IN THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 19-0298

PATRICK MORRISEY, *et al.*,

Petitioners,

vs.

WEST VIRGINIA AFL-CIO, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS

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STATEMENT OF THE CASE

During its 2016 Regular Session, the West Virginia Legislature enacted the euphemistically labeled "Workplace Freedom Act" ("the Act", "S.B. 1", or "the WFA"), often referred to as a "right to work" law.[1] S.B. 1 provides that no person may be required as a condition or continuation of employment to become or remain a member of a labor organization; pay dues, fees, assessments or other similar charges, however denominated, of any kind or amount to any labor organization; or pay to any charity or third party in lieu of those payments any amount that is equivalent to or a pro rata portion of dues, fees, assessments or other charges required of members of a labor organization.

The new law includes West Virginia Code § 21-5G-2, which provides:

> A person may not be required, as a condition or continuation of employment to:
>
> 1. Become or remain a member of a labor organization;
> 2. Pay any dues, fees, assessments or other similar charges, however denominated, of any kind or amount to any labor organization; or
> 3. Pay any charity or third party, in lieu of those payments, any amount that is equivalent to or pro rata portion of dues, fees, assessments or other charges required of members of a labor organization.

[1] Following enactment of the National Labor Relations Act in 1935, which guaranteed organizing and representational rights to labor organizations, unions typically bargained for contract provisions that required union membership as a condition of employment. Such a condition created a "closed shop." In 1947, Congress enacted the Taft-Hartley Act, which in § 8(a)(3), 29 U.S.C. § 158(a)(3), made closed shops an unfair labor practice. That section also provided, however, that collective bargaining agreements could create "union shops," that is, arrangements in which union membership could not be a condition for hire but could, after thirty days, be a condition for continued employment. Taft-Hartley added, as well, § 14(b), 29 U.S.C. § 164(b), which essentially authorized the states to enact laws prohibiting union membership as a condition of continued employment. About half of the states – the so-called right-to-work states – have enacted such laws, thus creating "open shops." As explained in the text, West Virginia has gone one step further.

West Virginia Code § 21-5G-3 makes a union security clause violating the new law "unlawful, null and void, and of no legal effect." The Act also repealed sections of the West Virginia Labor-Management Relations Act for the private sector that permitted labor organizations to negotiate contracts containing a union security clause. West Virginia Code §§ 21-1A-1 and 21-1A-5. Further, the Act made the enforcement of a union security clause (adopted after the statute's effective date) a misdemeanor for each day of enforcement. West Virginia Code § 21-5G-4.

On July 27, 2016, the plaintiffs/respondents filed an *Amended Petition for Declaratory Judgment and Injunctive Relief.* The Amended Petition requested that the circuit court issue a declaration that the Workplace Freedom Act (1) violated several provisions of the West Virginia Constitution, including Article III, §§ 1, 3, 7, 9, 10, and 16, Article VI § 30, (2) did not apply to the collective bargaining laws or agreements in the building and construction industries.[2] (A.R. 724) The petition also requested preliminary and permanent injunctions against the enforcement or application of the WFA and plaintiffs' attorneys' fees and costs. Following a hearing, the circuit court issued a preliminary injunction. The State subsequently filed an interlocutory appeal of that order, and this Court reversed. *Morrisey v. AFL-CIO*, 239 W. Va. 633, 804 W.E.2d 883 (2017). Upon remand and upon consideration of the additional evidence submitted with the plaintiffs' motion for summary judgment, the circuit court again concluded that the WFA transgresses plaintiffs' fundamental rights to freedom of association and from an uncompensated taking of property.

The West Virginia AFL-CIO is a federation of labor organizations and is a person

[2] The latter claim was subsequently mooted by a legislative amendment clarifying the scope of the Act's application.

within the meaning of *West Virginia Code* §§ 55-13-11 and 55-13-13, whose member organizations represent employees of employers in the private and public sectors in the State of West Virginia including the locals of the International Brotherhood of Electrical Workers, AFL-CIO, the United Mine Workers of America, AFL-CIO, and many other labor organizations in the same position as the plaintiffs/respondents. The WV AFL-CIO represents approximately 57 International Unions, who in turn represent 70,000 public and private sector employees in West Virginia.

The West Virginia State Building and Construction Trades Council ("WV ACT"), AFL-CIO, is a labor organization, and is a person within the meaning of *West Virginia Code* §§ 55-13-11 and 55-13-13, that represents approximately 20,000 construction workers throughout the State of West Virginia and surrounding counties. The Council and its members have an interest in collective bargaining agreements throughout the State of West Virginia.

The Chauffeurs, Teamsters, and Helpers Local No. 175 ("Teamsters"), the United Mine Workers of America ("UMWA"), AFL-CIO, and the International Brotherhood of Electrical Workers ("IBEW"), AFL-CIO, Locals 141, 307, 317, 466, 596, and 968 are each a labor organization within the meaning of § 2(5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 152(5) and West Virginia Code §21-1A-2(5). They represent employees engaged in interstate commerce for purposes of collective bargaining and are party to numerous collective bargaining agreements with employers in the State of West Virginia.

Amanda Gaines is a member of the Teamsters and an employee of Stonerise Healthcare Systems d/b/a Clarksburg Center, LLC.

SUMMARY OF ARGUMENT

This Court's decision in *Morrisey v. West Virginia AFL-CIO*, 239 W. Va. 633, 804 S.E.2d

883 (2017), dissolving the previously-issued preliminary injunction of the "Workplace Freedom Act" ("WFA"), W. Va. Code §§ 21-5G-1, *et seq.*, is not dispositive of this appeal. The earlier decision did not have the complete record before the Court, as the circuit court did when it ruled on the summary judgment motions. Moreover, the majority opinions in *Morrisey I* simply failed to address in any meaningful way the plaintiffs' constitutional arguments. Rather, the Court appears to have assumed that the Plaintiffs' challenge to the WFA is no different from prior cases dealing with constitutional attacks on "right to work" laws, dating to Lincoln *Federal Labor Union v. Northwest Iron & Metal Co.*, 335 U.S. 525 (1949), and that the usual judicial deference applied. This case, however, is quite different from most all prior cases considering right to work legislation and the greater burden that the WFA places on associational and property rights demands a countervailing rigorous scrutiny from this Court.

