IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
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.

REPLY BRIEF

PATRICK MORRISEY
ATTORNEY GENERAL

Lindsay S. See (WV Bar #13360)
Solicitor General
Counsel of Record

State Capitol Building 1, Room E-26
Charleston, West Virginia 25305
(304) 558-2021
Lindsay.S.See@wvago.gov

Counsel for Petitioners
Attorney General Patrick Morrisey
and the State of West Virginia

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Constitutional Provisions

Statutes

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

This case requires straightforward application of well-settled West Virginia and federal law. In *Morrisey v. West Virginia AFL-CIO*, 239 W. Va. 633, 804 S.E.2d 883 (2017), this Court dissolved the circuit court's preliminary injunction because there was not even a likelihood of success on the merits on the same claims Respondents press again now. The Court's conclusion was supported then by unanimous agreement from every federal and state appellate court in the country that had rejected similar claims when addressing challenges to similar state right-to-work laws—and that chorus has only grown louder since. In their brief Respondents have not identified any principle of West Virginia law that calls for a different result. Instead, they effectively abandon one claim on which the circuit court granted relief, and for the others, elide the many state and federal decisions showing that the law remains well-settled on the other side. This Court should reject Respondents' invitation to reinvent state law, reiterate courts' role to enforce the Legislature's policy judgments absent constitutional failure, and—despite the circuit court's attempt to write on a blank slate—confirm that the Court meant what it said two years ago.

ARGUMENT

I. The Court's Previous Decision Resolves This Challenge.

When dissolving the circuit court's preliminary injunction, this Court concluded that Respondents had not shown even a likelihood of success on the merits of their constitutional claims. Unable to point to any legal developments in the interim favoring their position, Respondents instead defend the circuit court's decision to largely ignore this Court's opinion by calling its methodology into question. Yet the fact remains that *Morrisey* resolved the legal issues in this case so decisively that remand should have been "nothing but a perfunctory exercise." *Morrisey*, 239 W. Va. at 646, 804 S.E.2d at 896 (Workman, J., concurring in part and dissenting

in part). Respondents' critiques of the Court's analysis read more like a petition for rehearing than reasons to backtrack from a published opinion that addressed identical legal issues. *Cf.* Syl. pt. 6, *Hatfield v. Painter*, 222 W. Va. 622, 671 S.E.2d 453 (2008) (questions "definitely determined by this Court" are "conclusive on parties, privies and courts, including this Court, upon a second appeal"). There is no reason to re-write *Morrisey* here: This Court applied the proper burden of proof and held correctly that Respondents were unlikely to succeed on their constitutional challenges, and the only factual and legal developments since strengthen that result.

First, the Court properly held that it "must presume a law is constitutional unless a party proves, beyond a reasonable doubt, that the law violates the Constitution." *Morrisey*, 239 W. Va. at 638, 804 S.E.2d at 888 (citing Syl. pt. 1, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965); Syl. pt. 2, *State ex rel. Frazier v. Meadows*, 193 W. Va. 20, 454 S.E.2d 65 (1994); *State ex rel. City of Charleston v. Coghill*, 156 W. Va. 877, 883, 207 S.E.2d 113, 118 (1973)). Respondents suggest a different standard applies where fundamental rights are at stake, Resp. Br. 6-7, but even in that context the Court has long presumed the validity of duly enacted laws and required challengers to prove otherwise. In *State v. Flinn*, for instance—a free-speech challenge—the Court explained that both state and federal law required proof of unconstitutionality beyond a reasonable doubt. 158 W. Va. 111, 129, 208 S.E.2d 538, 548 (1974).

The cases Respondents cite do not instruct otherwise. Respondents rely first on two federal decisions—an odd choice where Respondents also insist that the particulars of state law are the reason this Court should be the first in the country to strike down a right-to-work law like the Act—but the cases' presumption discussions are limited to the unique context of content-based speech restrictions. *See United States v. Playboy Entm. Grp., Inc.*, 529 U.S. 803, 818 (2000); *R.A.V. v. St. Paul*, 503 U.S. 377, 382 (1992). For right-to-work challenges, federal and state courts

routinely apply rational-basis review because these laws do not involve the type of suspect classifications that trigger heightened standards of review. *See, e.g., Zuckerman v. Bevin*, 565 S.W.3d 580, 598 (Ky. 2018); *Sweeney v. Pence*, 767 F.3d 654, 670 (7th Cir. 2014).

