In the West Virginia Supreme Court of Appeals
No. 21-0559

James C. Justice II, Governor of the State of West Virginia,

Respondent Below, Petitioner,

v.

West Virginia AFL-CIO, *et al.*,

Petitioners Below, Respondents.

BRIEF OF *AMICUS CURIAE* THE NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC., IN SUPPORT OF THE PETITIONER ARGUING FOR REVERSAL OF THE CIRCUIT COURT'S ORDER ISSUING A PRELIMINARY INJUNCTION

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INTEREST OF *AMICUS CURIAE*[1]

The National Right to Work Legal Defense and Education Foundation, Inc. ("Foundation") is a charitable, legal aid organization formed to protect the rights of ordinary working men and women from infringement by compulsory unionism. Through its staff attorneys, the Foundation aids individual employees who have been denied or coerced in the exercise of their right to refrain from collective activity. The Foundation has an interest in defending West Virginia public employees from compulsory union fees and coercive union dues deduction schemes. Foundation Staff Attorneys represented the plaintiff in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018). The U.S. Supreme Court's *Janus* decision is important to understanding the West Virginia Paycheck Protection Act's protection of public employees' First Amendment rights from government and union interference.

Pursuant to authority granted by the West Virginia Rules of Appellate Procedure, Rule 30(a), the Foundation submits this *Amicus Curiae* Brief to bring to the Court's attention controlling authority in support of Petitioner's appeal, and urges this Court to reverse and vacate the Kanawha County Circuit Court's order enjoining West Virginia's Paycheck Protection Act because that decision is based on fundamental legal errors.

INTRODUCTION

The West Virginia Paycheck Protection Act ("the Act")[2] protects public employees from government and union interference with their First Amendment rights under *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018). The U.S. Supreme Court's *Janus* decision requires public

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

[2] Codified as amended at W. Va. Code §§ 21-5-1; 21-5-3; 7-5-25; 8-5-12; 12-3-13b; 18A-4-9; 46A-2-116.

employers and unions to first obtain employees' affirmative, voluntary consent in the form of a knowing and intelligent waiver of their First Amendment rights before ever deducting union payments from their wages. *Id.* at 2486.

Employees who sign union dues deduction authorizations "waiv[e] their First Amendment rights, and such a waiver cannot be presumed." *Id.* (citations omitted). "Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." *Id.* To be effective and prove the employee consents to financially supporting a union, the "waiver must be freely given and shown by 'clear and compelling' evidence." *Id.* (quoting *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967) (plurality opinion)). "Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met." *Id. See also Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680-82 (1999).

West Virginia has elected to protect public employees' First Amendment rights from government interference by ending public employers' union dues deductions. The Act prevents the government from unwittingly violating their employees' First Amendment rights by seizing union dues from them without their voluntary, affirmative consent and knowing, intelligent waiver of those rights, as required under *Janus*. The State's protection of its employees' First Amendment rights does not violate the constitutional rights of Respondents West Virginia AFL-CIO, *et al.* ("the Unions"), because the Unions have no constitutional entitlement to public employees' money or to the employer's administration of union dues deduction schemes. The Act does not prohibit anyone's payment to a union, or interfere with any union activities.

To support their claims below, the Unions proffered unsigned dues deduction authorization agreements with no mention of First Amendment rights, much less any knowing and voluntary waiver of those rights. *See* Ex. 8.[3] Those agreements do not and cannot serve as employees' affirmative voluntary consent required by *Janus*. Even if signed, those agreements are void for failing to provide the waiver. The Unions cannot presume that any employee waived his First Amendment rights because he signed one of the invalid forms proffered in Exhibit 8. The Act, not the lower court's injunction, protects public employees' constitutional rights.

The Kanawha County Circuit Court's order enjoining the Act should be reversed and vacated because it permits unconstitutional dues seizures from West Virginia public employees and continuing constitutional rights violations. To the extent the Unions are demanding and taking any employee dues pursuant to the authorizations presented as evidence in the court below, the Circuit Court's injunction will irreparably harm West Virginia's public-sector workers by violating their First Amendment rights under *Janus*. Thus, the Circuit Court's injunction effectively enjoins West Virginia public workers' First Amendment rights, which the Act protects. The Act remedies the "long-standing" unconstitutional dues deduction practices *Janus* condemned—the very practices upon which the lower court relied to support its injunction. *See* Order 2-3, ¶¶ 5-6; Order 27, ¶ 55. In light of its specialized interest in the freedoms of individual employees, the *Amicus* here demonstrates why the Unions have no likelihood of success on the merits, and why the public interest counsels against enjoining the Act.

[3] *See* Verified Compl. of the W. Va. AFL-CIO, The W. Va. Am. Fed'n of Teachers, *et al.*, Seeking A Prelim. Inj., Permanent Inj., and Declaratory J., W. Va. AFL-CIO, *et al.* v. Jim Justice, Case Nos. 21-P-156-169, Dkt. 1, at Ex. 8 (Kanawha Cnty. Cir. Ct. May 20, 2021) (hereinafter, "Exhibit 8").