The extraordinary and unconstitutional burden placed by the WFA on the plaintiffs' associational rights is established by a line of cases that began with *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), and that dealt with various strategies used by southern states to undermine the effectiveness of the NAACP in combating racial segregation. The strategies included attempts to force disclosure of the names of members and contributors to the Association. Such efforts were designed to chill membership in the organization and to make it more difficult for it to raise the money it needed to be effective. The WFA accomplishes the same ends with regards to unions. Because unions must represent fairly and equally all members of a collective bargaining unit, prohibiting the unions from collecting fees for their services – as the WFA does – has the effect of encouraging "free riders" – of workers who make use of and benefit from the union but refuse to pay for the provision of those benefits. Those who do join would then have to make up for the costs of the benefits that the free riders receive. That combination obviously chills

workers from joining unions and imposes financial burdens on both the unions and their members. Because the ban on "agency fees" serves no legitimate purpose and only serves to discourage union membership and undermine the organizational effectiveness of labor unions, the ban cannot survive the scrutiny required for the protection of the freedom of association as set forth in Article III, §§ 7 (freedom of speech) and 16 (rights of assembly and to consult for the common good) of the West Virginia Constitution.

The WFA effectively requires unions to provide their services to members of any collective bargaining unit they represent and then prohibits them from collecting for their services. That is essentially requiring them to work for nothing, and that constitutes a taking of their property without just compensation in violation of Article III, § 9 of the West Virginia Constitution. *Phillips v. Legal Foundation of Washington*, 524 U.S. 156 (1998); *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003); *Calder v. Bull*, 3 U.S. (3 Dallas) 386, 388 (1798) (Chase, J., concurring) (the Constitution should not tolerate "a law . . . that takes property from A. and gives it to B."). "It has long been recognized that labor is property. The laborer ha[s] the same right to sell his labor, and to contract with reference thereto, as any other property owner. *DeLisio v. Alaska Superior Court*, 740 P.2d 437, 440-43 (Alaska 1987). This Court has agreed with that fundamental notion and has twice held that the State cannot force even lawyers – officers of the Court – to provide public defender services at rates that cannot allow them to show some profit. *Jewell v. Maynard*, 181 W. Va. 571, 383 S.E.2d 536 (1989); *State ex rel. Partain v. Oakley*, 159 W. Va. 805, 227 S.E.2d 314 (1976). The State has no justification for prohibiting unions from recouping the cost of the services they provide to nonunion members.

Contrary to the Attorney General's contentions, the circuit court's invalidation of the WFA does not conflict with federal law and is not preempted by it. Sections 8(a)(3) and 14(b) of the

National Labor Relations Act, 29 U.S.C. §§ 158(a)(3) and 164(b), authorize union shop contracts (requiring new hires to join a union after thirty days of employment) and authorize states to choose not to require union membership. The federal law includes no express authorization for states to prohibit union agency fees for services actually provided. The circuit court's decision says nothing about requiring, or not requiring, union membership, but simply states that West Virginia has opted through its Bill of Rights (see above) to disallow bans of contracts providing for agency fees. There is no conflict in that holding with portion of the U.S. Code.

STATEMENT REGARDING ORAL ARGUMENT

Due to the fundamental importance of the constitutional and statutory issues presented in this appeal, respondents advocate for a full Rule 20 oral argument.

ARGUMENT

I. THE COURT'S PRIOR OPINION IN THIS CASE IS NOT DISPOSITIVE OF THE ISSUES PRESENTED BY THIS APPEAL.

In its opinion in *Morrisey v. West Virginia AFL-CIO*, 239 W. Va. 633, 804 S.E.2d 883 (2017), this Court reversed the circuit court's issuance of a preliminary injunction against enforcement of the so-called "Workplace Freedom Act". The majority concluded that the plaintiffs had failed to demonstrate a sufficient likelihood of success on the merits to warrant a preliminary injunction. For several reasons, that decision does not support reversal of the circuit court's subsequent and considered ruling that the WFA violates the West Virginia Constitution.

First, the Court began with the assumption that the plaintiffs must establish "beyond a reasonable doubt[] that the law violates the Constitution." *Id.*, 239 W. Va. at 638, 804 S.E.2d at 888. Applying a standard of criminal evidence to a constitutional question is a dubious undertaking to begin with, but, in any event, this case implicates fundamental rights of association and just compensation. In such cases, "the usual presumption of validity" does not apply. *E.g.*, *Playboy*

Entertainment Group, Inc., 529 U.S. 803, 818 (2000); *R.A.V. v St. Paul*, 505 U.S. 377, 382 (1992); *Lewis v. Canaan Valley Resorts, Inc.*, 185 W.Va. 684, 694, 408 S.E.2d 634, 644 (1991). Rather, upon a state's intrusion on fundamental rights, "a heavy burden lies upon it to show" that the intrusion is necessary to further important state interests. *E.g., Pushinsky v. Board of Law Examiners*, 164 W.Va. 736, 748, 266 S.E.2d 444, 451 (1980); *accord, Women's Health Center of W. Va., Inc. v. Panepinto*, 191 W. Va. 436, 446 S.E.2d 658 (1993).

