IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

WEST VIRGINIA AFL-CIO, et al.;

Petitioners,

vs.

JIM JUSTICE, in his Official Capacity as Governor of the State of West Virginia,

Respondent.

Civil Action 21-P-156
[Consolidated with Civil Action No's 21-P-157; 21-P-158; 21-P-159; 21-P-160; 21-P-161; 21-P-162; 21-P-163; 21-P-164; 21-P-165; 21-P-166; 21-P-167; 21-P-168; and 21-P-169]

AMENDED ORDER

Pending before this Court is Petitioners' *Motion for Preliminary Injunction*. Based upon the testimony of Fred Albert, Steve Williams and Elaine Harris, presented at hearing on June 14, 2021, the Verified Complaint, briefs and all attachments submitted by both parties, as well as the total record in this case, the Court **FINDS** that Petitioners have met their burden to establish that a preliminary injunction must be issued herein. Furthermore, the Court grants Petitioners' *Motion for Waiver of Injunction Bond*. Therefore, Petitioners will not be required to give security for the preliminary injunction.

In support of the order granting a preliminary injunction herein, the Court makes the following Findings of Fact and Conclusions of Law:

1. Petitioners are West Virginia AFL-CIO; American Federation of Teachers – West Virginia, AFL-CIO ("AFT-WV"); Communications Workers of America, District 2-13, AFL-CIO ("CWA"); West Virginia State Lodge of the Fraternal Order of Police ("FOP"); The International

Union, United Mine Workers of America ("UMWA"); Professional Firefighters of West Virginia ("PFFWV"); West Virginia Education Association ("WVEA"); West Virginia School Service Personnel Association ("WVSSPA"); District 8 of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("United Steelworkers" or "USW"); CWA/NCPSO Local 2055/West Virginia Division of Corrections and Rehabilitation; West Virginia Troopers Association/CWA Local 2019; and CWA Local 2001/West Virginia Alcohol Beverage Control Administration Agency ("WVABCA"). Collectively, Petitioners represent thousands of public employees. Corporal J. W. Smith Jr., and Jacob Fertig, are individuals whose interests are directly impacted by House Bill 2009.

2. Petitioners seek injunctive relief and would have suffered irreparable harm if they were required to satisfy the thirty-day pre-suit notice requirement contained in West Virginia Code § 55-17-3. Thus, consistent with the plain language of West Virginia Code § 55-17-3, Petitioners were not required to provide such notice. As such, Respondent's *Motion to Dismiss* in this regard is denied.

3. Respondent Jim Justice, Governor of the State of West Virginia, is sued in his official capacity. Pursuant to Article 7, § 5 of the West Virginia Constitution, he is a proper party to this case as he is required to faithfully execute those laws passed by the Legislature. Therefore, Respondent's *Motion to Dismiss* in this regard is also denied.

4. During the 2021 Regular Session, the West Virginia Legislature enacted House Bill 2009, colloquially, the "Paycheck Protection Act" ("the Act"). The Act selectively prohibits the long-standing pattern and practice of public employees and their employers to have union dues automatically deducted from the employees' paychecks.

5. This practice has, in some instances, been in place for more than five decades and

has permitted public employees throughout the State of West Virginia to deduct union or labor organization dues from their payroll checks. *There is no record of a single public employer who complained about this agreed-upon arrangement between public employment unions, public employers, and the public employees.* Nor has a single public employer cancelled such an arrangement.

6. The agreements between public employers and public employee unions continue from year to year unless the public employer is notified in writing by the employee or the employee's union or association to cancel the automatic draft and remission of dues. If the employee or association representative does not cancel the automatic draft, then it remains in place pursuant to the existing agreement.[1]

7. In addition to the deductions made for union dues, public employers make a host of other deductions for other interests including private insurance, savings accounts with private banks, and charitable contributions. For example, the list of deductions from board of education employees in Boone County is varied and voluminous. This list includes:

AFLAC Insurance
Washington National, Inc
American Fidelity
American Heritage Life
American-Amicable Life Ins.
Amer. Gen. Life and Accident
Trustmark Ins. Co.

[1]For example, the West Virginia Service Personnel and West Virginia Education Association entered into a written Memorandum of Agreement Between The Wayne County Board of Education And The West Virginia School Service Personnel Association And The West Virginia Education Association ("Memorandum of Agreement") on June 28, 2018. As part of the Memorandum of Agreement, the unions and the board of education agreed, in part:

> If the employee has authorized auto draft for the payment of their dues said auto draft will continue from year to year unless the Board is notified in writing by the employee or the employee Association to cancel the auto draft and remission of their dues.

Credit Union
Credit Union Dir Dep
Huntington Banks Dir Dep
JPMorgan Chase D Dep
United Bank DD Savings
Boone Co. Comm. Foundation
R. McCormick Fund
C.Scott Memorial Fund
Big Coal Scholarship Fund
FBMC Optical/Dental Ins.
FBMC-ARAG Group Legal Ins.
Pioneer Credit Recovery
City of Madison Svc Fee Yr
City of Madison Ser. Fee
Judgement Pa Higher Edu AA
Lloyd and McDaniels
US Dept. Of Education
Judgement-Child Sup Enforc
WV Child Support
Miscellaneous Café Plan
Primerica - TSA
Ameriprise Financial - TSA
New York Life/Annuity TSA
New York Life Insurance Co
VOYA Financial Svcs
Variable - TSA (VALIC)
WV Retirement Plus
Retirement Loans
WVEA - Dues
WVFT - Dues
WV Prof Educators - Dues
WVSSPA - Serv Personnel Dues
WVFT Service Dues

Once the effective date of the Act is reached, union dues will no longer be deducted (absent injunctive relief from this Court), but the remaining deductions will still be removed from employees' paychecks.

8. Prior to the Act, the West Virginia Wage Payment and Collection Act specifically permitted the withholding of union dues. West Virginia Code § 21-5-1(g) previously stated:

The term "deductions" includes amounts required by law to be withheld, and

> amounts authorized for union or club dues, pension plans, payroll savings plans, credit unions, charities and hospitalization and medical insurance.

The Wage Payment and Collection Act also stated:

> No assignment of or order for future wages shall be valid for a period exceeding one year from the date of such assignment or order . . . Provided, however, That nothing herein contained may be construed as affecting the right of employer and employees to agree between themselves as to deductions to be made from the payroll of employees[.]

W. Va. Code § 21-5-3.

Thus, the Wage Payment and Collection Act specifically authorized employers to collect union dues – among many other purposes for distribution to the organization and entities selected by the employee.