ARGUMENT

I. The Unions have no likelihood of success on the merits.

The Circuit Court's order enjoining the Act should be reversed because its conclusion that the Unions are likely to succeed on the merits contradicts West Virginia Supreme Court, U.S. Supreme Court, and federal appellate court precedent. The Circuit Court erred in deciding that the Unions were likely to succeed on the merits of their speech and association claims, because this Court in *Morrisey I* and *II* rejected the Unions' arguments that West Virginia Constitution Article III, Sections 7 and 16 entitle them to state subsidization of their rights. *See Morrisey v. W. Va. AFL-CIO*, 239 W. Va. 633, 804 S.E.2d 883 (W. Va. 2017) ("*Morrisey I*"); *Morrisey v. W. Va. AFL-CIO*, 243 W. Va. 86, 842 S.E.2d 455 (W. Va. 2020) ("*Morrisey II*"). Moreover, U.S. Supreme Court and federal appellate court precedent overwhelmingly supports the conclusion that prohibiting public employers from administering union dues deductions does not violate union speech and association rights, thereby making it highly unlikely the Unions can prevail.[4]

The Circuit Court also erred in finding that the Unions were likely to prevail on their equal protection claims under West Virginia Constitution Article III, Sections 1, 3, and 10. The U.S. Supreme Court and other appellate courts have overwhelmingly rejected challenges to laws that ban public employer-administered union dues deductions while allowing deductions for nonunion organizations.[5] Finally, the Unions cannot succeed on their contract impairment claims because

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[4] *See Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009); *Utah Educ. Ass'n v. Shurtleff*, 565 F.3d 1226, 1229-31 (10th Cir. 2009); *Ark. State Highway Emps. Local 1315 v. Kell*, 628 F.2d 1099, 1103-04 (8th Cir. 1980); *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 645-46 (7th Cir. 2013); *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 319-21 (6th Cir. 1998); *S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1257 (4th Cir. 1989).

[5] *See Ysursa*, 555 U.S. at 359-60 (footnote omitted) (holding "Idaho's decision to allow payroll deductions for some purposes but not for [union] political activities is plainly reasonable"); *City of Charlotte v. Local 660, Int'l Ass'n of Firefighters*, 426 U.S. 283, 287-89 (1976) (rejecting equal protection challenge to city's refusal to deduct union dues while allowing United Way and other payroll deductions); *Bailey v. Callaghan*, 715 F.3d 956, 960 (6th Cir. 2013) (rejecting First Amendment and equal protection challenges to Michigan

the Unions' have no valid interests in unconstitutional agreements that are void and unenforceable under *Janus*.

A. The Act does not violate the Unions' speech or association rights under the West Virginia Constitution Article III, Sections 7 and 16.

1. The Unions have no constitutional right to force public employers to administer the Unions' dues deduction schemes.

Contrary to the Circuit Court's decision, the Act's prohibition of public employer-administered union dues deduction schemes does not burden the Unions' speech or association rights under West Virginia Constitution Article III, Sections 7 and 16.[6] Order 34, ¶ 72. In upholding the Workplace Freedom Act, this Court rejected the Unions' arguments that Article III, Sections 7 and 16 entitle them to state subsidization of their speech and association activities. *See Morrisey II*, 243 W. Va. at 102, 842 S.E.2d at 471. "[W]hat the Legislature gives, the Legislature can constitutionally take away." *Id.* at 127, 842 S.E.2d at 496 (Hutchison, J., concurring).

This Court recognized in *Morrisey II* that a "legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right[.]" *Id.* at 108, 842 S.E.2d at 477 (quoting *Regan v. Tax'n with Representation of Wash.*, 461 U.S. 540, 549 (1983)). This Court further recognized that West Virginia's Constitution "does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Id.* (quoting *Regan*, 461 U.S. at 549-50).

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statute prohibiting school payroll deductions for union dues); *Campbell*, 883 F.2d at 1257 (rejecting freedom of speech and equal protection challenges to enactment prohibiting payroll deductions for union dues while allowing payroll deductions for charities because the state has no "affirmative obligation ... to assist [the union] by providing payroll deduction services"); *Kell*, 628 F.2d at 1103-04 (holding state department could allow automatic payroll deductions for other organizations while denying deductions for union dues); *W. Cent. Mo. Reg'l Lodge No. 50 v. Bd. of Police Comm'rs*, 916 S.W.2d 889, 892-93 (Mo. Ct. App. 1996) (rejecting equal protection challenge to city's policy allowing payroll deductions for United Way and the Kansas City Police Credit Union but not union dues).

[6] West Virginia Constitution Article III, Section 7 states in relevant part, "No law abridging the freedom of speech, or of the press, shall be passed...." Additionally, Article III, Section 16 states, "The right of the people to assemble in a peaceable manner, to consult for the common good, to instruct their representatives, or to apply for redress of grievances, shall be held inviolate."

This Court has also held that union speech and association rights under Article III, Sections 7 and 16 do not give public-sector unions any constitutional entitlement to compel public employers to recognize or bargain with them. *See City of Fairmont v. Retail, Wholesale, & Dep't Store Union*, 166 W. Va. 1, 9, 283 S.E.2d 589, 593 (W. Va. 1980) ("[T]he First Amendment does not impose any affirmative obligation on the government ... to recognize the [union] and bargain with it." (quoting *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 465 (1979))); *Kirkpatrick v. Mid-Ohio Valley Transit Auth.*, 188 W. Va. 247, 248-49, 423 S.E.2d 856, 857-58 (W. Va. 1992); *Jefferson Cnty. Bd. of Educ. v. Jefferson Cnty. Educ. Ass'n*, 183 W. Va. 15, 21, 393 S.E.2d 653, 659 (W. Va. 1990).

