IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 21-0559

JAMES C. JUSTICE, II, GOVERNOR OF THE STATE OF WEST VIRGINIA,

Petitioner,

v.

WEST VIRGINIA AFL-CIO, ET AL.

Respondents.

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Respondents' brief gets just about everything backward. Take the burden of proof: Respondents emphasize the Governor's supposed failure to present evidence. But when it comes to injunctive relief, that burden rests squarely on the party seeking the remedy. *Camden Clark Mem. Hosp. Corp. v. Turner*, 212 W. Va. 752, 760, 575 S.E.2d 362, 370 (2002). Likewise, Respondents very nearly assume that the Paycheck Protection Act is unconstitutional, rejecting the interests that prompted it and playing up the supposed problems it might create. But the rule is the opposite: "[A] statute is presumed to be constitutional." *State v. Yocum*, 233 W. Va. 439, 443, 759 S.E.2d 182, 186 (2014). And Respondents—like the circuit court—all but argue that their claimed "irreparable harm" is reason enough to justify an injunction. Not so. "In the absence of a likelihood of success on the merits, the circuit court abused its discretion when it granted the unions' request for a preliminary injunction." *Morrisey v. W. Va. AFL-CIO*, 239 W. Va. 633, 642, 804 S.E.2d 883, 892 (2017) ("*Morrisey I*").

This upside-down approach confirms that the injunction should never have issued. The response brief also often fails to grapple with relevant authorities, and it treats any action that might run contrary to a union's interest as unconstitutional. The Court put that latter notion to rest in *Morrisey I* and *Morrisey II*. *See Morrisey I*, 239 W. Va. 633, 804 S.E.2d 883; *Morrisey v. W. Va. AFL-CIO*, 243 W. Va. 86, 842 S.E.2d 455 (2020) ("*Morrisey II*"). The U.S. Supreme Court did the same in *Janus*. *See Janus v. Am. Fed'n of State, Cnty., & Mun. Emps. Council 31*, 138 S. Ct. 2448 (2018). The Court should reject this latest effort to enlist the judiciary's injunctive power to freeze in amber a privilege the Legislature has full discretion to extend or remove. Unions do not have a right to extract dues payments from their members with help from the State, and it is no constitutional concern to ask them to collect money in the same way that thousands of

organizations and businesses do every day. The Court should vacate the preliminary injunction.

ARGUMENT

I. The Circuit Court Improperly Applied An Abrogated Legal Standard.

As the Governor explained in his opening brief, the circuit court applied an abrogated legal standard. That standard mainly—and incorrectly—focused on the likelihood of irreparable harm to Respondents. *See* Pet'r's Br. 13. In taking that approach, the circuit court ignored this Court's precedent, which recognizes that likelihood of success on the merits is a non-negotiable condition for securing a preliminary injunction. *See, e.g.*, *Morrisey I*, 239 W. Va. at 642, 804 S.E.2d at 892 (holding that the circuit court abused its discretion by issuing a preliminary injunction "[i]n the absence of a likelihood of success on the merits"); *Martin v. Unsafe Bldgs. Comm'n of Huntington*, No. 18-0778, 2020 WL 261738 (W.Va. Jan. 17, 2020)(memorandum decision) (affirming denial of a preliminary injunction where petitioner did not establish a likelihood of success on the merits). In response, Respondents take a confused approach: they seem to advocate for the right test in places, *see* Resp. Br. 15, only to defend the circuit court's out-of-date standard just a page or two later, *see id.* at 16-17.

Make no mistake—the circuit court applied the wrong standard. Although it cited approvingly some of the cases the Governor cited in explaining the preliminary injunction standard, it then failed to correctly apply them. A fair reading of the order shows that the circuit court reverted to the antiquated *Blackwelder* standard. After all, why would the circuit court have taken pains to defend its use of *Blackwelder* if Respondents are right that it did not actually rely on it? Using *Blackwelder* was wrong as that test overemphasizes irreparable harm and waters down the other, independent parts of the injunction standard. *See Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 347 (4th Cir. 2009), *judgment vacated on other grounds*, 559 U.S. 1089 (2010), *and adhered to in relevant part* 607 F.3d 355 (4th Cir. 2010).