On the state-law side, Respondents ignore the holding in *Lewis v. Canaan Valley Resorts, Inc.* that unconstitutionality of a statute "must appear beyond reasonable doubt." 185 W. Va. 684, 691, 408 S.E.2d 634, 641 (1991) (quoting Syl. pt. 1, *Appalachian Power Co.*, 149 W. Va. 740, 143 S.E.2d 351). The portion of the opinion Respondents cite about "a suspect classification or a fundamental, constitutional right" was limited to the "history of the certain remedy provision" in Article III, Section 17 of the West Virginia Constitution—which is not at issue here. *Id.* at 694 n.14, 408 S.E.2d at 644 n.14. Respondents' reliance on *Pushinsky v. Board of Law Examiners* is also misplaced because it conflates burden of proof and degree of judicial scrutiny: *Pushinsky*'s "heavy burden" is part of its explanation of intermediate scrutiny. 164 W. Va. 736, 748, 266 S.E.2d 444, 451 (1980). There is no tension between this discussion and decisions placing the burden of proof, or "duty to establish the truth of the claim," *Wright v. Banks*, 232 W. Va. 602, 614, 753 S.E.2d 100, 112 (2013) (emphasis and citation omitted), on the challenger. It may be easier to prevail under the reasonable doubt standard when a court applies intermediate or strict scrutiny, but the presumption of validity and burden on the challenger remain. And finally, the only portion of *Women's Health Center of West Virginia, Inc. v. Panepinto* that perhaps discusses proper burden of proof is the dissent. 191 W. Va. 436, 447, 446 S.E.2d 658, 669 (1993) (McHugh, J., dissenting). There is thus no reason to revisit the burdens relevant here.

Second, Respondents wrongly cite brevity of the Court's analysis of their constitutional claims as reason to set *Morrisey*'s holdings aside. Accusing the Court of "simply fail[ing] to consider the plaintiffs' arguments on the merits" and "entirely miss[ing] the point of their

arguments," they insist that their constitutional "rights deserve more respect than that." Resp. Br. 7-8. Yet the associational and takings claims were fully briefed and argued when this Court addressed them two years ago. The fact the Court did not explain its rationale to Respondents' satisfaction is not license to ignore a published opinion, nor is disagreement with Respondents' position evidence that the Court misunderstood it. The length of the analysis is also unsurprising, because *Morrisey* did not break new legal ground on these issues. The only syllabus point in the opinion is a reminder that the "Court does not sit as a superlegislature," and must instead enforce the Legislature's policy judgments "unless [legislation] runs afoul of the State or Federal Constitutions." Syl. pt., *Morrisey*, 239 W. Va. 633, 804 S.E.2 883. This Court applied well-settled principles of law to resolve the remainder of Respondents' claims—and it did so against the backdrop of similar decisions from every state and federal appellate court in the nation to have considered challenges to similar laws.

Third, Respondents take issue with the State's description of the lack of factual development after this Court's decision in *Morrisey*. Resp. Br. 8-9 (citing State Br. 2). Yet the State did not allege the record was the same when the circuit court entered the preliminary injunction and the permanent injunction, simply that there was no factual development after this Court's decision. State Br. 2. The Court was fully aware that summary-judgment proceedings took place before it handed *Morrisey* down. *See, e.g.*, 239 W. Va. at 647, 804 S.E.2d at 897 (Workman, J., concurring in part and dissenting in part) (explaining that "the circuit court has yet to make a decision" even "[a]fter conducting a hearing on the parties' motions for summary judgment" several months prior).

More to the point, Respondents do not explain how the summary-judgment materials sway the analysis. The Court's resolution of the legal issues in *Morrisey* did not turn on hard numbers;

instead of showing why it should have, Respondents discredit the majority opinion and concurrence as not "pertinent." Resp. Br. 10. And the "six affidavits" Respondents cite, *id.* at 9, simply describe Respondents' contracts, outline operating expenses, and speculate on potential membership losses. *See* A.R. 476-86. There is no dispute that unions require money to operate, and the only hard facts show that union membership has *increased* under right-to-work regimes. *See infra* pp. 11-12.