For the same reasons, the Unions' speech and association protections under Article III, Sections 7 and 16 do not confer any right or entitlement to compel public employers into administering the Unions' dues deduction schemes, i.e., serving as the Unions' bill collectors. The State's elimination of public employers' role in administering union dues deductions is the cancellation of a legislative benefit, which "the Legislature can constitutionally take away." *Morrisey II*, 243 W. Va. at 127, 842 S.E.2d at 496 (Hutchison, J., concurring).

Eliminating that benefit does not violate the Unions' constitutional rights because the State was "under no obligation to aid the unions" in the first place. *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009). *See also Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 187 (2007) (unions have no constitutional right to acquire "*other people's* money," and are only permitted to do so as a result of a government-conferred "extraordinary . . . entitlement," which can constitutionally be denied by the government in its entirety). "[T]he State's decision not to [assist unions with dues deductions] is not an abridgment of the [U]nions' speech; they are free to engage in such speech as they see fit." *Ysursa*, 555 U.S. at 359.

The Circuit Court ignored this Court's prior decisions, and found that the West Virginia Constitution Article III, Sections 7 and 16 give unions affirmative rights to State-assisted dues deduction arrangements. To reach this decision the Circuit Court twisted a familiar precept, stating that the Civil Rights Era cases "provide a floor for interpretation of the Article III protections in Sections 7 and 16," and "'the West Virginia Constitution offers limitations on the power of the state' to curtail the rights of association and speech 'more stringent [than] those imposed on the states by the Constitution of the United States.'" Order 34, ¶ 71 (quoting *Pushinsky v. W. Va. Bd. of Law Examiners*, 164 W.Va. 736, 266 S.E.2d 444 (W. Va. 1980)) (other citations omitted).

The Circuit Court's reasoning is flawed because it confuses negative freedoms with affirmative entitlements. West Virginia Constitution Article III, Sections 7 and 16 enshrine negative freedoms. As with the Bill of Rights, they "direct[] what government may not do to its citizens, rather than what it must do for them." *Walker*, 705 F.3d at 645. West Virginia's "more stringent limitations on the power of the state to curtail rights" means that the state constitution gives more rigorous protection to employees' freedoms *from* state interference (i.e., their negative freedoms). See *Pushinsky*, 164 W.Va. at 745, 266 S.E.2d at 449. It does not create any positive rights or expand what the government must do for its citizens, and it does not transform negative freedoms into affirmative entitlements. Nor does it give courts authority to re-write the West Virginia Constitution, convert negative freedoms into positive rights, and fashion new rights or entitlements.

The Circuit Court misapplies the "more stringent limitations" proposition, and gives unions a positive right to force public employers to enter into union dues deduction agreements that do not require employee knowledge of their First Amendment rights, much less a knowing and voluntary waiver of those important rights. *See* Order 34, ¶ 71. That decision impermissibly conflicts with

the First Amendment to the U.S. Constitution and is an invalid, unsupported interpretation under West Virginia's Constitution.

The decision below conflicts with the U.S. Constitution because the First Amendment "does not confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression." *Ysursa*, 555 U.S. at 355, 359. First Amendment speech and association rights do not require the government "to assist others in funding the expression of particular ideas." *Id.* at 358. *See also Regan*, 461 U.S. at 546 ("We again reject the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.") (citation and internal quotation marks omitted).

This Court also explained that "[b]y claiming that the denial of compelled dues violates their association rights, the [Unions] necessarily claim they are constitutionally entitled to those dues." *Morrisey II*, 243 W. Va. at 108 n.66, 842 S.E.2d at 477 n.66. The Court concluded that "unions have no [state] constitutional entitlement to the fees of nonmember-employees." *Id.* (citation and internal punctuation omitted). As it did in *Morrisey II*, this Court should interpret West Virginia Constitution, Article III, consistently with the First Amendment to the U.S. Constitution, which does not give the Unions an "affirmative right" to state-administered union dues deduction schemes.[7]

[7] The West Virginia Constitution, Article I, Section 1, makes the U.S. Supreme Court's First Amendment precedent binding on all West Virginia courts' interpretations of state constitutional provisions. *See Lance v. Bd. of Educ.*, 153 W. Va. 559, 563-64, 170 S.E.2d 783, 786 (W. Va. 1969), *rev'd on other grounds*, 403 U.S. 1 (1971). *See also City of Fairmont v. Schumaker*, 180 W. Va. 153, 155, 375 S.E.2d 785, 787 (W. Va. 1988); *Pushinsky*, 164 W. Va. at 744, 266 S.E.2d at 449.

2. Union representation costs incurred pursuant to the Unions' duties as exclusive bargaining representative are not a state-created burden.

a. The Civil Rights Era cases are irrelevant to prohibiting public employers from participating in union dues deduction schemes.

The Circuit Court relied on the Civil Rights Era cases to enjoin the Act, incorrectly reasoning that state laws hindering organizations' effectiveness burden their speech and association rights.[8] Order 30-33, ¶¶ 63-69. The Circuit Court misapplied the Civil Rights cases, which dealt with state racially-motivated disclosure laws that forced the NAACP to release members' records, and state registration laws that required individuals to disclose their membership in certain organizations to the government.[9] The courts in those cases invalidated state actions because they created obstacles that chilled members' association rights.