9. The Act has modified the definition of "deductions" under the Wage Payment and Collection Act and now states:

> The term "deductions" includes amounts required by law to be withheld, and amounts authorized for union, labor organization, or club dues or fees, pension plans, payroll savings plans, credit unions, charities, and ~~hospitalization and medical~~ any form of insurance offered by an employer: *Provided*, That for a public employee, other than a municipal employee covered by a collective bargaining agreement with a municipality which is in effect on July 1, 2021, the term deductions shall not include any amount for union, labor organization, or club dues or fees.

W. Va. Code §21-5-1(g) (emphasis added) (Excerpts from House Bill 2009).[2]

10. The amended language of the statute now excludes only the withholding of wages for public employees who have elected (in agreement with their public employer) to withhold from their pay public union labor organizations and club dues. All other wage deductions from public

[2]For ease of reference, the undersigned has quoted from the Senate Judiciary Amendments to House Bill 2009 and maintained the "strike and insert" amendments to demonstrate the salient changes to the law at issue. These changes are identical to the language contained in the Enrolled House Bill 2009.

employee wages are still permitted, and public employers retain the discretion to grant all other employee requests from payroll deductions. Moreover, such deductions are permitted for public employees who are in municipal labor organizations who have a collective bargaining agreement in effect on July 1, 2021. Finally, all private employer labor organizations may deduct such wages.

11. To prevent municipal employees' ability to have their union dues taken directly from their wages by agreement with their employer, the Legislature amended West Virginia Code § 8-5-12 to state, in pertinent part:

> (c) No deductions or assignments of earnings shall be allowed for unions, labor organizations, or club dues or fees from the compensation of officers or employees covered by this section: *Provided*, That this subsection shall not apply to municipal employees covered by a collective bargaining agreement with a municipality which is in effect on July 1, 2021.

12. Likewise, to prevent State employees' ability to have their union dues taken directly from their wages by agreement with their employer, the Legislature amended West Virginia Code §12-3-13b to state, in pertinent part:

> (a) Any officer or employee of the State of West Virginia may authorize that a voluntary deduction from his or her net wages be made ~~for the payment of membership dues or fees to an employee association. Voluntary deductions may also be authorized by an officer or employee~~ for any supplemental health and life insurance premium, subject to prior approval by the Auditor. Such dedications shall be authorized on a form provided by the Auditor of the State of West Virginia and shall state:
>
> ~~(a)~~ (1) The identity of the employee;
>
> ~~(b) the~~ (2) The amount and frequency of such deductions; and
>
> ~~(c) the~~ (3) The identity and address of the ~~association or~~ insurance company to which such dues shall be paid.
>
> (b) Upon execution of such authorization and its receipt by the office of the Auditor, such deductions shall be made in the manner specified on the form and remitted to

the designated ~~association or~~ insurance company on the tenth day of each month: *Provided*, That the Auditor may approve and authorize voluntary other deductions, ~~as approved and authorized by the Auditor, may~~ defined under §21-5-1 of this code, to be made in accordance with rules proposed by the Auditor pursuant to § 29A-3-1 et seq. Of this code: *Provided, however,* That deductions shall be made at least twice monthly. Deduction authorizations may be revoked at any time 30 days prior to the date on which the deduction is regularly made and on a form to be provided by the office of the State Auditor: ~~*Provided further,* That nothing in this section shall interfere with or remove any existing arrangement for dues deduction between an employer or any political subdivision of the state and its employees.~~

(c) No deductions or assignments of earnings shall be allowed for union, labor organization, or club dues or fees from the compensation of officers and employees covered by this section.

13. Finally, to prevent county education employees' ability to have their union dues taken directly from their wages by agreement with their employer, the Legislature amended West Virginia Code §18A-4-9 to state, in pertinent part:

> Teachers and all other employees whose salaries or wages are payable out of the school current fund shall be paid for their services by orders duly signed by the president and secretary of the board in accordance with the following provisions:
>
> (1) Notwithstanding any other provisions of this chapter and § 18A-1-1 et seq. of this code, the number of pays to be made during the school year to the various classes of employees shall be determined by the board: *Provided*, That the sum of such pays for any employee does not exceed the equivalent of an annual salary based upon 12 calendar months.
>
> (2) In the event a teacher or other employee is not paid the full salary or wage earned in the fiscal year in which the work is performed, the unpaid amount may be paid during July and August of the following fiscal year.
> (3) Adjustments for time loss due to absence may be made in the next paycheck following such time loss.
>
> (4) The county board may withhold the pay of any teacher or employee until he or she has made the reports required by the board or the state superintendent.
> (5) Accompanying the pay of each employee shall be an accounting of gross earnings, all withholdings, and the dollar value of all benefits provided by the state on behalf of the employee.
>
> (6) No deductions or assignments of earnings shall be allowed for union, labor

organization, or club dues or fees from the compensation of teachers and other employees covered by this section.

14. Based upon a thorough review of the record in this case, the Court **FINDS** that if the Act is implemented, it may violate the state equal protections rights of Petitioners. Moreover, it may impair the state constitutional right to enter and be free from impairment of existing contracts. Finally, it may violate the state constitutional rights to free speech and association.

15. The Court further **FINDS** that, if an injunction is not granted, the implementation of the Act will irreparably harm and significantly burden Petitioners' ability to collect dues while continuing to allow paycheck deductions for a host of other purposes. The implementation of the Act will likely impair contractual rights of Petitioners who have negotiated agreements with public employers for deduction of dues. Finally, it will adversely affect the free speech rights of Petitioners inasmuch as the paycheck deduction of dues arises from a decision by an employee to associate with a Union and pay his or her dues in this manner.

16. If an injunction against enforcement of the Act is not granted, Petitioner-unions will be forced to forego or curtail their fundamental representational activities such as grievance representation, interaction with government officials to resolve important issues and maintain industrial peace, and generally, represent the interests of its membership. Instead, the resources of the unions and its members will be expended seeking methods to collect union dues when, in fact, an effective, time-tested, and contractual arrangement for paycheck deductions is already in place.

ANALYSIS REGARDING MOTION FOR PRELIMINARY INJUNCTION

17. In *Jefferson County Board of Education v. Jefferson County Education Association*, 183 W. Va. 15, 24, 393 S.E.2d 653, 662 (1990), our Supreme Court "recognized the necessity of a balancing of hardship test" to determine whether to issue a preliminary injunction. That test was set forth in Syllabus Point 4 of *State ex rel. Donley v. Baker*, 112 W. Va. 263, 164 S.E. 154 (1932): "The granting or refusal of an injunction, whether mandatory or preventive, calls for the exercise of sound judicial discretion in view of all the circumstances of the particular case; regard being had to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award or denial of the writ."