Second, the Court simply failed to consider the plaintiffs' arguments on the merits. The *entirety* of the Court's "analysis" with regards to plaintiffs' freedom of association claim was this:

> [W]e must decide [whether] the unions have shown a likelihood of success in pressing their arguments that [the Act] impairs their freedom of association. At least twenty-seven other states have *some form* of a right to work law today, many in existence since the passage of the Taft Hartley Act in 1947. The unions have not directed us to any state or federal appellate decision accepting their constitutional freedom of association argument and disapproving of a right to work law on similar grounds.[3]

239 W. Va. at 641, 804 S.E.2d at 891 (italics added). That is it. There was no discussion of the case law, no recognition that there are significant differences between the laws in most of those twenty-seven other states and West Virginia's version, or that previous challenges to right to work laws have largely dealt with issues other than West Virginia's prohibition on agency fees. Rather,

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[3] The latter statement is technically accurate; it is also misleading. There is hardly any case law, going either way, testing bans on agency fees under the scrutiny of a freedom of association analysis. *Sweeney v. Pence*, 767 F.3d 654 (7th Cir. 2014), did not meaningfully address the argument – it simply concluded that *Lincoln Federal Labor Union v. Northwest Iron & Metal Co.*, 335 U.S. 525 (1949), had already decided the issue. As explained below, *Lincoln Federal* expressed no views on the issues in this case. Similarly, the Wisconsin, Idaho, and Kentucky courts failed to address freedom of association claims in their considerations of challenges to agency fees. *International Union of Operating Engineers Local 370 v. Wasden*, 217 F. Supp. 3d 1209 (D. Idaho 2016); *International Union of Operating Engineers Local 139 v. Schimel*, 210 F. Supp. 3d 1088 (E.D. Wis. 2016); *Zuckerman v. Bevin*, 565 S.W.3d 580 (2018). Litigation over such bans is a recent development, and the cases have not been decided without substantial dissents. *E.g., Sweeney*, 764 at 671-685 (Wood, C.J., dissenting); *Zuckerman v. Bevin, supra* (4-3 decision). Needless to say, there is *no* authority rejecting the unions' arguments under the express protection in Article III, § 16 for the "inviolate" right to consult for the common good.

the Court merely genuflected to the "seventy years" of case law upholding other versions of right to work laws while failing to note the extent to which West Virginia has gone beyond those other versions. The plaintiffs' associational rights deserve more respect than that.

The Court accorded the unions' uncompensated takings argument no more attention. The majority stated that the plaintiffs had no more than "a 'unilateral expectation' of receiving fees from nonunion employees." 239 W. Va. at 641, 804 S.E.2d at 891. That conclusion, however, entirely missed the point of the plaintiffs' contention that the Act presently requires the unions to provide services, without compensation, to non-union members and to non-fees paying members of the collective bargaining unit. Time is money. Unions have to pay its officers and employees to provide the services needed to negotiate and administer a collective bargaining agreement. *E.g.*, (*Lenhert v. Ferris Faculty Ass'n*, 500 U.S. 507, 552-53, 111 S.Ct. 1950, 1976, 114 L.Ed.2d 572 Scalia, J., concurring, in part, and dissenting in part, *quoting Abood v. Detroit Bd. Of Educ.*, 431 U.S. 209, 221-222, (97 S.Ct. 1782, 1792-1993, 52 L.Ed 2d 261 (1977)). The issue is not whether the plaintiffs had some "expectation" of future reimbursement; rather, the issue is whether the State can compel the unions to work for nothing. Compulsory, free labor has been unconstitutional in this country since enactment of the Thirteenth Amendment in 1865.

Third, the AG's Brief is based in significant part on the assertion that the record in this matter is "unchanged" (Petitioners' Brief, p. 2)[4] since this Court's decision reviewing the Circuit Court's preliminary injunction and that the "respondents did not develop new evidence"

[4] The Attorney General also asserts that, "recent legal developments confirm the wisdom of the Court's initial decision. In this regard the AG cites *Zukerman v. Bevin*, 565 S.W.3d 580 (Ky. 2018), and *Janus v. American Federation of State, County & Municipal Employees Council 31*, 138 S.Ct. 2448 (2018). With regard to Bevin, the Circuit Court's Order notes that "much of the discussion revolved around the unique provisions of Section 59 of the Kentucky Constitution which prohibits certain local and special acts; however, ultimately the legislation affecting private sector unions was upheld." (Order, p. 13. A.R. 039). The *Bevin* decision is of limited or no assistance to this Court's consideration of the instant matter. The *Janus* decision is discussed below.

(Petitioners' Brief, p. 2) The AG asserts, "Despite this unchanged record, however, the circuit court enjoined vital portions of the Act *again* - this time permanently – in a decision that all but ignores this Court's [preliminary injunction] decision. Reversal is warranted on this basis alone." (Petitioners' Brief, p. 2)

The Attorney General is simply incorrect; the record is clear that the evidence filed in the record with the respondents' motion for summary judgment was not before this Court when it heard and decided the issues related to the preliminary injunction. While, the hearing before the circuit court on the then-pending motions for summary judgment was held prior to the hearing in this Court, the record before this Court at the time of its review of the preliminary injunction did not include the summary judgment record.

The Plaintiffs/Respondents' summary judgment evidence included six affidavits which were cited a number of times in the circuit court' Order at issue in this appeal. (A.R. 036, 044, 045, 047, and 061)

The AG's repeated assertions regarding the alleged status quo nature of the record are troubling, are inconsistent with the record, and must be disregarded.