This Court twice rejected the Unions' analogy between the Civil Rights Era cases and the Workplace Freedom Act's prohibition of compulsory union fees. *See Morrisey II*, 243 W. Va. at 106, 842 S.E.2d at 475; *Morrisey I*, 239 W. Va. at 638, 804 S.E.2d at 888. This Court found that the Civil Rights Era cases concern only measures under which association "members could be subjected to retribution for their membership in the organization," and described the lower court's reliance on those cases as "misplaced." *See Morrisey II*, 243 W. Va. at 106, 842 S.E.2d at 475-76. The Court also found nothing in the prohibition of compulsory union fees that "prevents a person from making a voluntary choice to associate with a union or to pay union dues," or "discourage[s]

[8] The Circuit Court found that the Act "imposes every bit as much of a burden on [the Unions'] ability to function 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*." Order 35, ¶ 74.

[9] *Button* concerned a law limiting the ability of the NAACP to find plaintiffs to challenge unconstitutional state actions. *See NAACP v. Button*, 371 U.S. 415 (1963). *Thomas* concerned a Texas statute requiring union organizers to register with the State as a condition for soliciting membership. *See Thomas v. Collins*, 323 U.S. 516 (1945). *Patty* also involved statutes regulating the creation and sponsorship of litigation that were enacted to nullify the Supreme Court's decision in *Brown v. Board of Education*. *NAACP v. Patty*, 159 F. Supp. 503, 511 (E.D. Va. 1958).

or prevent[s] labor organizations from soliciting workers to join their organization." *Id.* at 107, 842 S.E.2d at 476 (quoting *Morrisey I*, 239 W. Va. at 640, 804 S.E.2d at 890).

This Court also found that, unlike the Civil Rights cases, the Workplace Freedom Act was "neutral," did not "facilitate retaliation upon those who voluntarily choose to become union members," and involved "[n]o such punitive action directed toward members of a [union] for the purposes of retaliating or deterring membership." *Id.* at 107, 842 S.E.2d at 476 (footnote omitted). The Civil Rights cases thus were irrelevant to the Workplace Freedom Act. *Id.*

The Civil Rights cases are inapposite because ending public employer-administered union dues deductions is not retaliation, does not deter union membership, and does not interfere with the Unions' rights to associate with others and advance a particular cause. Order 30, ¶ 62. West Virginia's Workplace Freedom Act prohibited compulsory union dues altogether, and that did not burden the Unions' association rights or hinder their effectiveness. The Act at issue here also does not require the Unions to disclose their members' names.[10] Nor does it prevent the Unions from organizing, discussing, or informing people about unions.

Eliminating public employers from the union dues deduction process "does not prohibit, regulate, or restrict the right of the [labor organization] or any other organization to associate, to solicit members, to express its views, to publish or disseminate material, to engage in political activities, or to affiliate or cooperate with other groups." *See Morrisey II*, 243 W. Va. at 109 n.67, 842 S.E.2d at 478 n.67 (quoting *Campbell*, 883 F.2d at 1256). West Virginia's Constitution "does

[10] On the contrary, under the Act, public employers will no longer know which employees pay union dues and which do not. The Civil Rights cases contradict the Circuit Court's reasoning. If anything, the Civil Rights cases support the State getting out of the business of keeping lists of who contributes to the union and who does not.

not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Morrisey II*, 243 W. Va. at 108, 842 S.E.2d at 477 (quoting *Regan*, 461 U.S. at 549-50).

"The state's failure to authorize payroll deductions for [the union] does not deny [union] members the right to associate, to speak, to publish, to recruit members, or to otherwise express and disseminate their views." *Campbell*, 883 F.2d at 1257. The Act neither prohibits the Unions from advocating, nor limits their ability to do so, or otherwise curtails their ability to join other "like-minded individuals to associate for the purpose of expressing commonly held views ...." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012).

b. Prohibiting public employers from participating in union dues deduction schemes does not prevent or burden the Unions' expressive activities.

The Circuit Court concluded that the Act burdens the Unions' ability to maintain the "resources needed to accomplish their associational purposes," because they will have to expend resources on dues collection, and forego representation services, grievances, and interaction with government officials. *See* Order 8, ¶¶ 15-16; Order 16, ¶ 35; Order 30-34, ¶¶ 63-69, 73.

Contrary to the Circuit Court's decision, the Act does not burden the Unions' speech and association rights simply because their alleged difficulties with collecting union dues might impair their representation services. This Court has recognized that "loss of payroll deductions may economically burden the [labor organization] and thereby impair its effectiveness, [but] such a burden is not constitutionally impermissible," *Id.* at 109 n.67, 842 S.E.2d at 478 n.67 (quoting *Campbell*, 883 F.2d at 1256). It also recognized that state action impairing or undermining a union's "effectiveness" is "[f]ar from ... prohibit[ing] or discourage[ing] union membership or association." *Morrisey II*, 243 W. Va. at 109 n.67, 842 S.E.2d at 478 n.67 (quoting *Smith*, 441 U.S. at 465-66). If such were not the case, every membership or political organization engaged in speech would have a constitutional right to force the government to collect its dues from public employees.

While the State may not create "obstacles in the path of [the Unions'] exercise of ... freedom of [speech], it need not remove those [obstacles] not of its own creation." *Regan*, 461 U.S. at 549-50. The Unions' alleged burden is the inconvenience and cost of collecting dues and making payment arrangements with members. But those burdens arise from the Unions' voluntary decision to seek monopoly bargaining representative status, not from the Act. Those "obstacles" are inherent to undertaking obligations and responsibilities as employees' "exclusive representative." The Unions cannot complain that "Uneasy lies the head that wears a crown," William Shakespeare, *Henry IV*, Part II. The Unions undertake these responsibilities knowing that legislatively-created subsidies like public employer-administered dues deduction schemes may be denied in their entirety. "[W]hat the Legislature gives, the Legislature can constitutionally take away." *See Morrisey II*, 243 W. Va. at 127, 842 S.E.2d at 496 (Hutchison, J., concurring).