18. The Court in *Jefferson County*, 183 W. Va. 24, 393 S.E.2d at 662, and in *Hart v. National Collegiate Athletic Association*, 209 W. Va. 543, 547, 550 S.E.2d 79, 83 (2001), elaborated that this approach requires a court to consider the "flexible interplay" between four factors in determining whether to issue a preliminary injunction: "(1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest." *Accord State ex rel. McGraw v. Imperial Marketing*, 196 W. Va. 346, 352 n.8, 472 S.E.2d 292, 798 n.8 (1996).

19. The first step is to balance the likelihood of irreparable harm to Petitioners against the likelihood of harm to Respondent, and if a decided imbalance of hardship should appear in Petitioners' favor, the likelihood-of-success standard is replaced by one that considers whether the Petitioners have raised questions going to the merits that are serious, substantial, difficult, and doubtful as to make them fair ground for litigation and, thus, for more deliberate investigation.

Blackwelder Furniture Co. v. Seilig, 550 F.2d 189, 195 (4th Cir. 1977), quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740, 743 (2nd Cir. 1953).[3]

Each of the factors in the instant matter weigh in favor of granting the motion for a preliminary injunction.

PETITIONERS ARE ENTITLED TO A PRELIMINARY INJUNCTION

20. Petitioners have established, by a preponderance of the evidence, that if the Act is allowed to take effect on or about June 17, 2021, Petitioners will have to forego many of their regular representational activities and redirect precious resources toward new methods of collecting union dues. The irreparable and severe injury that petitioners will suffer upon denial of their *Motion* is in stark contrast to any potential harm to Respondent should enforcement be halted.

21. For decades, members of public employee unions have had their union dues automatically deducted from their paychecks. This practice has benefitted all parties. Union members received the automatic deduction just as they have for charitable deductions and private insurance. Public employers were able to provide a service that enhanced or contributed to a

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[3] According to the Fourth Circuit,

> The two more important factors are those of probable irreparable injury to plaintiff without a decree and of likely harm to the defendant with a decree. If that balance is struck in favor of plaintiff, it is enough that grave or serious questions are presented; and plaintiff need not show a likelihood of success. Always, of course, the public interest should be considered.

Feller v. Brock, 802 F.2d 722, 727 (4th Cir. 1986), quoting *Blackwelder*, 550 F.2d at 196.

Since the United States Supreme Court decision in *Winter v. National Resources Defense Council, Inc.*, 555 U.S. 7 (2008), the Fourth Circuit and other federal courts no longer use the balances of harms test for deciding motions for preliminary injunction but emphasize, instead, the plaintiff's likelihood of success on the merits. *E.g., The Real Truth About Obama v. Federal Election Commission*, 575 F.3d 342, 346 (4th Cir. 2009). The *Jefferson County / Hart* balancing analysis, however, remains the law in West Virginia state courts.

peaceful and harmonious work environment. Like charitable deductions and deductions for private insurance, deduction of union dues was another benefit that public employers could provide to its employees.

22. Moreover, the paycheck deduction process involves agreements between a union and a public employer and between a union member and his or her public employees.

23. The agreements or contracts between public employers and public employee unions have been in place for years. Public employee union members have been the beneficiaries of such agreements. Traditionally, such agreements may only be terminated by the written notice of the employee or the employee's union.

24. Finally, the Act's prohibition of paycheck deduction strikes directly at the rights of free speech, freedom of association, and the right to hold a particular viewpoint. *The Act's only targets are public union and club dues*, that is, dues being paid by employees exercising and advancing their associational rights. No other entity is adversely affected by this Act. This Act comes in the wake of several years of anti-union animus from the Respondent and other legislative leaders. This anti-union animus has been demonstrated by repeated comments in the press, as well as a decidedly anti-union legislative agenda that was underscored in the most recent session with a series of pointed legislative proposals (some that became law and some that did not) that were, at best veiled and at worst blatant, attacks on unions and their constituencies.

25. In contrast to the constitutionally weighty interests that Petitioners have at stake, the State's interests appear limited to its ability to rely upon its duly created statutes and the "significant administrative costs" associated with continuing the decades-old practice.

26. The only conceivable legitimate state interest that can be claimed that the Act will vindicate is the negligible cost associated with administering the program. That is, there may be

some de minimis or inconsequential cost associated with updating the list of union deductions, from time to time, and then administering the paycheck deduction, which is perhaps several extra keystrokes and, possibly the printing and mailing of a check. These same insignificant costs will still be borne by public employers for charitable deductions, private insurance, and the like. Public employers throughout the State have readily agreed to take on this task for decades and without complaint to benefit their employees.

27. Any purported financial interest in ending paycheck deductions pales when compared to the potential harm to the Petitioners. The extreme imbalance of the comparable interests strongly implies that the Act is designed not as a money-saver, but instead as a method to hinder or silence an important countervailing voice in this State and to obstruct the important representational work that public employment unions perform for their members.

28. Because the Petitioners bear such an imbalance of the hardships in this case, the inquiry on the merits need only be to determine whether the "plaintiff[s] ha[ve] raised questions going to the merits so serious, substantial, difficult, and doubtful, as to make them fair ground for litigation and, thus, for more deliberate investigation." *Blackwelder*, 550 F.2d at 195, quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740, 743 (2nd Cir. 1953). Petitioners' case on the merits suffices to meet that standard. Petitioners can demonstrate a substantial likelihood of success on the merits.

PETITIONERS ARE LIKELY TO PREVAIL ON THE MERITS.

A. Petitioners Have Exhibited a Likelihood of Success Regarding their Claim that The Act Violates the Right to Equal Protection Under the Law as Guaranteed by Article III, §§ 3,[4] and 10 of the West Virginia Constitution.

[4]Article III, § 3 provides:

> Government is instituted for the common benefit, protection and security of the

29. Article III, § 10 of the West Virginia Constitution provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law[.]" The West Virginia Supreme Court of Appeals has held that "[t]he concept of equal protection of the laws is inherent in article three, section ten of the West Virginia Constitution, and the scope and application of this protection is coextensive or broader than that of the fourteenth amendment to the United States Constitution. *Appalachian Power Co. v. State Tax Dept. of West Virginia*, 195 W. Va. 573, 594, 466 S.E.2d 424, 445 (1995), quoting *Robertson v. Goldman*, Syl. Pt. 3, 179 W. Va. 453, 369 S.E.2d 888 (1988); *accord Israel v. West Virginia Secondary Schools Activities Com.*, 182 W. Va. 454, 388 S.E.2d 480 (1989), *cf. Bolling v. Sharpe*, 347 U.S. 497 (1954) (U.S. 5th Amendment Due Process Clause imposes an obligation of equal protection equivalent to that imposed on the states by the 14th Amendment's Equal Protection Clause).