Further, post-*Morrisey* developments on the legal front are all one-sided. Respondents would dispense with the Supreme Court of Kentucky's decision in *Zuckerman* as having "limited or no assistance to this Court's consideration" because much of its analysis "revolved around the unique provisions" of the state constitution. Resp. Br. 8 n.4 (quoting A.R. 39). But even the circuit court had to admit that "ultimately the legislation affecting private sector unions was upheld" against a very similar challenge to Respondents' here. *Id.*

Respondents also read *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018) too narrowly. Resp. Br. 21-22. To be sure, *Janus* was limited on its facts to the public-sector union context. But that does not mean the Supreme Court's rationale is inapplicable in other contexts. Overruling four-plus decades of precedent, *Janus* marks a sea change in safeguarding the rights of employees who do not join unions over the purported associational concerns of the unions themselves. *Janus*, 138 S. Ct. at 2465-78; *id.*at 2466 ("the assessment of agency fees" is a "restricti[on] of associational freedoms" (citation omitted)). These concerns may be greater for public employees, but they do not disappear altogether in the private sector. Indeed, the associate general counsel of the AFL-CIO—Respondents' parent organization—conceded soon after the decision that *Janus* "calls into question" the practice of "charging mandatory service fees under *private sector* agreements"

because *Janus* made clear that "it is simply not true that designation of a union as the exclusive representative of all employees in a unit and the exaction of agency fees are inextricably linked."[1] Similarly, the executive director of the National Federation of Independent Businesses Small Business Legal Center explained that *Janus* was "a positive step" for all Americans—not just public-sector employees—because it "speaks to the fact that government cannot lightly infringe upon free speech rights."[2]

In any event, crediting Respondents' objections to the persuasive value of these two recent decisions would not change the outcome in this case. The Court was right two years ago to rely on the fact that Respondents could not identify "any federal or state appellate court that, in over seven decades, has struck down" a state right-to-work law. *Morrisey*, 239 W. Va. at 637, 804 S.E.2d at 887. The same is true today. Respondents have thus shown no reason to set *Morrisey*—which resolves the same legal challenges they raise now—aside.

II. The Act Does Not Conflict With Respondents' Liberty Interests.

Even if there were some justification for the circuit court's choice to disregard this Court's prior decision—and there is not—the decision invalidating the Act fails on its own terms, as well. To begin, Respondents scarcely defend the circuit court's conclusion that the Act unconstitutionally restricts their liberty. Despite separate argument sections for the associational rights and takings arguments and ample unused pages in their brief, Respondents address this point

---

[1] James Coppess, *Symposium: Four propositions that follow from Janus*, SCOTUSblog (Jun. 28, 2018) (emphasis added; quotation marks omitted), *available at* https://www.scotusblog.com/2018/06/symposium-four-propositions-that-follow-from-janus/.

[2] Karen Harned, *Symposium: For this court, the First Amendment reigns supreme and small business is cheering*, SCOTUSblog (Jun. 27, 2018), *available at* https://www.scotusblog.com/2018/06/symposium-for-this-court-the-first-amendment-reigns-supreme-and-small-business-is-cheering/.

in a single footnote. Resp. Br. 13-14 n.8. And that footnote fails to explain how the Act could infringe on a constitutionally protected liberty interest: it contends only that the choice to organize as a members-only union is illusory. As explained further below, *infra* pp. 8-1 that argument is wrong as a matter of law and empirical fact. More importantly, Respondents' footnote does not explain how the "legislature has acted in an arbitrary and irrational way." *Wampler Foods, Inc. v. Wokers' Comp. Div.*, 216 W. Va. 129, 145, 602 S.E.2d 805, 821 (2004). Nor do Respondents dispute the many rational bases for the Legislature's policy decision to pass the Act, including growing our State's economy, protecting associational rights of non-members, and promoting workplace harmony. *See* State Br. 32-36; ABC Br. 10-20 (focusing on the Act's economic benefits); Chamber Br. 20-24. Respondents' failure to address *any* of these rational bases is telling: It suggests that the circuit court's determination of the issue is indefensible—even by the party that made the argument below.

III. The Act Does Not Violate Respondents' Associational Rights.

Respondents have also provided no reason to conclude that the Act violates their associational rights. This Court has already explained that "nothing" in the Act "prevents a person from making a voluntary choice to associate with a union or to pay union dues." *Morrisey*, 239 W. Va. at 640, 804 S.E.2d at 890. Respondents' argument to the contrary, Resp. Br. 14-22, flips the West Virginia Constitution on its head. Under their interpretation, a union's strong preference to operate with exclusive status means that the union must be able to force nonconsenting employees to pay for their services—or in other words, the Legislature is constitutionally disabled from protecting the associational rights of *all* employees. This argument has not prevailed anywhere else even though over half of the States have adopted right-to-work laws, and it should not here, either.

A. The crux of Respondents' argument (as in the circuit court decision) is that there is no true choice between organizing as an exclusive-agency union and a members-only union. *E.g.*, Resp. Br. 11-13; A.R. 51-54. This view is legally incorrect and conflicts with reality.