Moreover, the State has a compelling interest in prevent public employers from unwittingly burdening employees' First Amendment rights by seizing dues from them without their affirmative consent and knowing waiver of their First Amendment rights, as required by the U.S. Supreme Court's *Janus* decision.

3. The State has a substantial interest in preventing the Unions and public employers from violating employees' First Amendment rights.

Contrary to the Circuit Court's conclusions, West Virginia has a legitimate and substantial interest in protecting public-sector workers from being forced to support unions, and in preventing public-sector employers from violating their employees' First Amendment rights. *See* Order 35, ¶ 76. "Clearly a state may enact legislation that provides greater protections to its workers without offending constitutional rights." *Morrisey II*, 243 W. Va. at 108, 842 S.E.2d at 477. Consistent with *Janus*, the State can and, in fact, did decide to protect employees by ensuring that their public

employers do not unwittingly violate their First Amendment rights by deducting union dues that public employees have not authorized by knowingly and voluntarily waiving those rights.

Compelled subsidization of union speech seriously impinges on workers' First Amendment rights. *Janus*, 138 S. Ct. at 2464. The First Amendment prohibits public employers and public-sector unions from deducting union payments without "clear and compelling" evidence of employees' affirmative consent to pay and a knowing and intelligent waiver of their First Amendment rights. *Id.* at 2486; *see supra* at 1-2. Under *Janus*, public employers must first obtain "clear and compelling evidence" of employees' affirmative consent and proof of waiver before deducting union dues or fees from their paychecks. *Id.* Otherwise, they will violate the employees' First Amendment rights. Without that evidence of consent and waiver, the employers are constitutionally barred from making those deductions.

The necessary affirmative consent and knowing, intelligent waiver are absent from the Unions' unsigned dues deduction agreements upon which they rely to support their claims. The agreements' terms require that employees who sign must pay union dues for one year, with the employer deducting those dues throughout the year. The agreements automatically renew unless the employee revokes his agreement during a thirty-day window available only once a year (i.e., escape period). *See* Ex. 8.

Employees subject to these restrictions are effectively prohibited from exercising their First Amendment right to stop supporting union speech for 335 days each year. Employees who want to stop financially supporting the union but provide notice outside of the escape period that they wish to resign from the union and become nonmembers will nevertheless have payments for union speech seized from their wages by their public employers in contravention of their First Amendment rights.

The government employer thus effectively compels those employees to continue financially supporting the union and its speech until the employee revokes that obligation during the short escape period. These seizures violate the "bedrock principle" that "no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris v. Quinn*, 573 U.S. 616, 656 (2014). Employees cannot be prohibited from stopping union dues deductions for any time period unless they validly waived their constitutional right for that period. Without that consent and waiver, public employers would violate dissenting employees' First Amendment rights by compelling them to subsidize union speech until the Unions' designated "escape" period.

The State explained to the court below that "one of the purposes of the Act is the protection of employees from undue influence from other parties." State Resp. Br. 8. The State has a legitimate interest in preventing public employers from deducting union dues from employees, especially when the employers have nothing to rely on but the Unions' invalid dues deduction authorizations.

To the extent the Unions are relying on nothing more than these authorizations as their basis for extracting dues from employees, they are committing widespread violations of West Virginia workers' constitutional rights. The Unions' unsigned dues deduction authorization forms in Exhibit 8 fail to establish "clear and compelling" evidence of employees' knowing and intelligent waiver of First Amendment rights. None of those forms advise employees of their First Amendment rights under *Janus*, much less constitute a knowing and voluntarily waiver of those rights.

The Unions cannot demand or extract dues from any employee based on these forms. The Unions cannot presume that any employee waived his First Amendment rights because he previously signed one of the invalid forms proffered in Exhibit 8. One-time perpetual authorization

is inconsistent with the Court's conclusion in *Janus* that consent must be knowingly and freely given. *See* 138 S. Ct. at 2484, 2486. Organizations change over time, and consent to dues deductions or union membership cannot be presumed to be indefinite. *See Knox*, 567 U.S. at 315 (explaining that the choice to support a union may change as a result of changes in the union's advocacy). The Unions must prove that any employee who continues to pay union dues through automatic deductions gives affirmative consent to those deductions and that he knowingly, intelligently, and voluntarily waived his First Amendment rights. The Unions' invalid dues deduction agreements demonstrate the need for the Act, and show that the Circuit Court's injunction leaves West Virginia's public employees defenseless from union and government interference with their First Amendment rights.

B. The Act does not violate any union equal protection rights.

For many of the same reasons advanced above,[11] the Act also does not violate the Unions' equal protection rights under West Virginia Constitution Article III, Sections 1, 3, or 10. Contrary to the Circuit Court's decision, the Act does not impinge upon the Unions' fundamental rights, does not create any classifications based on speech or association rights, and does not violate West Virginia Constitution Article III, Section 3 Common Benefit Clause.

[11] The Circuit Court concludes that "the Act's classification scheme is constitutionally suspect" because "the Act adversely and selectively affects [the Unions'] speech, associational, and existing contractual rights[.]" Order 14. But the Circuit Court's decision that the Act creates "classifications" based on constitutional or fundamental rights simply recycles the same invalid claim—invalidated by this Court, as explained in Section A, *supra*, at 5-14—that the Act burdens the Unions' speech and association rights. *See San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 61 (1973) (Stewart, J., concurring); *see also id.* at 61 n.8 (citing cases that illustrate the principle).