Respondents dismiss this discussion as "hypertechnical." Resp. Br. 16. Yet cases are routinely won and lost on "hypertechnical" issues like balancing tests and standards of review. And indeed, the standard made all the difference here. Applying the flawed standard, the circuit court used the supposed "imbalance of the hardships" to conclude that 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.'" App. 249 (citing *Blackwelder Furniture Co. v. Seilig*, 550 F.2d 189, 195 (4th Cir. 1997)). In other words, it is no answer that the circuit court considered the merits in some fashion, Resp. Br. 16, because it held Respondents to the lower "fair ground for litigation" threshold, and leveraged its flawed analysis on irreparable harm into a win for Respondents on likelihood of success, too.

The Court can reverse on this error alone: The preliminary injunction order is rotten at the root.

II. Respondents Failed To Show A Likelihood Of Success On The Merits.

Respondents fare no better when they get to the (correct) heart of the argument. They have no likelihood of success on any of their claims.

A. *Morrisey I* and *Morrisey II* Matter.

Respondents urge the Court to turn a blind eye to this Court's precedent addressing the collection of union dues. Indeed, Respondents characterize *Morrisey I* and *Morrisey II* as "factually inapposite to this case." Resp. Br. 13. Put differently, Respondents suggest that not one but *two* recent decisions from this Court about the constitutional implications of laws affecting union dues—one vacating a preliminary injunction order based on a failure to show a likelihood of success on the merits—are "factually inapposite." That's a far stretch.

This case cannot be divorced from *Morrisey I* and *Morrisey II*. The West Virginia

Workplace Freedom Act is not the West Virginia Paycheck Protection Act, but the same core issue remains—the extent to which legislative restrictions on union dues collection infringe union rights. Those cases, like the U.S. Supreme Court's decision in *Janus*, at least rebut the assumption running underneath most all Respondents' arguments that unions enjoy a special right to collect fees with the assistance of the State given the important work that unions do. If unions can continue their work "[e]ven without agency fees," *Janus*, 138 S. Ct. at 2467, they can persist under a law that keeps the pool of dues-paying employees the same, and simply requires unions to collect fees like other money-collecting entities. At bottom, the *Morrisey* cases refused to recognize broad rights regarding union dues payments despite claims of serious financial harm. *See Morrisey I*, 239 W. Va. at 642, 804 S.E.2d at 892. And there the asserted harm—a total bar against collecting dues from a whole class of individuals—was weightier than the injury from disabling a particular method of collection. *Morrisey I* and *Morrisey II* thus teach an important lesson on irreparable harm, too: the importance of union dues and the activities they fund is not enough to justify injunctive relief.

Respondents (Resp. Br. 13-14) try to enfeeble the *Morrisey* cases by mischaracterizing a statement in the Governor's Opening Brief that this Court has twice held that "the West Virginia Constitution does not contain any right to collect union dues." Pet'r's Br. 1. Yet this phrase is both an accurate statement of the Court's holding and a reflection of the obvious import of cases like *Morrisey I* and *Morrisey II*: The State cannot outright bar unions from collecting fees from willing members, but neither can unions insist that dues be paid on their preferred terms under the guise of constitutional rights. The focus on "objecting nonmembers" in *Morrisey I* and *Morrisey II*, Resp. Br. 13, is likewise a distinction without a difference. There and here, Respondents ask the Court to consider feared harm to themselves, not the rights of employees writ large. After

already holding that unions cannot use the West Virginia Constitution to squeeze out benefits from unwilling *employee* payors, it is a short step to confirm that it cannot be used to squeeze out similar benefits from unwilling *employer* intermediaries, either. In other words, when it comes to measuring potential injury *to Respondents*, the Court has already answered the harder question.