As *Kyriazis v. University of West Virginia, et al*, 450 S.E.2d 649, 656 (1994), explained:

> Whether a statute or governmental action violates the Equal Protection Clause is a determination made by the application of one of two constitutional tests. The more demanding test relates to statutes which impinge upon sensitive and fundamental rights and constitutional freedoms, such as religion and free speech. In order to uphold such a statute, a reviewing court must find that a compelling state interest is served by the classification. . .

> people, nation or community. Of all its various forms, that is the best, which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and when any government should be found inadequate or contrary to these purposes, a majority of the community has an indubitable, inalienable, and indefeasible right to reform alter or abolish it in such manner as shall be judged most conducive to the common weal.

The section's Common Benefits 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. *E.g., Women's Health Center v. Panepinto*, 191 W. Va. 436, 446 S.E.2d 658 (1993) (*overruled on other grounds*, Article VI, § 57); *United Mine Workers v. Parsons*, 172 W. Va. 386, 305 S.E.2d 343 (1983). The principle established in those cases is developed in the text below.

> In all other instances, the constitutionality of a statute, challenged under the Equal Protection Clause, is subject to the traditional standard requiring that the state law be shown to bear some rational relationship to legitimate state purposes . . . Under this test, the court must consider whether the classification is a rational one based on social, economic, historic or geographic factors; whether the classification bears a reasonable relationship to a proper governmental purpose; and whether all persons within the classes established are treated equally.

Accord Appalachian Power at 445.

30. Where a challenged classification does not affect a fundamental right or constitutionally suspect criterion, the Court has held that "a governmental classification will be sustained so long as it is 'rationally related to a legitimate state interest.'"[5] *Id.*

B. Because the Act adversely and selectively affects Petitioners' speech, associational, and existing contractual rights, the Act's classification scheme is constitutionally suspect, and Respondent cannot meet the established standard that the Act's means are necessary to accomplish a Compelling State Interest.

31. The Act classifies eligibility for payroll deductions according to an entity's message (labor-protective advocacy), its associational activities (unions, labor organizations, and clubs), and the nature of its existing contractual relations with public employers (CBAs vs. other contracts). Because each of those bases implicates fundamental rights, Respondent must, pursuant to West Virginia Supreme Court precedent, demonstrate that the Act is necessary to accomplish a compelling state interest for the Act to survive. *E.g., Kyriazis, supra.*

32. The Act targets Petitioners because of the content of their public advocacy, past and present. The Act, on its face, expressly excludes *unions* and *labor* organizations (not all organizations), *i.e.*, petitioners. While "unions" does not overtly say "labor unions," the inference

[5]The Court has also established an intermediate standard relating to classifications based upon gender or illegitimacy. *Israel v. Board of Education, supra.* Those classifications are not at issue herein. Therefore, it is unnecessary to consider the intermediate standard in this case.

is clear that such are the intended victims. The inference is clear given: (1) the ordinary usage and meaning of the word, (2) its juxtaposition with "labor organizations" (separately included to make certain that the exclusion was not restricted to employee organizations with CBAs with public employers – in other words, that the exclusion would also include groups like the petitioners - AFT-WV and WVEA), and (3) the Act expressly authorizes continued deductions for employee credit "unions." Inclusion of the innocuous category, "clubs," does not distort the purpose of this law. One would have to take a blind eye to not only the text of the Act, but also to reality, to avoid the conclusion that this Act was aimed at groups whose messages were disfavored by the Legislature.

33. In addition to its facial classification of labor, the Act is also content-based because it is based on the Legislature's publicly and repeatedly stated disagreement with the unions' message. *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622 (1994); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). This is clear from Respondent's and legislators' publicly stated hostility to unions, which is detailed below, and, perhaps more importantly, from the Act itself. The inference arises from the absence of any persuasive justification for prohibiting payroll deductions of union dues after decades of positive experience using them. Saving the costs involved is not persuasive because the savings are *de minimis*, because other discretionary payroll deductions continue to be permitted, and because the State has offered no explanation why union dues were selected for reducing costs. In addition, the sheer breadth of the prohibition – banning the deductions at all levels of government and regardless of the local governments' desires – and its narrow and unexplained focus on a particular set of associations – unions and labor organizations – reenforce the conclusion of an ulterior and illicit motive. *E.g.*, *Romer v. Evans*, 517 U.S. 620 (1996).

34. While legislative motive is generally not a subject of judicial inquiry, it is appropriate when the "the very nature of the constitutional question requires an inquiry into legislative purpose." *South Carolina Education Association v. Campbell*, 883 F.2d 1251, 1259 (4th Cir. 1989), quoting *United States v. O'Brien*, 391 U.S. 367, 383 n.30 (1968). This is such a case because one of the inquiries for determining content discrimination asks, as noted above, whether the challenged law was adopted because of agreement or disagreement with the affected message. *Turner Broadcasting v. Federal Communication Commission*, 520 U.S. 662, (1994); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

35. The conclusion that the Act is a content-motivated attack on petitioners and like groups is reenforced by the fact that the law focuses on their lifeblood and thus their continued ability to get their messages out: Union dues serve as the sustenance for the essential activities of a union. Organizing around important workplace issues, providing representation to aggrieved union members, and supporting statutory and policy changes to advance the interest of union members all involve free speech activity. At the same time, all of these activities require the financial support provided by union dues. The Act is designed to throttle union activity by limiting its capacity to raise revenues.

36. The Act violates a line of decisions that has invalidated penalties on the exercise of constitutional rights in the absence of a satisfying compelling state interest analysis. Such cases involve denying governmental benefits to individuals because they have engaged in protected activity, including benefits to which an individual can claim no separate entitlement and which the government offers only out of beneficence. For example, the United States Supreme Court in *Speiser v. Randall*, 357 U.S. 513 (1958), invalidated the denial of a state-granted tax benefit for veterans to an otherwise qualified veteran because he belonged to an organization that advocated

the overthrow of the government by force or violence, an association that was protected by the First Amendment. *See Pushinsky v. West Virginia Bd. of Law Examiners*, 164 W. Va. 736, 266 S.E.2d 444 (1980). Numerous decisions have voided denials of governmental benefits to persons who have moved in interstate travel, thereby exercising a fundamental right. *E.g., Memorial Hospital v. Maricopa County*, 415 U.S. 250 (415 U.S. 1974) (denial of otherwise available nonemergency medical care provided to indigents if they have recently moved from another state); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (denial of the franchise to those who have traveled interstate was an unconstitutional penalty); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (denial of welfare benefits to otherwise eligible residents if they have not lived in the jurisdiction for one year unconstitutionally penalized the right to travel); *accord, Women's Health Center v. Panepinto*, 191 W.Va. 436, 446 S.E.2d 658 (1993) (denying an eligible indigent welfare benefits because she has accepted money to pay for an abortion is an unconstitutional penalty on the freedom to choose) (*overruled on other grounds*, Article VI, § 57); *see also Saenz v. Roe*, 526 U.S. 489 (1999).

