulated by this Court, it issued a Decision and Order in violation of the United States Constitution and as such, should be overruled.

Respectfully submitted,

By Counsel,



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