1. The Act does not impinge on the Unions' fundamental rights because public employer administered dues deduction services are a legislative benefit, not a fundamental right.

The Act does not impinge upon the Unions' fundamental rights because public-employer administered dues deduction services are not a fundamental right. Legislative benefits are not fundamental rights or part of a constitutional freedom. *See Woodring v. Whyte*, 161 W. Va. 262, 274, 242 S.E.2d 237, 245 (W. Va. 1978). Before the Legislature passed the Act, the West Virginia Wage Payment and Collection Act permitted public employers and the Unions to enter into payroll deduction agreements whereby the employer performed the administrative function of deducting union dues from employees' pay. Order 4-5, ¶ 8. Union dues deduction arrangements are a legislatively-created benefit that can be rescinded at the Legislature's discretion. The Act merely rescinds a previous legislatively-created benefit.

2. The Act does not create classifications based on speech or association rights.

a. The Act does not create speech-based classifications, or otherwise discriminate based on the Unions' viewpoint or content of their speech.

Contrary to the Circuit Court's conclusions, the Act does not create content or speaker based classifications, and is not a neutral façade for discrimination. Order 14, ¶ 31. The Circuit Court concluded that the Act discriminates based on the content of the Union's "advocacy" because it "expressly excludes *unions* and *labor organizations* (not all organizations)." Order 14, ¶ 32 (emphasis in original). But, the Act's exclusion of "union, labor organization, or club dues or fees" is not "content-based" discrimination.

Content-based discrimination involves laws that, on their face, "target speech based on its communicative content." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (citation omitted). The Act does not restrict the use of public employers' payroll systems to speech on a particular viewpoint. *See, e.g., Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 546-

48 (2001) (speech subsidy viewpoint discriminatory when conditioned on recipient advancing particular viewpoint). Legislation is content neutral unless it discriminates against the content of speech on its face. *Walker*, 705 F.3d at 648 (citing *Regan*, 461 U.S. at 548; *Ysursa*, 555 U.S. at 359; *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995)).

The Circuit Court also mistakes the purely administrative act of deducting dues for speech. Payroll deductions are not speech. *See Bailey*, 715 F.3d at 959 (finding that the employer's ministerial act of deducting money from an employee's paycheck is not expressive activity). While forums, real or virtual, are places where "some form of communicative activity occurs," *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983), the "administrative process in which that deduction occurs ... is not a forum of any kind." *Bailey*, 715 F.3d at 959.

The Circuit Court's reasoning is flawed because the Act itself does not stop or restrict employees' union dues payments; it merely stops the public employer's ministerial act of deducting dues. The Unions and their members "are free to engage in such speech [and association] as they see fit. They simply are barred from enlisting the State in support of [those] endeavor[s]." *Ysursa*, 555 U.S. at 359. Prohibiting payroll deduction arrangements does nothing to prevent the Unions from seeking and collecting dues, or from communicating their messages, or engaging in other expressive activities.

The Act is facially neutral because the plain text shows that public employers' participation in payroll deductions is not conditioned on beneficiaries advancing any particular viewpoint. The Act does not grant some organizations access to the payroll-deduction process, and deny access to others based upon whether the organization supports or opposes a particular policy position. *See, e.g., Bailey*, 715 F.3d at 959. Nothing in the text states deductions are prohibited for any

organization that engages in "labor-protection advocacy." The Act says nothing about speech of any kind. *See id* at 960; *Walker*, 705 F.3d at 648.

The Circuit Court concluded that the Act is viewpoint discriminatory because it "focuses on ... [the Unions'] continued ability to get their messages out." Order 16, ¶ 35. But nowhere in the text of the Act is there language that even vaguely alludes to union messages, much less prohibits any speech or conditions dues deductions on the making or cessation of any speech. The Act says nothing about prohibiting payroll deductions when a union speaks a particular message. Nor does it prohibit speech by forbidding certain speakers from spending money or engaging in certain types of speech. *See Walker*, 705 F.3d at 648 (citing *Citizens United v. FEC*, 558 U.S. 310 (2010). The Act simply takes the government out of collecting union dues.

b. The Act is not a "neutral façade" for discrimination.

The Circuit Court enjoined the Act concluding, despite its facial neutrality, that it discriminates against the content of the Unions' speech and exhibits legislative animus towards the Unions based on the Governor's and two senators' political disagreements with unions about matters unrelated to the Act. Order 15, ¶ 33. That, however, is not "content-based" discrimination. "[T]he contention that a statute is 'viewpoint based' simply because its enactment was motivated by the conduct of the partisans on one side of a debate is without support." *Hill v. Colo.*, 530 U.S. 703, 724 (2000); *see also Walker*, 705 F.3d at 654 ("[P]olitical favoritism is a frequent aspect of legislative action.").[12]

[12] "[T]here is no rule whereby legislation that otherwise passes the proper level of scrutiny ... becomes constitutionally defective because one of the reasons the legislators voted for it was to punish those who opposed them during an election campaign. Indeed one might think that this is what election campaigns are all about: candidates run on a certain platform, political promises made in the campaign are kept (sometimes), and the winners get to write the laws." *Hearne v. Bd. of Educ.*, 185 F.3d 770, 775 (7th Cir. 1999). "These sorts of decisions are left for the next election ... [W]e must resist the temptation to search for the legislature's motivation for the Act's classifications." *Walker*, 705 F.3d at 654.