All this might seem academic because, after complaining about the Governor's statement about a "right to collect union dues," Respondents also insist that they are invoking no such right. Resp. Br. 13. But look closer. Respondents repeatedly argue that the Court should keep the preliminary injunction in place because it "maintain[s] the status quo" and allows those who have "already elected to pay dues to continue to have them withheld as they have for years." Resp. Br. 1, 14 (emphasis omitted). Yet the Act does not stop anyone from making payments they want to make; union members can still pay their dues, and Respondents' evidence shows many are eager to do so. Pet'r's Br. 6. More to the point, by referencing the "status quo" and "years" of past practice Respondents are in fact arguing for a right to collect union dues—they simply wrap it in the language of reliance and history. But just as there is no broad constitutional right to collect union dues, there is also no constitutional principle of "no takebacks" after the Legislature confers a gratuitous benefit. This case, then, is the next logical extension of *Morrisey I* and *Morrisey II*. The Court should not indulge backdoor efforts to revive precepts it already laid to rest.

B. Respondents Are Not Likely To Succeed On Their Equal Protection Claim.

Respondents, like the circuit court, misapply the West Virginia Constitution's equal protection provisions. This Court should course correct.

1. Respondents have not explained why this Court should ignore compelling persuasive authority on the same issue.

Ultimately, Respondents' biggest problem is the substantial authority from federal and state appellate courts across the country that uniformly endorses a State's right to withdraw as an

intermediary in the payment of union dues. Those cases rejected equal protection challenges materially identical to those Respondents present here—that is, claims of harm from permitting automatic payroll deductions in some cases while disallowing them for union dues. *See City of Charlotte v. Loc. 660, Int'l Ass'n of Firefighters*, 426 U.S. 283 (1976); *Ark. State Highway Emp. Loc. 1315 v. Kell*, 628 F.2d 1099 (8th Cir. 1980); *S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251 (4th Cir. 1989); *W. Cent. Mo. Reg'l Lodge No. 50 v. Bd. of Police Comm'rs*, 916 S.W.2d 889 (Mo. Ct. App. 1996).

The differences Respondents grasp at between the Act and the circumstances before those other courts are immaterial, imagined, or both. *See* Resp. Br. 28-31. These supposed distinctions largely fall into four boxes: (1) the governments involved in the other cases purportedly produced more evidence for implementing their laws, (2) the plaintiffs there made fewer claims, (3) no "prior history" of automatic deductions existed in the other cases, and (4) the governments in the prior cases had an interest in maintaining political neutrality.

The first basis is no real distinction at all: Even Respondents recognize that the Act can produce some cost savings. Although they insist (without evidence) that such savings are a "piddling" when it comes to each individual employee, Resp. Br. 23, even "piddlings" can become significant when multiplied thousands of times over across the entire public-sector population. As in *Charlotte*, the government "has not drawn its lines in order to exclude individual deductions, but in order to avoid *the cumulative burden of processing deductions* every time a request is made." 426 U.S. at 288 (emphasis added). That is enough.

Respondents further suggest that the Legislature should have written the cost-savings rationale into the text of the law, Resp. Br. 31 n.29, yet no authority imposes that onerous requirement. Quite the opposite: under rational basis review, a law "must be upheld against equal

protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification," and "[a] State ... has no obligation to produce evidence," let alone cite statutorily enshrined legislative findings, "to sustain the rationality of a statutory classification." *Heller v. Doe*, 509 U.S. 312, 320 (1993); *see also, e.g.*, *Bowen v. Owens*, 476 U.S. 340, 350 (1986) (considering what Congress could have "presumably" thought in enacting a challenged classification).

The second distinction is immaterial. It makes no difference that Respondents here chose to file a shotgun complaint. *See* Resp. Br. 30 n.29. They do not explain why that would matter and it is hard to see how it could, as the resolution of an equal protection claim does not change depending on the number of other counts brought. Respondents' additional claims fail for separate reasons, as discussed more below, but their existence is no reason to set aside factually similar, well-reasoned authority concerning *this* one.

As for the third distinction, Respondents cite no authority to support their position that a checkoff's "prior history" justifies special treatment. Resp. Br. 30 n.29. To be sure, in a narrow class of cases in which a government-conferred direct benefit vests into a property interest, the government cannot withdraw that benefit without due process. *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970). But Respondents do not (nor could they) claim a property interest in these checkoffs, so that authority is no help. And although the U.S. Supreme Court has affirmed a State's use of reliance interests to *justify* a classification that might otherwise violate equal protection, *Nordlinger v. Hahn*, 505 U.S. 1, 13 (1992), neither that Court nor this one has held that reliance interests can be used to *attack* such a classification. After all, consider the import of such a rule—state law would be frozen in time. The State would need to establish special grounds to withdraw any benefits, direct or indirect, once granted, and one would expect most every statute withdrawing

a benefit to face legal challenge. The law cannot work that way.