Respondents argue that the choice between exclusivity and a members-only structure is "pie-in-the-sky" because it forces a choice between "functioning as a union and rejecting the reason for its existence." Resp. Br. 12-13. Congress and the Supreme Court disagree: Members-only unions are a real legal option. Even Respondents admit, as they must, that unions may "seek[] to bargain collectively on behalf of only union members." *Id.* at 12. The U.S. Supreme Court has also recognized members-only unions for over 80 years: Rejecting an argument that employees may not form members-only unions, the Court held that "in the absence of [] an exclusive agency [union] the employees represented by the [union], even if they were a minority, clearly had the right to make their own choice." *Consol. Edison Co. of N.Y. v. N.L.R.B.*, 305 U.S. 197, 237 (1938). And as recently as *Janus*, the Court emphasized that "[n]o union is ever compelled" to seek exclusive agency status. 138 S. Ct. at 2467.

Other courts and scholars confirm that the choice to organize as a members-only union is not a sham. The Supreme Court of Indiana, for example, rejected Respondents' same argument in *Zoeller v. Sweeney*, 19 N.E.3d 749 (Ind. 2014). As it explained, a union's "obligation to represent all employees in a bargaining unit *is optional*; it occurs only when the union elects to be the exclusive bargaining agent, for which it is justly compensated by the right to bargain exclusively with the employer." *Id.* (emphasis added; citing 29 U.S.C. § 158(a)). Legal scholars similarly agree that members-only versus exclusive status is more than a choice in name only. *See, e.g.*, Christine Neylon O'Brien, *When Union Members in A Members-Only Non-Majority Union (Monmu) Want Weingarten Rights: How High Will the Blue Eagle Fly?*, 10 U. Pa. J. Bus. & Emp.

L. 599, 600 (2008); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 Colum. L. Rev. 319, 388 & n.266 (2005); Julie Yates Rivchin, *Building Power Among Low-Wage Immigrant Workers: Some Legal Considerations for Organizing Structures and Strategies*, 28 N.Y.U. Rev. L. & Soc. Change 397, 416 (2004); Carol Brooke, *Nonmajority Unions, Employee Participation Programs, and Worker Organizing: Irreconcilable Differences?*, 76 Chi.-Kent L. Rev. 1237, 1269 (2000). Respondents provide no legal support for their opposite view.

Members-only unions are also more than a theoretical choice: Despite Respondents' unadorned statement that "member-only union contracts with employers do not exist," Resp. Br. 13 n.6—which conflicts with their stipulation below that members-only unions exist at least in the public sector, A.R. 578—many unions have availed themselves of this option. For example, in "a win for VW, a win for the employees who wanted union representation, and perhaps even a win for those employees who didn't," several years ago a group of workers at a Chattanooga Volkswagen plant organized as a members-only union.[3] In Nash County, North Carolina, the Carolina Auto, Aerospace, and Machine Workers Union also organized as a members-only union.[4] That union has been in continuous operation for almost 30 years—and its biggest challenge has been *other unions' hostility* towards members-only unions. The United Auto Workers, for example, refused to associate with the union because of its organization as a members-only union.[5] Yet despite this opposition from other unions, it has "made the members-only model look like a

---

[3] *See* Catherine L. Fisk, *Labor at a Corssroads: In Defense of Members-Only Unionism*, The American Prospect (Jan. 15, 2015), *available at* https://prospect.org/article/labor-crossroads-defense-members-only-unionism.

[4] *See* Moshe Marvit & Leigh Anne Schriever, *Members-only Unions: Can They Help Revitalize Workplace Democracy?*, The Century Foundation, 6 (Oct. 1, 2015).

[5] *See id.*

successful tactic many times."[6] Indeed, members-only unions also exist outside right-to-work States. Even though Pennsylvania does not have a right-to-work law, employees at a Grove City General Electric plant formed a members-only union in 2013 that has "seen some genuine success." *See* Marvit & Schriever at 9-10.