37. This case is no different. The State has authorized a benefit - payroll deductions for employee-designated purposes - but has specifically denied the benefit if the purpose is to deduct for the payment of dues to "unions, labor organizations, and clubs." Thus, the exception denies the benefit only to employees who have engaged in *lawful* and *constitutionally protected* associational memberships – and only those employees. That is the only purpose for which public employers are *prohibited* from providing payroll deductions. In that way, the exception appears to penalize employees because of their exercise of their constitutional rights.

38. In a similar vein, our Supreme Court has molded from the Common Benefits Clause – that "[g]overnment is instituted for the common benefit, protection and security of the people"

– in Article III, § 3 of the West Virginia Constitution an obligation on the State of *neutrality* whenever it establishes a program that implicates fundamental rights. In *United Mine Workers of America v. Parsons*, 172 W. Va. 386, 305 S.E.2d 343 (1983), the Court confronted a suit by a union seeking to gain access to broadcasts of West Virginia University football games to respond to ads placed there by two coal associations advocating for changes in the law that would be conducive to business but (in the union's view) adverse to workers. The Common Benefits Clause, the Court held, imposes on the State an "obligation . . . to preserve its neutrality when it provides a vehicle for political expression" and "serves important equal protection objectives." 172 W. Va. at 398, 305 S.E.2d at 355. Thus, if the State opens a forum to the expression of ideological views, it must allow access to those espousing a contrary opinion. Similarly, *Women's Health Center v. Panepinto*, *supra*, held unconstitutional the State's Medicaid program to the extent that it funded childbirths but not abortions. According to that Court, "when state government seeks to act 'for the common benefit, protection and security of the people' in providing medical care for the poor, it has an obligation to do so in a neutral manner so as not to infringe upon the constitutional rights of our citizens." 191 W. Va. at 445, 446 S.E.2d at 667. In both of these decisions, the State offered a program that was not compelled by the Constitution but was created solely out of its beneficence. Nevertheless, Article III, § 3 compelled the State in operating its program to remain neutral with respect to fundamental rights. So, too, in this case, the State is not required to provide for employee-designated payroll deductions, but once it creates a program for them, it must proceed in a neutral fashion and respect the exercise of fundamental rights. The Act's exclusion of dues for "unions, labor organizations and clubs" fails to adhere to Article III, § 3's strictures.

39. In addition, House Bill 2009 selectively prohibits payroll deductions only for public employees whose dues are paid to unions or clubs that do not have an existing collective bargaining agreement. Payroll deduction arrangements for municipal public employees who have a collective bargaining agreement ("CBA") in effect on July 1, 2021, shall still be permitted to have their dues deducted from their wages. Thus, the State has drawn a classification regarding eligibility for public employees to claim eligibility for a payroll deduction based upon the nature of the contracts formed between the relevant employer and its employees and their union. Employees who request payroll deductions for dues pursuant to a formal CBA can be honored, yet employees' requests made pursuant to standing agreements between an employer and union/employees regarding only payroll deductions are *required* by the Act to be rejected. While one could certainly understand the Legislature's desire to avoid impairing the obligations of contract created by CBAs, no legitimate explanation comes to mind why narrower, yet equally valid employment agreements about payroll deductions, should not be similarly respected.

40. The only legitimate state interest that can be identified to support the Act's exclusion of Petitioners from payroll deduction arrangements – beyond a state's interest in enforcing its laws – is to save the cost associated with the collection and payment of union dues. Yet this cost is *de minimis* and entails, perhaps, the value of a few keystrokes to implement the benefit. Meanwhile, other deductions will be permitted to occur, including charitable contributions and private insurance. Thus, the only savings occasioned by the Act are the costs of not deducting for union dues over and above the costs of other mandatory and nonmandatory deductions. In other words, a piddling. This savings can hardly rise to the level of "compelling." Indeed, courts have routinely held that the saving on administrative costs cannot satisfy the strict scrutiny standard. *E.g., Dunn v. Blumstein, supra; Shapiro v. Thompson, supra.*

C. No rational, legitimate purpose sustains the Act.

41. As the Court stated in *Kyriazis*, the rational relationship requirement applies to all governmental classifications, regardless of the nature of the discrimination and the individual right affected. While Petitioners assert that fundamental rights are at stake, they also insist that the Act cannot pass muster even under the reasonable relationship test.

42. "Rational basis review, while deferential, is not 'toothless.'" *Peoples Rights Org.*, 152 F.3d at 532, quoting *Mathews v. Lucas*, 427 U.S. 495, 510 (1976); *accord Whitlow v. Board of Education*, 190 W.Va.223, 438 S.E.2d 15 (1993); *cf. Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co.*, 174 W. Va. 538, 547-548, 328 S.E.2d 144, 154 (1985) (although substantive due process rational basis review of economic legislation is deferential it is not a knee-jerk validation of any law). The standard requires that, where a statutory provision employs classifications that burden or disadvantage certain persons or groups, "the *classification itself* [must be] rationally related to a legitimate government interest" being advanced by that provision. *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 533 (1973) (emphasis added).

43. The government cannot satisfy the rational-basis standard by mere *ipse dixit*, for "even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." *Romer v. Evans*, 517 U.S. 620, 632 (1996). That is because "[t]he search for the link between classification and objective gives substance to the Equal Protection Clause." *Id.* "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, [courts] ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.* at 633.

44. Accordingly, a classification will fail to pass constitutional muster where a legislature has sought to advance a legitimate purpose in making the classification, but there is no rational basis on which to conclude that the classification will achieve that purpose. *See Moreno*, 413 U.S. at 533 (rejecting rationality of relationship between proffered purpose of encouraging nutrition and stimulation of the agricultural economy and denying the distribution of food stamps to non-related individuals living in the same household); *Craigmiles v. Giles*, 312 F.3d 220, 228 (6th Cir. 2002) (finding that prohibition on sale of caskets by persons not licensed as funeral directors had no rational relationship to articulated purposes of health, safety and product quality).