A last distinction that Respondents try to draw gives away the game. In describing *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307 (6th Cir. 1998), Respondents argue the prohibited checkoff focused on "deductions for political causes." Resp. Br. 31. They then concede "the State has an obvious and important interest in maintaining politically neutral government." *Id.* Yet this conceded interest just as easily supports the Act. In fact, in *Janus*, the Supreme Court emphasized that unions often speak out on "sensitive political issues" like "climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions." *Janus*, 138 S. Ct. at 2476 (footnotes omitted). The Legislature could have legitimately chosen to extract the State from any ties to such "sensitive" political activities by removing itself as an intermediary between unions and their members. And there is every indication the Legislature intended exactly that, as the introduced version of the bill that led to the Act was directed in many parts toward withholdings for "political activities." *See generally* H.B. 2009 (as introduced Feb. 10, 2021). *Pizza*'s "distinction," then, is another reason to sustain the Act.

2. Respondents' affirmative arguments fail, too.

Respondents' other equal protection arguments fare no better than their efforts to distinguish the substantial authority against them.

First, Respondents ask the Court to treat the Act as if it barred *all* collection of union dues. They stress that dues are the "lifeblood" for union activates, and they insist (without citation) that the Act is "designed to throttle union activity by limiting its capacity to raise revenues." Resp. Br. 20. It must be said again: the Act does not restrict the amount of dues unions may collect, does not constrain who they may enlist as members, and does not stop unions from building their financial resources to advance their mission. It provides only that the State will no longer directly

assist in unions' fundraising processes through payroll deductions. Because a State is "under no obligation" to use "publicly administered payroll deductions" to "aid the unions," *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009), there can be no constitutional quarrel with that goal. *See also id.* (explaining that the State's choice does not "abridg[e] ... the unions' speech" but "simply bar[s] [them] from enlisting the State in support of that endeavor").

Second, for similar reasons, the Act is nothing like the "line of decisions" addressing "penalties on the exercise of constitutional rights." Resp. Br. 20. The Act does not fine individuals for engaging in union activity or otherwise punish them for being members. Respondents try to analogize the Act to *Speiser v. Randall*, 357 U.S. 513 (1958), which addressed a California law that discriminatorily denied a tax exemption because of an individual's speech. Yet the Supreme Court there explained that the denial of a tax exemption is a penalty because it effectively operates as a fine. *Id.* at 520. In contrast to subjecting disfavored actors to unique financial harm, the Act returns unions to the *same category* as thousands of other businesses and entities that do not enjoy a special privilege to make automatic deductions from state payroll. Deeming that action a penalty would invoke Respondents' illusory "no takebacks" principle again, suggesting that a government could never withdraw a statutorily created benefit to a person engaging in constitutionally protected activity. Such a broad-sweeping rule would effectively prevent the State from cutting spending programs or making policy adjustments in any number of areas. Unsurprisingly, that rule finds no support in any authority.

Third, Respondents incorrectly claim that the Act implicates the Common Benefits Clause in Article III, Section 3 of the West Virginia Constitution. Respondents cite cases addressing benefits available to the public. *See* Resp. Br. 20-21 (citing *United Mine Workers of America v. Parsons*, 172 W. Va. 386, 305 S.E.2d 343 (1983); *Women's Health Cntr v. Panepinto*, 191 W. Va.

436, 446 S.E.2d 658 (1993)). But the "benefit" here is in no sense "common." Respondents do not (and cannot) show that any member of the public may force the State to collect monies on his or her behalf through automatic payroll deductions. Respondents further insist that the State's payroll system is a "forum [for] the expression of ideological views," Resp. Br. 22—a dubious proposition to begin with. *See Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 647 (7th Cir. 2013) ("[T]he Unions cite no case applying nonpublic forum analysis to a state payroll system, and this Court is not aware of any."). Yet even if that were an accurate description, Respondents have not shown that the State has thrown that door "open" to all manner of "expressions." Resp. Br. 22. The State's automatic deduction program applied to a limited universe of entities before the Act, too.