The Attorney General has at no time submitted any evidence, whatsoever, in this matter. The record contains significant evidence from the Plaintiffs/Respondents in support of the preliminary injunction and plaintiffs' motion for summary judgment and nothing from the Attorney General. As noted by the circuit court, for example, the AG asserts that the Plaintiffs receive substantial benefit from being granted exclusive bargaining power, and yet, "The AG puts forward this contention while at the same time placing no evidence in the record to support it." (Order at 34; A.R. at 060). The circuit court contrasted the lack of the AG's evidence with the "hard evidence" of the Plaintiffs. (Order at 34-35; A.R. at 060-061)

Chief Justice Loughry's concurrence was no more pertinent than the majority opinion. He first mischaracterized the plaintiffs' freedom of association contention: "respondents assert that by merely allowing employees to *choose* whether to join the union, the Act impairs the union's [sic] ability to associate with employees." 239 W. Va. at 643, 804 S.E.2d at 893 (emphasis, for whatever reason, in original). That was not, and is not, the unions' argument. They have no quarrel with the ability of collective bargaining unit members to decline to join a union; that is their right. Rather, what the plaintiffs object to is the Act's prohibition on the unions' assessments for services provided to those nonmembers. The former Chief Justice also asserted that the "United States Supreme Court effectively rejected" the plaintiffs' freedom of association argument "more than half a century ago" in *Lincoln Federal Labor Union v. Northwest Iron & Metal Co.*, 335 U.S. 525 (1949). 239 W. Va. at 653, 804 S.E.2d at 893. *Lincoln Federal*, of course, did no such thing. It examined only the question of the states' ability to prohibit contracts limiting employment to union members; it said absolutely nothing about the issue in the present case: whether the state may prohibit contracts that allow unions to collect the costs of the services they provide to free riders. The Former Chief Justice also iterated the incorrect assertion that "the Taft-Hartley Act expressly allows for the states to prohibit compulsory union membership [that it does] and/or dues remittance [that it does not]." 239 at 644, 804 S.E.2d at 894. The operative provision of the NLRA, § 14(b), 29 U.S.C. § 164(b) provides:

> Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

That hardly constitutes an "express" authorization permitting the states to bar unions from negotiating agreements that would allow them to recover for the services they provide to all members of a collective bargaining unit.

II. THAT THE RESPONDENT UNIONS HAVE VOLUNTARILY CHOSEN TO SEEK EXCLUSIVE REPRESENTATION STATUS IS IRRELEVANT.

The Attorney General emphasizes in his brief [5] that the State's ban on agreements requiring workers to pay fees for the administrative and representational services of a union does not violate the associational and property rights of unions and their members because unions have a choice: they can invoke exclusive agency status or they can function as a members-only representative. In so arguing, the AG (and the West Virginia Legislature) plays a shell game and ignores the fundamental premises and finely wrought structure of the NLRA.

In enacting the NLRA, Congress sought to promote industrial peace, to address the inequality of bargaining power between employers and employees, and to improve the wages and working conditions for employees – all in the service of enhancing interstate commerce. 29 U.S.C. § 151. The means that it found necessary to implement those goals provided for a regime supporting collective action by workers and requiring a workplace democracy with respect for individual worker and employer rights. *Id.*; *Emporium Capwell Company v. Western Addition Community Organization*, 420 U.S. 50, 61-64 (1975). To implement that regime, Congress enacted a carefully crafted process.

First, Congress established the right of workers to form, join, or assist labor organizations and to refrain from doing so. NLRA, §§ 7 & 8(a)(1)(3)(4), 29 U.S.C. §§ 157 & 158(a)(1)(3)(4). Second, Congress required employers to bargain with a duly elected representative of employees in a defined bargaining unity. NLRA, § 8(a)(5) & (d), 29 U.S.C. § 158(a)(5) & (d). Third, § 9, 29 U.S.C. § 159 promoted workplace democracy by requiring that any labor organization seeking to bargain collectively with an employer must be elected by a majority of employees within an

[5] See for example, pp. 14, 16 and 36.

appropriately defined bargaining unit as determined by the National Labor Relations Board ("NLRB"). A majority of unit members could also reject union representation or could (within time restrictions) bring about decertification of a union. While reliance on majority rule requires the subordination of some individual interests to advance the collective good, Congress has enacted numerous provisions to protect dissenting members from majoritarian abuses. *E.g.*, NLRA, §§ 7, 8(b) & (c), 29 U.S.C. §§ 7, 8(b) & (c); Labor Management Relations Act ("Taft-Hartley"), 29 U.S.C. §§ 158(b) & 185, *et seq.*; Labor Management Reporting & Disclosure Act ("Landrum-Griffin"), 29 U.S.C. §§ 401, *et seq.* Finally, Congress ensured that a majority-elected labor organization could be effective by bestowing upon it the exclusive power to bargain with employers on behalf of bargaining unit employees. NLRA § 9(a), 29 U.S.C. § 159(a). Because of the extraordinary scope of that grant of exclusivity and the potential for compromising the rights of minorities of all ilks, the Supreme Court has imposed on majority-status unions the duty to fairly represent all members of the collective bargaining units, including non-union members. *E.g.*, *Vaca v. Sipes*, 386 U.S. 171 (1967); *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944).

The AG argues, however, that unions can avoid that duty by eschewing exclusivity and entering into a "members only" agreement with the employer. The argument is pie-in-the-sky. If a union achieves majority status and is certified by the NLRB as such, then necessarily the duties to bargain, union exclusivity, and the duty of fair representation all apply. If the union does not seek Board certification, but instead seeks to bargain collectively on behalf of only union members, then there is no duty on the employer to bargain with the union. The duty to bargain arises *only* when a union is certified as a majority representative of the bargaining unit employees. Thus, an employer can, and almost invariably would, inform a "member-only" labor organization seeking

to negotiate a contract to get lost.[6] And even if the employer did agree to such negotiations, the union would have little to no leverage with the employer because the latter could, on any issue, simply invoke its trump card that it does not have to negotiate at all and leave the table or threaten to do so.

As the Attorney General puts it, "When seeking to represent a group of employees, unions may choose to organize as either an exclusive agency union or a members-only union. That choice bears certain costs and benefits. (Petrs. Brief at 3). The union's "choice" that the AG puts forth is essentially that between functioning as a union and rejecting the reason for its existence.

As detailed below, the "Workplace Freedom Act" causes serious harm to the associational rights of the State's unions and their members and will effect an unconstitutional taking of their assets.[7] Meanwhile, the unions must provide full service to those workers who opt not to pay for them and to do so to the same extent and with equal zeal as they provide to workers who pay for what they get.