Nevertheless, Respondents insist that a members-only union is not a valid option because the "duty to bargain arises *only* when a union is certified as a majority representative of the bargaining unit employees." Resp. Br. 12. This, too, is factually incorrect. For over 30 years, the federal courts of appeals have recognized that employers must negotiate with members-only unions (or arbitrate for a contract) when the parties' collective bargaining agreement includes certain provisions. *See Local Union No. 666 v. Sotkes Elec. Serv., Inc.*, 225 F.3d 415, 423 (4th Cir. 2000); *Sheet Metal Workers Int'l Ass'n v. Dane Sheet Metal, Inc.*, 932 F.2d 578, 582 (6th Cir. 1991); *see also Local Union 257 v. Sebastian Elec.*, 121 F.3d 1180, 1185 (8th Cir. 1997); *Am. Metal Prods. v. Sheet Metal Workers Int'l Ass'n*, 794 F.2d 1452, 1455 (9th Cir. 1986). Respondents' emphasis on the importance of the duty to bargain also illustrates the point: Unions that organize as exclusive agency unions gain the ability to force the employer to come to the bargaining table—that is, to restrict the employer's liberty under threat of federal-law sanctions. Respondents' preference for this option is understandable, but it remains a preference. A highly attractive option does not mean that other choices cease to exist, nor that Respondents are entitled to receive the benefits from that option without its known costs of mandatory representation and the possibility States will enact right-to-work laws pursuant to Section 164(b).

B. Even if Respondents were correct that they have no choice but to organize as exclusive agency unions, their associational claim would still fail because the Act does not

---

[6] *Id.* at 8.

"prevent[] a person from making a voluntary choice to associate with a union or to pay union dues." *Morrisey*, 239 W. Va. at 640, 804 S.E.2d at 890.

Respondents argue first that the Act will lead to significant membership loss, citing a report commissioned by the Legislature that unions "could" see "up to a 20% reduction in membership." Resp. Br. 13 & n.7 (citation omitted). Yet Respondents' brief has no response to the empirical evidence showing that union membership has *increased* under right-to-work regimes. Federal workers' and United Postal Service employees' unions cannot collect agency fees from non-members; even so, about 1,400,000 federal and Postal Service employees have chosen to become union members. *See* State Br. 22 (citing *Janus*, 138 S. Ct. at 2466). Nor did *Janus* weaken public-sector union membership: Analysis of trends in New York and Pennsylvania show increased public-sector union membership, State Br. 22 & nn. 4-5, and ten large public-sector unions saw a combined increase of 132,312 members post-*Janus*.[7] As another example, the National Education Association union "budgeted for" a decrease "of a couple hundred thousand members" after *Janus*; instead, it is "up several thousand."[8] And the president of the American Federation of State, County, and Municipal Employees stated that "[a]fter the *Janus* case, public-service workers are choosing to join AFSCME at a much higher rate than those who drop."[9]

In each of these cases, the explanation for the increase in union membership appears to be the need for unions to demonstrate the value of the high level of services they provide, rather than

---

[7] Rebecca Rainey & Ian Kullgren, *1 year after Janus, unions are flush*, Politico (May 17, 2019), *available at* https://www.politico.com/story/2019/05/17/janus-unions-employment-1447266.

[8] *Id.*

[9] Katherine Barrett & Richard Greene, *Defying Predictions, Union Membership Isn't Dropping Post-Janus*, Governing (Dec. 10, 2018), *available at* https://www.governing.com/topics/workforce/gov-janus-impact-union-membership.html.

relying on assured funding based on the ability to charge non-member agency fees.[10] There is no reason to expect a different result under the Act. The example of other jurisdictions thus negates Respondents' speculation (at 19) that workers "would have no incentive to join the union or remain a member" if they can receive "the full benefit of the union's services" for nothing.

Respondents' reliance on cases from the Civil Rights Era, Resp. Br. 15-17, likewise does not support its position that the Act impermissibly restricts its associational rights. Like the circuit court, Respondents place heavy weight on *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) and its progeny, Resp. Br. 14-18, yet as the State explained in its opening brief and Respondents do not contest, the restrictions at issue in those cases spurred serious threats of violence against current and potential members. State Br. 20-21. *Patterson*'s holding turned on the fact that compelled disclosure of group membership could "induce members to withdraw from the Association and dissuade others from joining it because of *fear of exposure* . . . and the consequences of this exposure." Resp. Br. 15 (quoting *Patterson*, 357 U.S. at 462-63 (emphasis added)). Fear of physical reprisal is far afield of employees debating whether to join a union where they will be represented by an exclusive agency union either way. Respondents' remaining support is the same. *See, e.g., Bates v. Little Rock*, 361 U.S. 516 (1960) (striking down disclosure requirement where violence against members was a tangible threat); *Shelton v. Tucker*, 364 U.S. 479 (1960) (requirement "could threaten [teachers'] jobs" and "lead to reprisals," Resp. Br. 16).