Fourth, Respondents mistakenly argue that the Act is subject to heightened scrutiny. Resp. Br. 19. But as should be plain by now, a union has no constitutional right to paycheck deductions for union dues, so the Legislature did not tread in fundamental rights territory. *See Pizza*, 154 F.3d at 319, 321-22 (holding that the "parties have no constitutional right to checkoffs"). Nor does the Act interfere, as Respondents suggest, with union members' associational, speech, or contractual rights, Resp. Br. 19; that argument is a carbon copy of Respondents' losing expressive rights and Contract Clause claims. *See infra* Parts II.C.-D. And Respondents admit that the Act does not target a protected class. Resp. Br. 19.

To survive scrutiny, the Act must therefore be rationally related to a legitimate state interest, *Kyriais v. Univ. of W. Va.*, 192 W. Va. 60, 67, 450 S.E.2d 649, 656 (1994), and the Act easily clears that modest bar. Recall that "any *conceivable* legitimate governmental interest will do." *Bailey v. Callaghan*, 715 F.3d 956, 960 (6th Cir. 2013) (citation omitted). The State has legitimate interests in both avoiding the slippery slope of providing automatic payroll deductions

for any purpose that an employee requests and extricating itself from a position as intermediary between union and union members.

Even Respondents concede that "[t]he rational basis standard does not preclude a state [ ] from even-handedly denying to public employee unions a benefit (such as a payroll deduction) that is provided only to other, differently situated, entities." Resp. Br. 27. They likewise acknowledge that equal protection concerns arise only when a State denies benefits to "similarly situated unions or groups of employees." *Id.* at 28. But the Act treats all similar unions, labor organizations, and clubs equally. Respondents argue that the Act discriminates by carving out a subset of municipal employees with collective bargaining agreements, *id.* at 28 n.25, yet employees covered by collective bargaining agreements are not similarly situated to those who are not. Among other differences, collective bargaining agreements generally enjoy special protections under federal law that other agreements do not. *See, e.g., Chapple v. Fairmont Gen. Hosp., Inc.*, 181 W. Va. 755, 759, 384 S.E.2d 366, 370 (1989) (explaining the role of federal law in enforcing collective bargaining agreements). Likewise, municipalities receive protections that other units of state government do not. *See* W. Va. Const., Art. VI, § 39(a). In any event, the Act simply provides a limited grace period for municipalities with existing collective bargaining agreements that include paycheck deductions. It does not draw a permanent distinction between employees with collective bargaining agreements and those without. And Respondents have not identified a single employee who has a checkoff arrangement that arises *outside of* a covered collective bargaining agreement—so even if such persons could be called "similarly situated," there is no evidence they exist.

Fifth, Respondents mistakenly conclude that the Act was born of legislative animus. Although Respondents claim the Act sprang from a dislike of unions on the part of the Governor

and the Legislature, they have not put forth any relevant, concrete evidence. Like the circuit court's opinion, the case Respondents mount consists of comments from the Governor about teachers and educational policy. Resp. Br. 26. None of these comments reveals a broader intent to harm public-sector unions. *Contra U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (finding that legislation was driven by "a bare congressional desire to harm a politically unpopular group" where specific statements in the legislative history evidenced an intent to hurt "hippies"). Indeed, by its very language, the Act's purpose is to support unions, not harm them. *See* Preamble, W. Va. HB 2009 (Mar. 19, 2021); Pet'r's Br. 5, 21. And in the end—at least outside the clearest cases of targeted animus—what matters is not what the Governor or a lawmaker might think about unions as a subjective matter, but whether the Act advances a legitimate state interest. *See, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2421 (2018) (explaining that a court "must accept [the government's] ... independent justification" for a law challenged under rational basis review, even though the President had made many arguably discriminatory statements related to its subject).