That unions "choose" to seek exclusive status has naught to do with the respondents' association and property rights implicated by the WFA. Unions – and any other organizations – "choose" to come into existence, they "choose" to perpetuate, and their members freely "choose" to join, and participate in, the associations. That is how a democracy works, including a workplace democracy[8].

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[6] That reality no doubt provides the reason why member-only union contracts with employers do not exist.

[7] According to the report commissioned by and relied upon by the West Virginia Legislature in enacting West Virginia Code §§ 21-5G-1, *et seq.*, the act could cause unions to suffer up to a 20% reduction in membership. Plaintiffs' Exhibit 6, A.R. 659-707 at 663, 692-693 (John Deskins, "The Economic Impact of Right to Work Policy in West Virginia" (2015)).

[8] The AG assigns error to the Circuit Court's holding that the statute at issue violates the Plaintiffs/Respondents Liberty interest (AG Brief, pp 32-36). The AG's argument is based on the assertion that a union's duty of fair representation only arises if the union makes a "voluntary choice" to

III. THE WORKPLACE FREEDOM ACT VIOLATES PLAINTIFFS' FREEDOM OF ASSOCIATION PROTECTED BY ARTICLE III, §§ 7 AND 16 OF THE WEST VIRGINIA CONSTITUTION.

Article III, § 16 of the West Virginia Constitution expressly states that the freedom to consult for the common good shall be held inviolate. United States and West Virginia Supreme Court decisions have also held that the right to associate with others to advance particular causes is necessarily embedded in the freedoms of speech and press and is accorded fundamental status protected by the strictest of judicial scrutiny. *E.g.*, *United States v. Robel*, 389 U.S. 258 (1968); *Pushinsky v. Board of Law Examiners*, 164 W. Va. 736, 266 S.E.2d 444 (1980). The "Workplace Freedom Act" casts a blunderbuss shot at the plaintiffs' ability to associate with employees to advance workers' causes.

In a series of cases that grew out of the massive Southern resistance to the Supreme Court's desegregation rulings in *Brown v. Board of Education*, the Court firmly established that the freedom of association imposes an extremely heavy burden on the state to justify measures that discourage membership in lawful organizations and that impair their lawful missions. The cases dealt with Southern strategies designed to chill membership in the NAACP and to combat the organization's effectiveness in desegregating public facilities.

The series began with *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), which thwarted a law suit filed by the State's Attorney General to oust the organization from Alabama for its failure to comply with a state statute that required any association doing business in the state to file qualification papers providing the names and addresses of all of its members and agents.

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organize as an exclusive agent instead of a members-only union. The false issue of choice is discussed above and was rejected by the Circuit Court. The AG's purported error regarding the Plaintiffs/Respondents' liberty interest must be rejected as well.

The Court first noted that the argument that the State had not taken "direct action" against associational rights was not determinative because abridgement of such rights could follow from varied forms of governmental action. *Id.* at 461. Justice Harlan's unanimous opinion for the Court then relied on the obvious: "compelled disclosure of [the NAACP's] membership is likely to affect the ability of [it] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and the consequences of this exposure." *Id.* at 462-63. Alabama could muster no interest that could justify such a burdensome disclosure requirement.

Similarly, *Bates v. Little Rock*, 361 U.S. 516 (1960), struck down the city's 1957 amendment to its occupation license tax that required any organization operating in the municipality to file with the city "a statement as to dues, assessments, and contributions paid, by whom and when paid." *Id.* at 518. The freedom of association, said Justice Stewart for another unanimous Court, is "protected not only against heavy-handed frontal attack, but also from being stifled by more subtle interference," *id.* at 523, although he did not explain what was subtle about Little Rock's tactic. He pointed to the evidence showing that "the public disclosure of the membership lists discouraged new members from joining the organization and induced former members to withdraw." *Id.* at 524. When such a "substantial abridgement of associational freedom" occurs, "the State may prevail only upon showing a subordinating interest which is compelling." *Id.* The city lacked any interest that approached that level. *See also Louisiana ex rel. Gremilion v. National Association for the Advancement of Colored People*, 366 U.S. 293 (1961) (Louisiana statute requiring all nonprofit organizations to file annually a list of the names and addresses of all its members and officers in the state violated freedom of association of the

organizations and their members).

The State of Arkansas's somewhat different tactic met the same fate in *Shelton v. Tucker*, 364 U.S. 479 (1960). A 1958 statute required every public-school teacher in the state, all of whom worked on one-year contracts without any assurance of rehire, to file annually an affidavit, which would become a public record, listing all of the organizations to which the teacher belonged or contributed within the preceding five years. The Court had no trouble concluding that the compelled disclosures would seriously impair the teachers' associational rights. The teachers would reasonably be concerned that certain associational ties with controversial groups could threaten their jobs and that public disclosure could lead to reprisals. Although the Court recognized that Arkansas had a legitimate interest in ensuring its teachers met the State's standards, the reporting requirement went far beyond what was needed to meet that interest. "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Id.* at 488.

In 1956, the Virginia Legislature enacted five statutes "for the express purpose of impeding the integration of the races in the public schools of the state which the plaintiff corporations are seeking to promote." *NAACP v. Patty*, 159 F. Supp. 503, 511 (E.D. Va. 1958) (3-judge court). The first two were registration laws similar to those invalidated in the cases discussed above. The other three related to regulation of the practice of law with regards to creating and sponsoring litigation. The legislative history of the statutes "conclusively show[ed] that they were passed to nullify as far as possible the effect of the decision of the Supreme Court in *Brown v. Board of Education*." *Id.* They were challenged in federal court in *Patty*, which invalidated three of them

and abstained to allow for state court interpretations of the other two. The Supreme Court reversed the invalidations, holding that the district court should have abstained on those statutes as well. *Harrison v. NAACP*, 360 U.S. 167 (1959). Eventually, the Virginia Supreme Court held that the statute prohibiting the solicitation of legal business and fomenting litigation applied to the NAACP's practices of recruiting plaintiffs to challenge school segregation and of paying attorneys to prosecute the cases and that such application was constitutional.