[10] *See* Steven Greenhut, *Don't believe the hype: Janus ruling will help public employee union members – and unions*, R Street Institute (Jan. 30, 2018), *available at* https://www.rstreet.org/2018/01/30/dont-believe-the-hype-janus-ruling-will-help-public-employee-union-members-and-unions/; *see also See* Trey Kovacs, *Supreme Court Can Strike a Victory for Worker Freedom in Janus Case*, Competitive Enterprise Institute, 7 (Jan. 24, 2018).

Respondents' fear of potential membership loss is not enough to transform the Act into "a weapon of oppression." *NAACP v. Button*, 371 U.S. 415, 435-36 (1963) (cited at Resp. Br. 16-17). Indeed, far from passing legislation "for the express purpose of impeding" *Brown v. Board of Education* as in some of the cases Respondents cite, Resp. Br. 16 (citation omitted), federal law explicitly contemplates statutes like the Act. *See* 29 U.S.C. § 164(b).

In contrast to Respondents' appeal to decisions from an era of intentional associational burdens through racially discriminatory policies, their brief pays scant attention to the U.S. Supreme Court decisions with facts much closer to these. Respondents, for instance, do not respond to the line of precedent making clear that not *subsidizing* a right is different from infringing it. *See Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983); cases cited State Br. 20. They are similarly silent about the decisions holding that freedom of association includes the right *not* to associate as well. *See* cases cited State Br. 23-24. Respondents do challenge *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949), because it "did not include a ban on contracts that impose agency fees." Resp. Br. 21 n.9. Yet as the State previously explained, the North Carolina law did include such a ban. State. Br. 18-19. Further, Respondents would limit the Supreme Court's more recent extension of *Lincoln Federal* in *Davenport v. Washington Education Association*, 551 U.S. 177, 185 (2007), to fees for political or ideological purposes only. Resp. Br. 22—even though *Janus* overruled the 1977 decision that formed the basis for this distinction in the first place. *See* State Br. 19; *Sweeney*, 767 F.3d at 670 (adopting similar reasoning to affirm Indiana ban on agency fees).

Respondents urge the Court to extend the Civil Rights Era cases to this context because the West Virginia Constitution's associational protections are "more stringent than those imposed on the states by the Constitution of the United States." Resp. Br. 18 (quoting *Pushinsky*, 164 W. Va.

at 745, 266 S.E.2d at 449). Yet they offer no reason to find those cases persuasive, but not the ones more closely analogous that they would rather ignore. Indeed, like the circuit court, *see* A.R. 43-44, Respondents do not identify what specific aspects of West Virginia's associational right might call for such a result—especially where it would place our State at odds with every other state and federal appellate court to have addressed similar challenges under similar state laws. If anything, *Pushinsky* more likely cuts in favor of individual employees' freedom not to associate with a union through paying agency fees than of Respondents' organizational claim. State Br. 25-26. Here too, Respondents have no response. Instead, when it comes to non-member employees' rights, Respondents assert that the Legislature only has "legitimate and substantial interests in protecting workers from being forced to support political and ideological messages with which they disagree." Resp. Br. 20. In Respondents' estimation that may be the extent of "the State's concern about forced association," *id.* at 20-21, but the Legislature exercised its judgment that the right not to associate means more. Where Respondents are free not to take on the burdens that come with exclusive agency status, where the fear of losing members appears ill-suited to reality, and where no state constitutional provision mandates parting ways from the rest of the courts to address these issues, Respondents' associational claim must fail.

IV. The Act Does Not Take Property Without Just Compensation.

Respondents' takings argument also fails. The expectation Respondents identify—agency fees from nonconsenting employees under post-Act contracts—is not a constitutionally protected property interest. They also fail to make out a valid takings claim because they cannot show that *the State* compels them to conduct services on non-members' behalf, nor that they are uncompensated for any services they choose to undertake.

First, this Court held squarely in *Morrisey* that a unilateral expectation of future agency fees is not property protected by the West Virginia Constitution. 239 W. Va. at 641, 804 S.E.2d at 891 (citing Syl. pt. 3, in part, *Orteza v. Monongalia Cty. Gen. Hosp.*, 173 W. Va. 461, 318 S.E.2d 40 (1984)). Respondents would set this holding aside because it "missed the[ir] point." Resp. Br. 8. Yet the Court did not misunderstand Respondents' position; it rejected it. The Court knew that the Act does not require "unions to provide services, without compensation, to non-union members," *id.*, because the Act expressly allows unions to collect agency fees for collective bargaining agreements entered into before its effective date, *see* W. Va. Code § 21-5G-7(a). The Act thus takes nothing from Respondents, but merely prohibits taking non-members' property without their consent under as-yet-unknown terms of potential *future* contracts. *Morrisey* confirms—and Respondents provide no authority undermining its conclusion—that one-sided expectation interests like these are not protected property under West Virginia law.