45. A classification also will fail when it serves an illegitimate interest, such as "'a bare . . . desire to harm a politically unpopular group.'" *Romer*, 517 U.S. at 634, quoting *Moreno*, 413 U.S. at 534. Indeed, laws that draw distinctions between the burdened class and the non-burdened class that are sufficiently disconnected from any legitimate state purpose "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of person affected." *Romer*, 517 U.S. at 634. *See also City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 450 (1985) (concluding that ordinance requiring a special permit for a group home was so irrational that "requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded"); *Moreno*, 413 U.S. at 535 (striking down, under the rational-basis test, provisions denying eligibility for Food Stamps to households containing unrelated members, on the ground that the classification was poorly adapted to the state purpose of fraud prevention but closely adapted to the illegitimate purpose of burdening "hippies"). *Cf. Craigmiles*. 312 F.3d at 228 ("Finding no rational relationship to any of the articulated purposes of the state [in defense of a statute prohibiting the sale of caskets by persons not licensed as funeral directors], we are left with the more obvious illegitimate purpose to which [the] licensure provision is very well

tailored."). Similarly here – as noted above – "the extreme imbalance of the comparable interests strongly implies that the Act is designed not as a money-saver, but instead as a method to hinder or silence an important countervailing voice in this State and to obstruct the important representational work that public employment unions perform for their members."

46. There is much contemporaneous evidence to support that conclusion. Respondent has, in the recent past, expressly stated his support for the continuation of the deduction of union or association dues from public payroll checks. In 2017, the Legislature passed Senate Bill 239 which was similar to House Bill 2009 in that it attempted, *inter alia*, to impede payroll deduction of union dues from public employees. On April 26, 2017, Respondent disapproved and returned Enrolled Committee Substitute for Senate Bill 239. Respondent observed that Senate Bill 239 presented a "hardship" to employers and employees; was an "unnecessary burden" on employers; and an "inconvenience" for employees and organizations collecting dues. He stated:

> This bill creates a significant hardship on employers and employees for a convenient practice that has become commonplace in today's society, authorizing employee payroll deductions. Payroll deductions are used for a variety of purposes, such as employee benefit payments, donations to non-profit organizations (i.e., the United Way), and employee membership dues. Current law requires an employee to complete a payroll deduction authorization prior to any deduction being made by an employer from the employee's paycheck. The authorization continues until the employee changes or discontinues it.
>
> Enrolled Committee Substitute for Senate Bill 239 modifies the definition of deduction to exclude amounts for authorized credit unions, charities, outside savings plane, or union or club dues. It places an unnecessary burden on businesses, and an inconvenience on employees and organizations receiving deductions, by mandating the creation of a new wage assignment ***every year*** to continue the authorization.
> Therefore, I disapprove and return Enrolled Committee Substitute for Senate Bill 239.

Letter from Jim Justice, Governor of West Virginia, to Mac Warner, West Virginia Secretary of State (Apr. 26, 2018).

47. Since that time, however, Respondent and many legislative supporters have overtly attacked unions in West Virginia. As Petitioners set forth in their verified *Complaints*, unions have been subjected to a bombardment of attacks by Respondent and legislators in the run-up to the Act. Government leaders have pejoratively referred to union leadership as "union thugs" and have developed a legislative agenda that may be characterized both as "anti-union" and "anti-employee." For example,

> • Respondent Justice reportedly referred to "union bosses" perpetuating rumors that teachers 50 and over would not be able to get vaccines calling these comments "plain garbage." "Justice Claims Education Workers Under 50 Won't Get COVID Vaccine Garbage 2000 Death Recorded," www.connect-bridgeport.com, January 20, 2021.
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> • Respondent Justice reportedly had no plans to speak with public education unions regarding the return to five day per week in person instruction in the midst of a global pandemic. "Justice Open to Speak With Teachers School Workers But Not Union Heads," www.wvmetronews.com, January 6, 2021.
>
> • Respondent Justice dismisses union's call for distancing education amidst global pandemic reportedly stating "If I were a member paying dues and that's what I was delivered by my union bosses, I would absolutely be looking elsewhere."" A Union Leader Is Calling For WV Classrooms To Close For The Rest Of 2020. But State Leaders Say In-School Spread Is Scarce," www.loganbanner.com, November 16, 2020.
>
> • Respondent Justice, who was criticized by public educators for repeatedly tweaking the map utilized for school closure during the global pandemic, stated "we don't listen to the union bosses." www.wvpublic.org., October 13, 2020.
>
> • Senator Craig Blair threatened to fire teachers if they struck in the fall of 2020. "Senator Craig Blair Threatens Firing of Teachers," https://morgancountyUSA.org, August 14, 2020.
>
> • Then-Senate President Mitch Carmichael stated "union bosses" have lost "grip on reality" during statewide school employees strike. "History Professor: 'Union Bosses' Term Doesn't Reflect Today's Realities," https://wchstv.com, February 18, 2019. Carmichael also referred to "union bosses" who exercised their rights of free speech to criticize charter school legislation. wvlegislature.gov., July 10, 2019.

• Senator Craig Blair referred to "teacher union bosses" who criticized education reform. "Jim Justice Is Neither Democrat Nor Republican He's A Narcissistic Opportunist," https://wvrecord.com, June 11, 2019.

• Then-Senator Carmichael referred to "union bosses" who opposed legislation relating to charter schools and work stoppages. "West Virginia Considers Bill Penalizing Teachers Who Strike," www.wsj.com, June 17, 2019.

48. The 2021 legislative session included a barrage of attacks on public education and its employees. In addition to the unlawful Act at issue herein, the Legislature passed:

• House Bill 2012: expanding charter schools

• House Bill 2013: providing for de facto educational savings account of approximately $4,600 per year without financial accountability standards.

• Committee Sub for Senate Bill 11: codifying illegality of public employee work stoppages and striking.

Other bills that passed weakened certification requirements (Eng. Committee Sub for Senate Bill 14) and may create higher content area shortages in special education instruction.[7] (Senate Bill 680)

49. Even assuming that the Act was motivated by a desire to save on the costs of

[7]Further anti-union and anti-public employee animus (and an attack on local control) can be gleaned from the following bills that were proposed, but did not pass:

• Senate Bill 566: would have allowed state superintendents' interpretation of law or policy to supersede independent judgments of Grievance Board Administrative Law Judges, which arise from due process proceedings.