The case returned to the U.S. Supreme Court in *NAACP v. Button*, 371 U.S. 415 (1963), which held that the activities of the NAACP were "modes of expression and association protected by the First and Fourteenth Amendments" that Virginia could not prohibit. *Id.* 428-29. Litigation for the NAACP was not just a process for resolving differences; rather, it was "a means for achieving the lawful objectives of equality of treatment by all government" and was "thus a form of political expression." *Id.* at 429. Given the intense resentment and opposition in Virginia to civil rights efforts, "a statute broadly curtailing group activity leading to litigation may easily become a weapon of oppression." *Id.* at 435-36. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id.* at 438.

The final case in the series confronted an attempt by a Florida legislative committee to enforce a subpoena *deuces tecum* for all of the NAACP's membership records from which its president could purportedly answer questions about whether alleged Communists were also members of the Association. *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963). Although preventing subversive activity in the state was clearly a legitimate subject for legislative inquiry, the Court held that the chilling effect on associational rights that enforcement of the subpoena would generate required the State to establish a substantial connection between the Association and purported subversive activity. The record did not establish such a nexus.

Unions and their members, of course, have long received constitutional protection for the exercise of associational rights. *Hague v. C.I.O.*, 307 U.S. 496 (1939), for example, struck down a permitting ordinance that had been used to block unions' organizing efforts. In *Thomas v. Collins*, 323 U.S. 516 (1945), the Court held that a Texas statute requiring labor union organizers to register with the State as a condition for soliciting membership in their unions could not constitutionally be applied to stop or punish a speech advocating union membership by a union president to a large audience. "The right [to] discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly." *Id.* at 532. In that case, the Texas "restriction's effect, as applied, in a very practical sense was to prohibit Thomas not only to solicit members and memberships, but also to speak in advocacy of the cause of trade unionism in Texas, without having first procured the [registration] card." *Id.* at 536. The Court also applied the *Button* decision to protect unions' First Amendment right to provide their members with an attorney to represent them in workers' compensation cases. *U.M.W.A. Dist. 12*, v., Illinois. Bar Ass. 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964). The states' labeling the provision of the services as engaging in the unauthorized practice of law could not justify the burden it placed on unions to deliver effective services to their members and on the members' rights to petition for redress of grievances.

The foregoing federal cases provide a floor for interpretation of the Article III protections in §§ 7 and 16, and this Court has stated that "the West Virginia Constitution offers limitations on the power of the state" to curtail the rights of association and speech "more stringent than those imposed on the states by the Constitution of the United States." *Pushinsky, supra*, 164 W. Va. at 745, 266 S.E.2d at 449; *accord, West Virginia Citizens Action Group v. Daley*, 174 W. Va. 299,

311, 324 S.E.2d 713, 725 (1984); *see also Woodruff v. Board of Trustees*, 173 W. Va. 604, 319 S.E.2d 372 (1984).

Application of the foregoing principles to the WFA – to its prohibition of agency fees in § 21-5G-2(2) and to its penalties in §§ 21-5G-4 to -6 for entering into contracts containing them – reveals that the Act unnecessarily and unconstitutionally imposes an excessive burden on plaintiffs' associational rights.

Membership is obviously the lifeblood of any labor organization. Members' dues provide unions with nearly all of their revenues for operating expenses, (PI Tr. 15-16, A.R. 548-549; PI Exs. 1 & 2, A.R.650-651) and members' commitment and participation give the organizations their capacity to represent workers effectively in dealing with employers. The WFA will seriously hamper the unions' ability to recruit new members and retain old ones. (PI Ex. 6 at 29, A.R. 693; Affidavit of Curt Koegen, A.R. 487-496). As explained above, both federal and state law requires that a union must fairly represent all workers in the collective bargaining unit, including those who are not members of the union. That duty is a corollary of the conferral in 29 U.S.C. § 159 and W. Va. Code § 21-1A-5 on the union of the status as the employees' exclusive agent; that is, if the law bestows exclusive powers on a private organization, then that organization must adhere to equal protection principles. *E.g.*, *Vaca v. Sipes*, 386 U.S. 171 (1967); *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944). Those principles forbid union discrimination against nonmembers and against persons who do not support the union's political and ideological messages. If unions cannot exact agency fees, employees would be able to receive, without any cost to them, the full benefit of the union's services in negotiating and administering the contract. And if workers can get those services for free, they would have no incentive to join the union or remain a member. *Id.* In fact, those who do join or stay in a union pay a penalty for the privilege

because their dues would have to be enlarged to underwrite the union's services provided to the free riders. (PI Tr. 15-17, A.R. 548-550; PI Exs. 1 & 2, A.R. 65-651; Affidavit of Curt Koegen, A.R. 487-496).

This double whammy on unions' associational rights imposes every bit as much of a burden on their ability to recruit and retain members as did the disclosure requirements in the NAACP cases and hinders the unions' effectiveness as much as the restrictions in *Button* and *UMWA v. Illinois Bar Association*. It must be remembered that, "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton*, 364 U.S. at 488. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Button*, 371 at 438.

In this case, West Virginia clearly has legitimate and substantial interests in protecting workers from being forced to support political and ideological messages with which they disagree or to join an organization they do not support. Those interests, however, can be, and have been, fully accomplished without taking the additional steps of prohibiting agency fees, giving free riders something for nothing, and gutting labor unions. Federal law already requires unions to reimburse its members working under union shop contracts for that portion of their dues spent on advocacy of causes with which they disagree. *E.g., Communications Workers of America v. Beck*, 487 U.S. 735 (1989); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). So, a ban on agency fees does nothing to further the State's concern about forced advocacy or association. In addition, West Virginia has taken the option offered by 29 U.S.C. § 164(b) and banned union shop contracts. *See* S.B.1's Amendment to W. Va. Code § 21-1A-4(a)(3). That completely vindicates the State's

concern about forced association. West Virginia, however, has gone beyond that step and has tacked on bans on agency fees.