Every federal circuit to address the issue has rejected these political retaliation challenges to legislation eliminating state-sponsored collection of union dues through payroll deductions. *See In re Hubbard*, 803 F.3d 1298, 1313 (11th Cir. 2015) (citing cases). Courts do "not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968); *Walker*, 705 F.3d at 649-50 (refusing to "peer[] past the text of the statute to infer some invidious legislative intention"); *Bailey*, 715 F.3d at 960.

The Circuit Court improperly imputed this so-called "content-based discrimination" to the entire Legislature based only upon the Governor's and two senators' political statements. Order 15, ¶ 33). "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *O'Brien*, 391 U.S. at 384 (refusing to infer discriminatory intent from the floor statements of several different congressmen). Whatever animus the Circuit Court may attribute to the Governor and two senators, it cannot impute their political statements to the entire Legislature, and presume its motives for passing the Act.[13]

The Circuit Court also concluded that the Act discriminates against the content of the Unions' speech and was motivated by anti-union animus based on other legislative enactments expanding charter schools, establishing education savings accounts, and codifying the illegality of public employee work stoppages and strikes. This Court has cautioned that, "In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative, and executive branches." *Morrisey I*, 239 W. Va. at 638, 804 S.E.2d at 888 (footnote omitted). "Courts [should

[13] The Circuit Court mischaracterized the objected-to political statements as "the *Legislature's*" disagreement with the Unions' messages. *See* Order 15, ¶ 33 (emphasis added). But the Legislature did not make *any* statements about the Unions or their message; the court below improperly imputed the Governor's and two legislators' political statements about matters unrelated to the Act to the entire Legislature and the Act.

not be] concerned with questions relating to legislative policy." *Id.*, 804 S.E.2d at 888. Courts do not sit as "superlegislature[s], commissioned to pass upon the political, social, economic, or scientific merits of statutes pertaining to proper subjects of legislation." *Morrisey II*, 243 W. Va. at 129, 842 S.E.2d at 498 (Hutchison, J., concurring) (footnote omitted). The Circuit Court's decision finds animus by examining the merits of political decision-making and legislative policy. That, however, is not the province of the courts.[14]

3. The Act does not violate the West Virginia Constitution Article III, Section 3 Common Benefit Clause.

Prohibiting public employers from administering the Unions' dues deduction schemes does not violate West Virginia's Common Benefit Clause because those arrangements do not dispense benefits for the exercise of constitutional rights. The Common Benefit Clause only applies when the State chooses to subsidize *constitutional rights*.[15] *See Panepinto*, 191 W. Va. at 444, 446 S.E.2d at 666 ("[The Common Benefit Clause] imposes an 'obligation upon state government ... to preserve its neutrality when it provides a vehicle' for the exercise of constitutional rights." (quoting *Parsons*, 172 W. Va. at 398, 305 S.E.2d at 354)).

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[14] "Whether a law is fair or unfair is not a question for the judicial branch of government. Courts cannot dwell 'upon the political, social, economic, or scientific merits of statutes[.] The wisdom, desirability, and fairness of a law are political questions to be resolved in the Legislature. Those decisions may only be challenged in the court of public opinion and the ballot box, not before the judiciary. [The judiciary's] duty boils down to weighing whether the preliminary injunction was proper." *Morrisey I*, 239 W. Va. at 636, 804 S.E.2d at 886-87 (footnote omitted).

[15] The Circuit Court incorrectly stated that the Common Benefit Clause "has been interpreted to impose on the state the duty to adhere to equal protection principles in the distribution of governmental benefits and opportunities, even when there is no underlying constitutional right to the same." Order 12-13 n.4 (citing *Women's Health Ctr. v. Panepinto*, 191 W. Va. 436, 446 S.E.2d 658 (W. Va. 1993) (overruled on other grounds, Article VI, Section 57); *United Mine Workers v. Parsons*, 172 W. Va. 386, 305 S.E.2d 343 (W. Va. 1983). But that is not true. Those cases specifically hold that the clause applies only when the government dispenses benefits for the exercise of constitutional rights.

What this means is that, once the government chooses to dispense benefits that subsidize the exercise of constitutional rights, it must do so in a nondiscriminatory fashion. The Act allows public employer deductions for general employee interests—"pension plans, payroll savings plans, credit unions, charities, and any form of insurance offered by an employer"—but, like dues deductions, *supra* at 5-8, those deductions do not involve the exercise of constitutional rights. *See* W. Va. Code § 21-5-1(g) (Wage Payment and Collection Act); § 8-5-12 (municipal employees); § 18A-4-9(6) (county education employees).

Unlike *Parsons*, the Act does not provide a platform for public speech to some while denying it to others. "The administrative process in which that deduction occurs ... is not a forum of any kind." *See Bailey*, 715 F.3d at 959 (citations omitted). And, unlike *Panepinto*, the Act does not provide a benefit for employees who exercise a constitutionally-protected right in one fashion while denying it to others who exercise the protected right in an opposing fashion. If anything, continuing union dues deduction arrangements discriminates against employees who decide to resign from union membership but find themselves coerced by the public employer-administered dues deduction system into continuing payments in contravention of their constitutional rights. *See supra* at 1-2, 12-15. *See also Panepinto*, 191 W. Va. at 445, 446 S.E.2d at 667.