• Senate Bill 601: would have made significant changes to the public employees grievance procedure that would potentially block or discourage access to this process by, among other things, making employees liable for employer attorneys fees, complicating grievance filings, and prohibiting certain grievances during a state of preparedness or emergency.

• HJR1: proposed giving the Legislature ultimate and total authority in education policy thereby stripping the West Virginia Board of Education of its constitutional authority to govern schools and leaving the authority of the Legislature unchecked in this vital area.

• House Bill 2364: would have permitted K-12 teachers to carry concealed firearms in school as designated school protection officer.

allowing payroll deductions, the Act still fails rational basis. When cutting costs or benefits for legitimate reasons, the State cannot accomplish that end by means that are arbitrary. For example, the Court in *Romer v. Evans, supra*, held that Colorado could not justify eliminating sexual orientation discrimination from civil rights laws as a resource-conserving measure. Neither could Illinois rationalize the dismissal of a fair employment claim for the State's failure to meet a time deadline as a cost-saving measure. *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 441-42 (1982) (Blackmun, joined by Justices Brennan, Marshall & O'Connor, concurring); *Lyng v. United Auto Workers*, 485 U.S. 360, 376-77 (1988) (Marshall, J., dissenting).[8] So, too, here, if the State (improbably) concludes that it needs to cut the costs of implementing nonmandatory payroll deductions, it cannot willy nilly pick and choose beneficiaries to exclude; it has to have a reason for the exclusions it makes. None presents itself in this case. The costs and burdens for making union and club dues payroll deductions cannot be distinguished from those created by other nonmandatory payroll deductions. And, if costs really were a concern, the State could require cost-sharing as a requirement for continued eligibility.

50. The rational basis standard does not preclude a state or local government from even-handedly denying to public employee unions a benefit (such as payroll deduction) that is provided only to other, differently situated, entities. *See City of Charlotte v. Local 660, Int'l Ass'n of Firefighters*, 426 U.S. 283, 288 (1976); *Toledo Area AFL-CIO v. Pizza*, 154 F.3d 307, 322 (6th Cir. 1998). Nor does it preclude laws that treat certain occupational groups differently based on

[8] "Although it is true . . .that preserving the fiscal integrity of the Government is a legitimate concern of the State, . . . this Court expressly has noted that a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources. . . . We have insisted that such classifications themselves be rational rather than arbitrary. . . . Our cases thus make clear that something more than an invocation of the public fisc is necessary to demonstrate the rationality of selecting strikers, rather than some other group, to suffer the burden of cost-cutting legislation." 485 U.S. at 376-77 (internal citations and quotation marks omitted).

distinctions between them that are relevant to the purposes of the statutory provision in questions. *See Central State Univ. v. American Ass'n of Univ. Professors*, 526 U.S. 124 (1999).

51. But the rational basis standard *does* preclude laws that deny rights or benefits to certain unions or groups of employees while granting such rights to other similarly situated unions or groups of employees. *See Truck Drivers & Helpers Local 728 v. City of Atlanta*, 468 F. Supp. 620, 623 (N.D. Ga. 1979) (holding that a city violated the Equal Protection Clause by denying payroll deduction of dues to the police union while granting it to the firefighters union, notwithstanding the city's argument that the distinction was "based on differences in the functions which the two departments perform," because the differing functions did not relate to the particular matter of payroll deduction). *See also International Ass'n of Firefighters Local 3858 v. City of Germantown*, 98 F. Supp. 2d 939, 948 (W.D. Tenn. 2000) (where statute required dues deductions for fighters in some counties but not others, "[f]inding that the statute . . . violates the equal protection guarantees [of the federal and state constitutions] is not even a close call.")

52. Here, the statute specifically treats those public employees with collective bargaining agreements differently than those without. Those who have a collective bargaining agreement will enjoy the right to paycheck deduction during the remainder of the contract. In contrast, those who are not subject to a collective bargaining agreement will not, regardless of whether they had a pre-existing contractual arrangement for payroll deductions. Moreover, under the Act, payroll deductions may continue to be made for other non-union purposes.

53. *Kyriazis* also indicates that a Court should consider "social, economic, historic or geographic" factors in assessing whether there is a rational relationship between the statute and its intended goal. Here, the economic, social, and historic factors all cut against a finding that a

rational relationship exists.[9]

54. The payroll deduction for union dues imposes virtually no economic impact on the public employers, as evidenced by the fact that *none* has complained to Petitioners about the arrangement. Rather, public employers have been voluntarily participating in it for years.

55. In this instance, historical and social factors are intertwined. As public employment unions have developed, they have become an integral part of the relationship of public employment labor relations. Historically, the payroll deduction practice for teachers, upon information and belief, dates back to the *1960s*. Similarly, such deductions by the State of West Virginia for State employees represented by the Communications Workers of America have been in place for approximately four (4) decades and the FOP has had similar arrangements for approximately twenty-five (25) years. Public employees have sought representation and the unions that are party to this case have provided it. Public employers have benefitted and embraced the participation of public employee unions in the development of policy; resolution of grievances; administration of the RIF and transfer practice in the realm of public education; and other purposes that support the important goal of workplace harmony and industrial peace.

56. For employers, the payroll deduction has been another benefit that it can offer its employees. As noted, if it were a drain on their resources, public employers would not have consistently agreed to the arrangement.

As such, there is no rational relationship between the Act and any legitimate purpose.

[9]Geography is not at issue in this analysis.

D. Petitioners Have Exhibited a Likelihood of Success Regarding their Claim that the Act violates the State Contract Clause which prohibits the passage of a law that impairs the obligation of contract.

57. Article 3, § 4 of the West Virginia Constitution provides that "[n]o . . . bill of attainder, ex post facto law, or law impairing the obligation of contract shall be passed." According to the West Virginia Supreme Court of Appeals,

> In determining whether a Contract Clause violation has occurred, a three-step test is utilized. The initial inquiry is whether the statute has substantially impaired the [existing][10] contractual rights of the parties. If a substantial impairment is shown, the second step of the test is to determine whether there is a significant and legitimate public purpose behind the legislation. Finally, if a legitimate public purpose is demonstrated, the court must determine whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption.

Syl. Pt. 4, *Shell v. Metropolitan Life Ins. Co.*, 181 W. Va. 16, 380 S.E.2d 183 (1989).; *accord State ex rel. Lambert v. County Com'n of Boone County*, 452 S.E.2d 916, 192 W. Va. 448 (1994).