Recognizing one of the Act's legitimate reasons (cost savings) while ignoring all others, Respondents lastly try to refashion their animus cases into a rule against "arbitrary" cost cuts. *See* Resp. Br. 27. But "[l]egislatures may implement their program step by step," and "a statute is not invalid under the Constitution because it might have gone farther than it did." *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 305 (1976). The Legislature made a reasonable judgment to target union and club dues, which no doubt comprise much of the administrative burden of the automatic-deduction program. To be sure, the Legislature could have banned deductions for a bigger or smaller group, but "[t]his Court does not sit as a superlegislature, commissioned to pass upon the political, social, economic or scientific merits of statutes pertaining to proper subjects of legislation." Syl. pt. 2, *Huffman v. Goals Coal Co.*, 223 W. Va. 724, 725, 679 S.E.2d 323, 324

(2009). Nor must a law "be in every respect logically consistent with its aims to be constitutional." *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-88 (1955). Here, the Legislature identified an adequate "evil at hand for correction," and deemed the Act "a rational way to correct it." *Id.*

* * * *

Respondents cannot summon any case holding that a withdrawn checkoff privilege creates an equal protection problem—and they cannot rebut the many cases that say otherwise. Put simply, the "legislature's decision not to subsidize the exercise of a ... right does not infringe the right." *Morrisey I*, 239 W. Va. at 644, 804 S.E.2d at 894 (quotation omitted); *see also, e.g.*, syl. pt. 1, *Morrisey II*, 243 W. Va. 86, 842 S.E.2d 455 (same). Respondents are not, then, likely to succeed on this claim.

C. Respondents Are Not Likely To Succeed On Their Free Speech And Associational Rights Claim.

As with their equal protection claim, Respondents press the strength of their free speech and associational rights claims by asking the Court to cast aside relevant precedent addressing the same issues. That would be a mistake. Again: ending a state-sponsored mode of billing does not unduly burden unions' protected activities where this Court has deemed it constitutionally sound to bar collecting dues in any manner from an entire class of employees. *See* Syl. pt. 1, *Morrisey II*, 243 W. Va. 86, 842 S.E.2d 455. And indeed, the U.S. Supreme Court has held that prohibitions like the Act do not offend these expressive freedoms, as the State can appropriately choose not to employ its resources to advance private operations—particularly political ones. *See Ysursa*, 555 U.S. at 364 ("The question is whether the State must affirmatively assist political speech by allowing public employers to administer payroll deductions for political activities. ... [T]he answer is no.").

Here too, Respondents mistakenly liken the effects of the Act to attempts to block unions' organizing efforts altogether. Resp. Br. 35. But the Act does no such thing—it merely removes the State as an intermediary when collecting dues. Unions remain free to speak openly and recruit and advocate for their members, and workers may associate with any union (or any other organization) they choose. Lest there be any doubt, the Act includes a rule-of-construction provision specifically designed to avoid potential limits on union and employee rights—an important omission from Respondents' brief given their burden to refute the statute's presumption of constitutionality. *See* W. Va. Code § 21-5-3(g); Pet'r's Br. 14, 26.

Respondents also invoke the same line of Civil Rights era cases this Court declined to apply in *Morrisey II*. *Compare* Resp. Br. 32-35 (citing *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449 (1958); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *Shelton v. Tucker*, 364 U.S. 479 (1960)), *with Morrisey II*, 243 W. Va. at 106, 842 S.E.2d at 475 (rejecting circuit court's reliance on same cases). As explained in the Governor's Opening Brief, this Court has considered those cases irrelevant in an arguably stronger context, and for good reason. Just consider the subject matter of those rights-establishing cases compared to the inconvenience of directly billing union dues. *See* Pet'r's Br. 23-24. Affirmative disclosure requirements like those in the *NAACP* cases also stand on a different footing than the Act, which only pulls back on a gratuitous benefit. Nor can one earnestly say that taking away an incidental benefit like payroll deduction is akin to exposing advocacy organizations' membership rolls to a racist mob in the heat of the Civil Rights era. Respondents do not even acknowledge that this Court has already rejected these flawed comparisons, and the circuit court was wrong to consider the argument on a blank slate.