Indeed, the *only* things that the agency fee ban accomplishes beyond what these less drastic means already effect are to impose a significant burden on unions to recruit and retain members and to penalize individuals who do join unions. Those are not, however, legitimate purposes that can co-exist with Article III, §§ 7 and 16's protections for the freedoms of speech and association.[9] *Thomas v. Collins, supra*; *Pushinksky, supra.*

The Attorney General responds by reliance on a series of recent Supreme Court decisions that struck down as First Amendment violations state laws and public contracts that required public employees represented by a public sector union to pay agency fees. Petitioner's Brief at 19-20, citing *Janus v. AFSCME. Council 31*, ___ U.S. ___, 138 S.Ct. 2448 (2018); *Knox v. Service Employees Int'l Union, Local 1000,* 567 U.S. 298 (2012). Those cases, however, are not controlling here. First, the cases necessarily involved *government*-compelled exactions to support union expression on matters relating to public collective bargaining agreements. The contracts prohibited by the WFA relate solely to private sector contracts. By definition public sector agreements involve state action and are thus limited by the First Amendment. By definition, the private sector agreements affected by the WFA do not. Second, the theme of the *Janus* and *Knox* cases was that public sector union bargaining over contract negotiation and administration

[9] The Attorney General has cited to *Lincoln Federal Labor Union v. Northwestern Iron & Metal Company*, 335 U.S. 525 (1949), which upheld right to work laws in Nebraska and North Carolina. The laws at issue in that case, however, were quite different from the West Virginia law challenged here and did not include a ban on contracts that impose agency fees. *Id.* at 528-29, nn. 1-2. The case thus did not address the central issue in this case: whether prohibiting contracts that require agency fees (and no more) is consistent with the freedoms of association and from uncompensated takings. *Lincoln Federal* was also decided well before the associational rights cases relied upon by the plaintiffs were decided and did not address the takings question (no doubt because the laws in that case did not amount to a taking).

unavoidably implicate major considerations of public policy and concern, such as government spending and taxing priorities, educational policy, and the provision of government services. *E.g., Janus*, 138 S.Ct. at 2473-75. Consequently, the compulsory fees to support the public sector unions' advocacy in contract negotiation and administration had major political and ideological implications. That is not the case with contracts in the private sector.

The AG also cites in support of its appeal the Supreme Court's opinion in *Davenport v. Washington Education Association*, 551 U.S. 177, 185 (2007), for the proposition that "unions have no constitutional entitlement to the *fees* of nonmember-employees." Petitioner's Brief at 19 (emphasis supplied by the AG). *Davenport* is also unavailing for the AG. First, the "fees" at issue in that case were those that supported the union's electoral/political activities, which since *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), have required employee consent for their imposition and are not at issue in this case. Second, the respondent unions do not argue that they have a constitutional entitlement to employees' fees. Rather, they argue that the State cannot prohibit them from entering into agreements in which they contract for the payment of services actually provided. The difference between those two positions is enormous.

IV. THE WORKPLACE FREEDOM ACT EFFECTS AN UNCONSTITUTIONAL UNCOMPENSATED TAKING OF PLAINTIFFS' PROPERTY.

As explained above, federal and state laws require unions to provide equal services and representation to all members of the collective bargaining unit. If allowed to take effect, the WFA will prohibit unions and employers from assessing nonmembers of the union for any services that the union provides to the bargaining unit, including those provided to the nonmembers. It costs money to negotiate and administer a contract. Union officials have to be paid, union representatives have to be paid, union lawyers have to be paid, union staff have to be paid, accountants have to be paid, grievances and arbitrations have to be paid for, as do all the expenses

(rent/mortgage, supplies, equipment, etc.) of running an office. Union dollars, almost totally reliant upon members' dues, have to pay for all of that. Prohibiting a union from collecting appropriate fees from nonmembers effects a taking of property; it takes money from the union, and derivatively from its members, and essentially gives it to the free riders. (PI Tr. 15-17, A.R. 548-550; PI Exs. 1 & 2, A.R. 650-651; Affidavit of Curt Koegen, A.R.487-496). The Act therefore violates Article III, § 9 of the West Virginia Constitution, which provides that "[p]rivate property shall not be taken or damaged for public use without just compensation."

Recent decisions confirm the intuitive sense that requiring a private citizen or entity to give money to another private citizen is a taking. *Phillips v. Legal Foundation of Washington*, 524 U.S. 156 (1998), confronted a takings challenge to a state's practice of using the interest generated by lawyers' trust accounts (IOLTA) for the support of legal services for the poor. The Court held that the interest on the accounts was the private property of the persons owning the principal. *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), then held that those persons had suffered a taking of their property – their money – for public use when it was paid into the state account. Accord, *Calder v. Bull*, 3 U.S. (3 Dallas) 386, 388 (1798) (Chase, J., concurring) (the Constitution should not tolerate "a law . . . that takes property from A. and gives it to B."). No compensation was due in *Brown*, however, because net losses could not be proved. That is not the case with the WFA. The union's losses are easily calculable; in fact, current law requires unions to calculate annually what is the *pro rata* share of union expenditures that is devoted to contract negotiation, administration, and other workplace services and that share spent on external speech. *Hudson, supra*. The amount spent on bargaining unit work would be the value bestowed upon each free rider under the WFA, and that amount times the number of free riders in the collective bargaining unit will constitute the net losses of the unions and its members.

One's labor is one's property. Other states have reached a consensus that labor performed for money is property. The Supreme Court of Alaska, for example, has held:

> [E]xcluding personal services from the [takings] clause's provisions is manifestly unreasonable. It has long been recognized that "labor is property". The laborer ha[s] the same right to sell his labor, and to contract with reference thereto, as any other property owner.