Respondents proceed instead as though *Morrisey* did not decide the issue, and argue that forced labor is always an unconstitutional taking. They cannot dispute, however, that the Court has rebuffed this expansive argument in other contexts as well. *See Jewell v. Maynard*, 181 W. Va. 571, 581, 383 S.E.2d 536, 546 (1989) (rejecting argument that, absent additional evidence, appointing attorneys "even for no pay at all" is a taking). This principle undercuts the persuasive force of the decisions Respondents cite from other jurisdictions that may take a broader view of property than West Virginia law. *See* Resp. Br. 24 & n.10. And even there, those States have declined to extend this approach to the specific context of right-to-work laws. In Indiana, for instance, unions relied on *Webb v. Baird*, 6 Ind. 13 (1854) (cited at Resp. Br. 24 n.10) when challenging the State's right-to-work law. *See* Supp. Br. of Unions, *Zoeller v. Sweeney*, 45S00-1309-PL-00596, 2014 WL 6736820, *9 (Ind. June 2, 2014). Nevertheless, the Supreme Court of

Indiana followed the Seventh Circuit's lead and rejected the argument: With "no state demand for services" and where "the law merely prohibits employers from requiring union membership or the payment of monies as a condition of employment," there was no taking. *Zoeller*, 19 N.E.3d at 752 (citing *Sweeney*, 767 F.3d at 666).

More fundamentally, the reason there is no tension between rejecting Respondents' claim and the cases they cite (Resp. Br. at 23-25) about compelled personal services is because in each of those cases there was no choice *not* to work. Here, Respondents can opt-out of providing services for non-members by forgoing exclusive agency status. If they opt-in, however, they must take the bitter with the sweet. Indeed, Respondents ignore this Court's holding that a takings challenge cannot succeed where an entity voluntarily chooses to participate in a regulatory regime that imposes certain costs. State Br. 30-31 (citing *State ex rel. Lambert v. Cty. Comm'n of Boone Cty.*, 192 W. Va. 448, 459, 452 S.E.2d 906, 917 (1994)); *see also Rucklehaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984) (rejecting takings challenge to regime that imposed terms "rationally related to a legitimate Government interest" in exchange for "economic advantages").

Second, Respondents address their takings argument to the wrong sovereign. To state a claim for relief under the West Virginia Constitution's Takings Clause, a plaintiff must show that the "*state or its delegated agent*" took some action which "substantially interferes with the beneficial use" of the property. Syl. pt. 6, *Stover v. Milam*, 210 W. Va. 336, 557 S.E.2d 390 (2001) (emphasis added; quotation omitted). Article III, Section 9 does not—nor could it—provide relief when the United States Federal Government interferes with a property interest. Respondents cannot cite a single West Virginia decision supporting their interpretation of state law, nor from any other jurisdiction for that matter. And they ignore the cases teaching that the proper remedy for a purported taking is to sue the entity that did the taking. *See* State Br. 29.

This failure is fatal. The "compelled" labor Respondents challenge—providing services for non-members who do not pay agency fees, Resp. Br. 4-5—flows from the *federal-law* duty of fair representation. It is federal law, the NLRA, that "has been interpreted to impose a duty of fair representation on labor unions." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 271 (2009) (quoting *Marquez v. Screen Actors*, 525 U.S. 33, 44 (1998)). This duty to represent non-members fairly does not depend on any provision of state law, but applies equally across the country regardless whether a State has enacted right-to-work protections. It is also federal law that expressly permits States to adopt right-to-work laws in the first place. 29 U.S.C. § 164(b). Respondents assert (without support) that this statute "hardly constitutes an 'express' authorization," Resp. Br. 10, but ignore the Supreme Court's opposite holdings, *see* cases cited State Br. 5.

Respondents' quarrel, then, is not with the Act; it is with Congress. After all, the Act does not create a distinct West Virginia-based duty of fair representation—if Congress amended the NLRA tomorrow to not require fair representation of non-members, Respondents' takings claim would vanish. The Court should reject Respondents' side-door attack on the federal duty of fair representation and the choice Section 164(b) gives States to forbid agency fees.