The most Respondents can credibly claim is that unions may have to spend money on direct billing and some employees may not choose to pay dues with an alternate method, thereby making

some funds unavailable for directly accomplishing unions' associational goals. But even if these harms occur, they are not constitutional injuries—state *or* federal. *See, e.g.*, syl. pt. 1, *Morrisey II*, 243 W. Va. 86, 842 S.E.2d 455; *see also id.* at 101, S.E.2d at 470. Simply put, "the Constitution does not confer an entitlement to such funds as may be necessary to realize all the advantages" of speech and associational rights. *Regan*, 461 U.S. at 549-50 (citation omitted); *accord S.C. Educ. Ass'n*, 883 F.2d at 1256 ("Although loss of payroll deductions may economically burden the SCEA and thereby impair its effectiveness, such a burden is not constitutionally impermissible."). Were that true, for instance, then a publicly owned utility service could commit an *NAACP*-style violation merely by increasing rates on the union.

Because there is no constitutional requirement that the Legislature perpetually expend the State's resources to provide a special, discretionary service, the Court should hold that Respondents have no likelihood of success on this claim, too.

D. Respondents Are Not Likely To Succeed On Their Contract Clause Claim.

In pressing their Contract Clause claim, Respondents elide one of the strongest points against them: paycheck deductions are traditionally state-regulated matters, so new regulation is not a substantial impairment. As the State explained, Pet'r's Br. 31, "an impairment of contract may not be found if the prior regulation of an industry is related to the subject of the contract so as to put the parties on notice of the possibility of future regulation on the same subject." *Shell v. Metro. Life Ins. Co.*, 181 W. Va. 16, 22, 380 S.E.2d 183, 189 (1989); *accord Columbia Gas of W. Va., Inc. v. Pub. Serv. Comm'n of W. Va.*, 173 W. Va. 19, 25 n.4, 311 S.E.2d 137, 142 n.4 (1983); *Sec. Nat. Bank & Tr. Co. v. First W. Va. Bancorp., Inc.*, 166 W. Va. 775, 781, 277 S.E.2d 613, 616 (1981). The Act does more than touch on a "subject" the Legislature has taken up before; as Respondents recognize, Resp. Br. 3, these deductions would not exist *without* state regulation. Respondents therefore could have and should have anticipated a time when the State might stop

offering a benefit it was never under a duty to provide in the first place. That alone makes Respondents' Contract Clause claim likely to fail. And it distinguishes this case from *Pizza*, Resp. Br. 40-41, where the Sixth Circuit held that the contract at issue had not been previously subject to regulation so as to place the unions there on notice that the bargained-for wage checkoffs could be extinguished. *See Pizza*, 154 F.3d at 324-25.

Beyond that hurdle, Respondents still have not identified the specific contracts they insist have been impaired. Below, Respondents attached certain documents that were facially insufficient. Now before this Court, Respondents do not explain how these unsigned, form documents are valid contracts between legally relevant parties. *See* Pet'r's Br. 27-28. Instead, Respondents rely on other affidavits and unspecified "emails" that purportedly reflect "agreements" to do automatic deductions. Resp. Br. 39. Yet "[t]he term 'agreement,' although frequently used as synonymous with the word 'contract,' is really an expression of greater breadth of meaning and less technicality. Every contract is an agreement; but not every agreement is a contract." *In re Nat'l Gas Distributors, LLC*, 556 F.3d 247, 255 (4th Cir. 2009) (quoting *Black's Law Dictionary* 74 (8th ed. 2004)). Respondents have left this Court to guess at what specific agreements exist, under what terms, and between which parties. Those specifics are necessary elements of Respondents' claim. *See, e.g., Kestler v. Bd. of Trustees of N.C. Loc. Governmental Emps.' Ret. Sys.*, 48 F.3d 800, 804 (4th Cir. 1995) (finding no Contract Clause violation where contract did not give rise to any right under state law before enactment of the state law at issue). Without more, the Court cannot judge whether the Act impairs a contract—and neither could the circuit court. (Oddly, Respondents blame *the Governor* for not presenting "evidence regarding the many [supposed] agreements," Resp. Br. 39—but letting plaintiffs speculate an element of their claim and faulting the defendant for not proving them wrong turns the burden of proof on its head.)

Nor (overlooking their failure to identify specific contracts) can Respondents show substantial impairment. Without knowing a contract's terms, it is impossible to know whether and to what degree the Act might affect it—results may vary for a contract setting out dozens of contractual duties and one involving paycheck deductions alone. *See* Pet'r's Br. 28-29.