58. As the Court held in *Shell*, the initial inquiry as to whether a violation of the Contract Clause has occurred is to determine whether the statute has substantially impaired the contractual right of the parties. The existing agreements reached between public employers and public employees and their unions provided for the employers to withhold union dues and pay them over to the unions. Obviously, an Act that prohibits employers from making payroll deductions for union dues will substantially impair the obligations of those prior agreements. Indeed, the Act will obliterate the obligations.

59. Given that there will be a substantial impairment of the contractual rights at issue,

[10]The Contracts Clause does not apply prospectively to limit the terms of contracts. *E.g., Ogden v. Saunders*, 25 U.S. (12 Wheaton) 213 (1827).

Shell instructs that the next step of the test is to determine whether there is a significant public purpose behind the legislation. As the foregoing discussion demonstrates, there is no significant and legitimate public purpose behind the legislation. Viewed in the light most favorable to the legislation, the only impact it might have is to save de minimis administrative costs. As noted, however, the public employers who have entered into agreements to withhold dues will still be withholding charitable contributions and private insurance payments. There is no rational support for the Act, let alone a significant and legitimate public purpose.

60. Rather, the Act serves to undermine the significant and legitimate public purpose of encouraging harmonious workplaces and industrial peace. The agreement to withhold dues is a service provided by public employers that generates good will with employees and permits the employer to provide an additional benefit to its employees. Likewise, unions receive the benefit of dues collections and public employees receive the convenience of the same. The Act only serves to undermine this agreed upon arrangement that has been in place for decades.

61. Since there is no significant legitimate public purpose for the Act, *Shell* instructs that it is unnecessary to reach the third prong: whether the adjustment of the rights and responsibilities of the contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the Act's adoption. That is the case here. In any event, as demonstrated in the discussion above on equal protection, the Act lacks a rational basis while targeting particularly unpopular (in the legislators' eyes) groups. That is hardly a law that is "based upon reasonable conditions and is of a character appropriate to [a legitimate] public purpose[.]" *Shell, supra.*

E. Petitioners Have Exhibited a Likelihood of Success Regarding their Claim that he Act violates Petitioners' free speech and associational rights under the West Virginia Constitution.

62. United States and West Virginia Supreme Court decisions have held that the right to associate with others to advance a particular cause 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, supra*. The Act takes aim at Petitioners' and public employees' ability to associate to advance workers' causes.

63. 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 impairs 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 parallels among those cases and the instant one are equally striking and troubling.

64. The series began with *NAACP v. Alabama et rel. Patterson*, 357 U.S. 449 (1958), which thwarted a lawsuit 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. 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 [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.

65. 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 city "a statement as to dues, assessment, 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 organization 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).

66. The State of Arkansas's somewhat different tack 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 abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." *Id.* at 488.

67. 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 were 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 relate 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 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.

68. The case returned to the 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 436-36. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id.* at 438.

69. The final case in the series confronted an attempt by a Florida legislative committee to enforce a subpoena *duces tecum* for all of the NAACP's membership records from which its president could answer questions about whether alleged Communists were also members of the Association. *Gibson v. Florida Investigation Committee*, 372 U.S. 539 (1963). Although the possibility of 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.

70. Unions and their members, of course, have long received constitutional protection for their 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

to 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. *United Mine Workers of America, Dist. 12*, 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 or grievances.

71. The foregoing federal cases provide a floor for interpretation of the Article III protections in §§ 7 and 16, and our 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 that those imposed on the states by the Constitution of the United States." *Pushinsky v. West Virginia Board of Law Examiners*, 164 W. Va. 736, 266 S.E.2d 444 (1980); *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).

72. Applying the foregoing principles to the Act, its prohibition of deduction of union dues by public employees unnecessarily and unconstitutionally imposes an excessive burden on Petitioners' associational rights.

73. Membership obviously provides the sustenance for any labor organization, and members' dues provide unions with the bulk of their revenues. The Act will seriously hamper the unions' ability to maintain the steady and reliable resources needed to accomplish their associational purposes.

74. This attack on unions imposes every bit as much of a burden on their 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*. 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 U.S. at 438.

75. In this case, assuming that a valid economic concern actually exists, public employment unions could pay a reasonable processing fee with a surety bond, if needed. Indeed, this very arrangement occurs regularly with requests made under the Freedom of Information Act. A reasonable fee may be charged to cover the administrative costs.

76. Respondent has not demonstrated a substantial countervailing purpose to support this legislation. At most, implementation of the Act will reduce the work for some public employers in only the slightest manner.

F. The Public Interest Will Be Best Advanced by Granting the Preliminary Injunction.

77. The public interest analysis in this case follows from the balance of harms discussed *supra*. The public interest is advanced by the protection of Petitioners' fundamental constitutional

rights of equal protection, contract, and association. The public interest is also promoted by having effective public employment unions, whose operations will be seriously and adversely affected by the Act. There is no indication that the public interest has been harmed in any manner by the current method of collecting union dues by paycheck deduction.

For the foregoing reasons, the Court hereby grants Petitioners' motion for a preliminary injunction and enjoins the Respondent from enforcing the Act, which prohibits the long-standing practice of public employers collecting public employee union dues. Specifically, this Court **ORDERS** as follows:

A. That Petitioners have exhibited a likelihood of success regarding their claim that House Bill 2009 violates Petitioners' equal protection rights guaranteed to them by Article III, Sections 1, 3 and 10 of the West Virginia Constitution to the extent set forth in the *Complaint*;

B. That Petitioners have exhibited a likelihood of success regarding their claim that House Bill 2009 violates the Contracts Clause, Article III, Section 4, of the West Virginia Constitution to the extent set forth in the *Complaint*;

C. That Petitioners have exhibited a likelihood of success regarding their claim that House Bill 2009 violates Petitioners' constitutional rights to freedom of speech and association and their right to Equal Protection under Article III, Sections 1, 3, and 10 of the West Virginia Constitution, by selectively and differentially regulating them based on their viewpoints and in retaliation for their exercise of their rights to free speech, association, and political activity;

D. That Petitioners have exhibited a likelihood of success regarding their claim that House Bill 2009 penalizes Petitioners for their exercise of their rights of speech and association without any legitimate purpose and thereby violates Article III, Sections 3, 7, 10, 11, and 16 of the West Virginia Constitution; and

E. That a preliminary injunction be issued against enforcement of House Bill 2009 by Respondent, Respondent's agents, or anyone acting in concert with Respondent or under the authority of House Bill 2009.

F. That Petitioners' counsel shall contact the Court to establish a scheduling Order for further adjudication of this matter.

The Clerk is directed to send a certified copy of this Order to all counsel of record via electronic and U.S. mail.

Dated: June 16, 2021

Judge Tera L. Salango, Judge