Third, Respondents have received valuable compensation for any "taking," and their protestations to the contrary contradict their associational freedom claim. The Takings Clause of the West Virginia Constitution does not bar takings outright; it requires paying just compensation first. W. Va. Const. art. III, § 9; *see W. Va. Dep't of Transp., Div. of Highways v. Echols*, 241 W. Va. 575, 827 S.E.2d 45, 54 (2019). As part of their associational freedom argument, Respondents concede that they receive important benefits when they choose to form as exclusive-agency unions—the ability to force employers to the bargaining table, and significant "leverage" when they arrive. *See* Resp. Br. 12-13. These are high-value tools: A union with exclusive status has

the full force of federal law on its side to compel individuals and corporations to do what they may not want to do and certainly would not be required to do otherwise.

In the takings section of their brief, however, Respondents argue that there is "no evidence" of these benefits, that they cannot be quantified in dollars and cents even if they do exist, and that the "responsibilities and limitations" from the duty of fair representation "diminish" any benefit unions receive. Resp. Br. 25. The argument does not hold both ways. If it is really the case that the benefits of exclusive status are so great that organizing in a different form would "reject[] the reason for [a union's] existence," Resp. Br. 13, then it is difficult to see how Respondents have not received fair compensation even if those benefits suffer some "diminishment" after a state right-to-work law. Respondents—again—also provide no support for their assertion that the benefits they receive under federal law are irrelevant to their takings claim, and offer no response to the numerous courts holding that these benefits "fully and adequately compensate[]" unions for the federal regime's attendant burdens. *Sweeney*, 767 F.3d at 666; *see also Zoeller*, 19 N.E.3d at 753 (finding unions receive just compensation for any taking under Indiana's right-to-work statute); cases cited State Br. 31-32. Thus, even if the Act worked a taking of a constitutionally protected property interest, Respondents' takings claim would still fail.

V. The Circuit Court's Decision Conflicts With Federal Law.

Finally, Respondents are incorrect that no tension exists between the circuit court's construction of the West Virginia Constitution and federal law. *See* Resp. Br. 26. Respondents suggest that whether 29 U.S.C. 164(b) allows States to prohibit contracts with agency fees "is a serious question of statutory interpretation," *id.*, yet offer no statutory basis for their doubt. There is none. *See, e.g.*, State Br. 5-6.

Respondents' only substantive argument on this point is that West Virginia has exercised its choice to allow agency fees through Article III of the West Virginia Constitution. Yet Respondents do not dispute this Court's holding that an interpretation of state law must yield where it "would foreclose choosing" an option federal law expressly left open. *Morgan v. Ford Motor Co.*, 224 W. Va. 62, 79, 680 S.E.2d 77, 94 (2009). Nor do they challenge the legal environment when Congress passed Section 164(b) in 1947. Incorporation of the federal Bill of Rights against the States was then only two decades old, *see* Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 Harv. L. Rev. 431, 460 (1926), and for next several decades courts almost uniformly construed state constitutional provisions as coextensive with their federal counterparts, *see* Peter Miller, *Freedom of Expression Under State Constitutions*, 20 Stan. L. Rev. 318, 326 (1968). This means that Congress—which knew many States had right-to-work laws at the time, State Br. 18-19—would have assumed that through Section 164(b) it was leaving open the choice whether to pass similar laws in other States. Respondents would separate West Virginia from the rest of the country by making it the only State where that choice is unavailable. The circuit court's decision is wrong on the merits, and wrong to create this tension with federal law.

* * *

This Court's decision in *Morrisey* so thoroughly rejected Respondents' arguments that "remand [should have been] nothing but a perfunctory exercise." 239 W. Va. at 646, 804 S.E.2d at 896 (Workman, J., concurring in part and dissenting in part). Over two years after the Court's original decision, Respondents (like the circuit court) are still unable to point to any successful challenge in any of the 27 other States with laws similar to the Act. Nor have they identified any unique aspect of West Virginia law that could support a contrary outcome here, much less one strong enough to warrant overturning a published decision of the Court. The Court should bring

this protracted challenge to an end, reaffirming that the Legislature's policy decision to pass the Act violates none of Respondents' organizational rights, and instead protects the rights of *all* workers to choose to associate with a union—or not.

CONCLUSION

The States respectfully asks this Court to reverse the circuit court's order and remand with instructions to enter judgment in favor of the State.

Respectfully submitted,

ATTORNEY GENERAL PATRICK MORRISEY AND THE STATE OF WEST VIRGINIA

By counsel

PATRICK MORRISEY
ATTORNEY GENERAL

Lindsay S. See (WV Bar #13360)
Solicitor General
Counsel of Record

State Capitol Building 1, Room E-26
Charleston, West Virginia 25305
(304) 558-2021
Lindsay.S.See@wvago.gov

Counsel for Petitioners
Attorney General Patrick Morrisey and the State of West Virginia

Dated: August 21, 2019