DeLisio v. Alaska Superior Court, 740 P.2d 437, 440-43 (Alaska 1987) (citing as support authorities from Kansas, Indiana, Missouri, Utah, and the English common law[10]); *see also McNabb v. Osmundson*, 315 N.W.2d 9, 22-23 (Iowa 1982) (the right of reasonable compensation for services "was described as complete, without further legislative enactment, and a fundamental rule of right, foundationed on the constitutional mandate that private property shall not be taken without just compensation"); *Sudberry v. Royal & Sun Alliance*, 2006 WL 2091386 (Tenn. Ct. App. 7/27/2006) (an individual "has a property interest in his labor"); *County of Dane v. Smith*, 13 Wis. 585, 587-89 (1861) (the State cannot "command the time and services of the citizen . . . and then say that he shall receive no pay for them").

The West Virginia Supreme Court has aligned Article III, § 9 law with these principles. Both *Jewell v. Maynard*, 181 W. Va. 571, 383 S.E.2d 536 (1989), and *State ex rel. Partain v. Oakley*, 159 W. Va. 805, 227 S.E.2d 314 (1976), held that forcing lawyers to represent criminal defendants at a rate that did not allow them at least some profit was a taking of their property without just compensation. A lawyer's time, the Court recognized, is her livelihood, her bread and butter, and forcing her to expend that time without adequate remuneration deprives her of a

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[10] The cited cases included *State ex rel. Scott v. Roper*, 688 S.W.2d 757 (Mo.1985) (en banc); *Ruckenbrod v. Mullins*, 102 Utah 548, 133 P.2d 325 (1943); *Coffeyville Vitrified Brick & Tile v. Perry*, 69 Kan. 297, 76 P. 848 (1904); and *Webb v. Baird*, 6 Ind. 13 (1854).

tangible asset. The Court in those cases did concede that a lawyer's professional obligation as an officer of the court might confer some power on the State to impose on lawyer's time, *see* Code of Professional Responsibility Rule 6.1 (lawyer's duty to provide *pro bono* service), but that qualification has no application to unions[11].

Finally, the AG contends (Petitioners' Brief at p. 32) that the benefits of exclusive bargaining agent status conferred on unions by § 9 (29 U.S.C. § 159) provide adequate compensation for any costs the unions incur by providing uncompensated services to free loaders. There are several responses to that contention. First, no evidence in the record supports that sweeping assertion. Second, while the costs of unions' contract negotiation and administration are discernible – and, indeed, are calculated annually pursuant to the Supreme Court's decision in *Communications Workers v. Beck* the value of exclusivity's benefits is not reducible to a calculable amount. Third, and most importantly, although election as the exclusive bargaining agent enables a union to force an employer to the table and to exercise *some* leverage at the table, it also carries with it responsibilities and limitations that diminish the benefit. Those include not only adherence to the duty of fair representation but also the constraints and duties imposed by § 8(b), 29 U.S.C. § 158(b), and by the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 401, *et seq.* For unions to meet those requirements, getting just compensation for their services rendered becomes even more important.

V. THERE IS NO CONFLICT BETWEEN THE CIRCUIT COURT'S INTERPRETATION OF THE WEST VIRGINIA CONSTITUTION AND FEDERAL LABOR LAW.

[11] The State, of course, can cure the constitutional violation by paying the unions for their time expended on behalf of nonpaying bargaining unit members. That would truly reflect the State's commitment to promoting individual workers' freedom of association. The State, however, has opted for the cheaper alternative of, basically, requiring unions to provide its services without charging for them.

Even taking the Attorney General's rendition of federal preemption law as accurate (which requires a stretch), it is clear that no conflict – or even "tension" – exists between the circuit court's application of the West Virginia Constitution and federal labor law. Consequently, there is no federal preemption that precludes affirming the lower court's decision.

As noted above, and as conceded by the AG, § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3), specifically authorizes employers and unions to enter into union shop contracts, which could require bargaining unit members to join a recognized union after thirty days of employment. Section 14(b), 29 U.S.C. § 164(b), then provides that nothing in the statute "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." Whether that permission authorizes states to enact a law prohibiting contracts that require agency fees is a serious question of statutory interpretation. Assuming that § 14(b) can be stretched to permit agency fee bans, however, there is still no conflict between the circuit court's holding and federal law.

As the A.G. notes, §§ 8(a)(3) and 14(b) "[t]aken together . . . show Congress's clear intent that states have a choice" regarding union security provisions, however that term is construed. Petrs.' Brief at 37. The circuit court simply decided that West Virginia, as expressed through its Bill of Rights, Article III, §§ 7, 9, 10, and 16, has exercised that choice and has opted to preclude bans on mandatory agency fees. Where's the conflict?[12]

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[12] The circuit court's assessment of this issue was apt:

> The effect of a ruling in favor of the plaintiff and invalidating SB 1 would permit unions and management to agree that all members of a collective bargaining should be assessed for the union's costs of contract negotiation and enforcement. That could hardly be in conflict with federal law when it is expressly authorized by the NLRA. Section 8(a)(3) of that Act expressly provides "[t]hat nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a

CONCLUSION

Based on the foregoing, and on the well-reasoned opinion of the circuit court, this Court should affirm in full that court's decision invalidating and enjoining the operation of West Virginia Code §§ 21-5G-2 through 6.

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condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement." A state law saying that management and labor can agree to assess bargaining unit members with a fee can hardly be said to be in conflict with § 8(a)(3). The section specifically says that federal law shall not be construed to preclude union shops. Case law has held that such agreements cannot go further than requiring the payment of agency fees – fees to pay for those costs incurred by the union in negotiating and administering a collective bargaining agreement. *E.g., Communications Workers v. Beck, supra*; *Hudson, supra*. 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. (Order p.37, A.R. 063)