C. The Act does not impair the obligation of contracts under the West Virginia Constitution Article III, Section 4.

The Act does not impair contract obligations in violation of the West Virginia Constitution Art. III, Section 4. The Act does not "impair[] the existing contractual obligations of the parties." *Shell v. Metro. Life Ins. Co.*, 181 W. Va. 16, 21, 380 S.E.2d 183, 188 (W. Va. 1989). The Unions have only proffered unsigned dues deduction agreements in support of their contract impairment claims. But they have not presented any actual dues deduction authorization agreements signed by employees. *See* Ex. 8. There is no evidence that any employee signed these agreements, and, even

if there are signed agreements, there is no record of *when* they were signed. Thus, it is impossible to discern whether any *existing* agreements are impacted at all.

Moreover, there is no impairment concern with agreements that are unconstitutional and void against public policy. To the extent that the unsigned dues deduction authorizations in the Unions' Exhibit 8 are representative of actual signed and dated dues deduction agreements with employees, those agreements are invalid under *Janus* because they lack the clear and compelling evidence of the signatory's knowing and intelligent waiver of his First Amendment rights. At a minimum, the Unions' agreements must expressly inform employees that by signing they are waiving their First Amendment rights not to join and not to pay union dues as a condition of employment.

There can be no substantial impairment because the Unions have no reliance interests in such agreements. The agreements purport to renew automatically from year to year unless the employee gives notice of his revocation. Thus, the Unions could not be confident that these arrangements would continue for more than one year at a time. *See Janus*, 138 S. Ct. at 2485. Moreover, "that public-sector unions may view agency fees as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that nonmembers share in having their constitutional rights fully protected." *Id.* at 2484 (cleaned up).

Even if there were "substantial impairment," it is outweighed by the "significant and legitimate public purpose behind" the legislation. *Shell*, 181 W. Va. at 20; 380 S.E.2d. at 187 (citation omitted). As stated, there is a "significant and legitimate public purpose" in protecting public employees' speech and association rights under the First Amendment and West Virginia Constitution Article III, Sections 7 and 16. *See supra* at 1-2, 12-15; *infra* at 23-24; *cf. Lincoln Fed. Labor Union No. 19129 v. Nw. Iron & Metal Co.*, 335 U.S. 525, 531 (1949) (the contention that

state Right to Work laws "conflict with Art. I, s 10, of the United States Constitution, insofar as they impair the obligation of contracts made prior to their enactment[,] . . . is without merit . . . .).

Finally, "the adjustment of [] rights and responsibilities ... [is] ... appropriate to the public purpose justifying the [legislation's] adoption." *Shell*, 181 W. Va. at 21; 380 S.E. 2d at 188 (citations and internal punctuation omitted). The Unions' negligible interests in public employer-administered dues deductions must yield to the vastly more important governmental interest of protecting public employees' First Amendment rights. "[I]t would be unconscionable to permit free speech rights to be abridged in perpetuity in order to preserve contract provisions that will expire on their own in a few years' time." *Janus*, 138 S. Ct. at 2484. The Unions have been on notice since 2018 regarding *Janus*'s waiver requirements, yet they have failed to conform their dues deduction agreements to the constitutional requirements of that decision, leaving the Legislature no choice but to act to protect the constitutional rights of public employees.

II. The public interest is best served by reversing the Circuit Court's preliminary injunction.

"[A]s far as the public interest is concerned, it is axiomatic that the preservation of First Amendment rights serves everyone's best interest." *Loc. Org. Comm., Denver Chapter, Million Man March v. Cook*, 922 F. Supp. 1494, 1501 (D. Colo. 1996). West Virginia's public interest is best served by the Act, which prevents public employers from unwittingly violating West Virginia workers' First Amendment rights. Public employers and unions must, under *Janus*, ensure that public employees knowingly and intelligently waive their constitutional rights to refrain from paying dues and, give voluntary, affirmative consent to any union dues deduction before demanding or attempting to extract dues from them. The State has decided, as it may, that it does not want to participate in union dues deduction arrangements that pose an inherent risk of violating employees' constitutional rights.

The Legislature, representing the people of West Virginia, passed the Act for the benefit of public employees. The passage of the Act itself is evidence of the public's interest in protecting worker freedoms. The people of West Virginia have determined that public employees' First Amendment rights are worthy of the utmost protection. Depriving West Virginia workers of those rights would cause *them* irreparable harm. Demanding and taking public employees' dues pursuant to the Unions' dues deduction agreements submitted as evidence here will cause irreparable harm to West Virginia's public-sector employees by violating their First Amendment rights under *Janus*. The Circuit Court's injunction will cause irreparable harm to every public employee whose dues are continuingly seized without affirmative, voluntary consent and a knowing, intelligent waiver of their First Amendment rights, as required under *Janus*.

CONCLUSION

For the foregoing reasons, the Circuit Court's order enjoining the Act should be reversed and vacated. West Virginia has a definite interest in protecting employees from labor organizations' coercive influence over employees who find it extremely difficult to extract themselves from dues deduction authorizations when they never affirmatively consented or knowingly, intelligently waived their First Amendment rights, and who now want to exercise those constitutional rights. The Act does not prohibit employees from paying union dues if they wish and voluntarily consent within the meaning of *Janus*. It merely requires that the Unions and their members take the initiative to make their own dues payment arrangements through cash, checks, credit card or bank account authorizations.

DATE: September 3, 2021

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on September 3, 2021, a true and correct copy of the Brief of *Amicus Curiae* the National Right to Work Legal Defense and Education Foundation, Inc., in Support of the Petitioner Arguing for Reversal of the Circuit Court's Order Issuing a Preliminary Injunction, was served upon the following via Email and U.S. Mail, and addressed as follows:

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