Finally, Respondents tout the assumed seriousness of the burden on their also-assumed contractual rights, while simultaneously downplaying the State's counterbalancing interests. Given the record evidence that unions will have many other avenues to collect money from their members, App. 289, 314-15, and given the testimony that members are highly motivated to pay their dues, App. 328-29, the Legislature was right that the burden on unions is light: Unions can continue to serve interests like "industrial peace" without a checkoff. Resp. Br. 39. Meanwhile, though Respondents may not consider saving a bit of money worth the Legislature's time, this Court and the U.S. Supreme Court have said otherwise in many contexts. *See, e.g., Law. Disciplinary Bd. v. Cooke*, 239 W. Va. 40, 52, 799 S.E.2d 117, 129 (2017) ("Given the state of the public fisc, the actual injury [from excessive costs] to the taxpayers of the State of West Virginia is all too real."); *Lyng v. Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW*, 485 U.S. 360, 373 (1988) ("[O]ur review of distinctions that Congress draws in order to make allocations from a finite pool of resources must be deferential, for the discretion about how best to spend money to improve the general welfare is lodged in Congress rather than the courts.").

If the burden Respondents fear here is too great, it is difficult to see what laws the Legislature *could* pass without running afoul of the Contract Clause. In short, Respondents' Contract Clause claim—like the others—will likely fail.

III. The Act Will Not Cause Respondents Irreparable Harm.

Respondents did not show that the Act is likely to irreparably harm them—with or without an injunction.

Respondents repeatedly confuse the harm of (a) restricting one method of dues collection a union might use with (b) shutting down or curtailing the union's operations. One might imagine an extreme situation where (a) might lead to (b), such as a law that blocks unions from talking about dues with their members or that prevents members from using cash to pay their dues. But the Act is not that hypothetical case. Thus, broad language praising the work of unions—however true those sentiments might be—cannot justify a preliminary injunction of the law the Legislature actually put in place. Respondents' own evidence, after all, makes it every bit as likely that union members will pay their dues promptly, just as they have always done. *See* Pet'r's Br. 6. Real-world experience concurs: "[S]everal states [have] considered or enacted so-called 'paycheck protection' laws that prohibit or restrict the deduction of union dues or association fees from public employee paychecks," yet unions in those States have continued to function. Kenneth Glenn Dau-Schmidt & Winston Lin, *The Great Recession, the Resulting Budget Shortfalls, the 2010 Elections and the Attack on Public Sector Collective Bargaining in the United States*, 29 HOFSTRA LAB. & EMP. L.J. 407, 423 (2012). And even if some members default on their dues payments here in West Virginia, this Court has acknowledged that a reduction in fees is not a sufficient injury to sustain a preliminary injunction. *See Morrisey I*, 239 W. Va. 633, 804 S.E.2d 883. It bears repeating once more that the potential harm from prohibiting the collection of union dues from an entire category of employees—as in *Morrisey I*—is greater than the potential harm from requiring unions to collect their own dues without intervention from the State.

One might have expected Respondents to point to concrete facts establishing the specific, significant harms that they believe would arise absent an injunction. They did not. The best they offer is lay opinion testimony from union members saying that the Act would be "devastating." Resp. Br. 43. Those witnesses never offered evidence beyond rhetoric and speculative future

harms of "redirection of staff to collecting debt." Resp. Br. 7. Rather than resort to speculation, Respondents could have tried to show what specific percentage of dues would be lost. Or they could address how the Act would specifically impair union operations in the short-term. *See Hart v. Nat'l Collegiate Athletic Ass'n*, 209 W. Va. 543, 549, 550 S.E.2d 79, 85 (2001) (a movant must show the harm that will follow "if emergency action is not taken in their particular case"). Or they could have shown when the burdens of obtaining payment in the ordinary manner would threaten the union in a material way. *See Century Aluminum of W. Va., Inc. v. United Steelworkers of Am.*, 82 F. Supp. 2d 580, 581 n.2 (S.D. W.Va. 2000) ("An injunction will not be granted against something merely feared as liable to occur at some indefinite time in the future." (quotation omitted)). Without details, a witness's self-serving statement imagining a worst-case scenario is no more helpful than an unsupported statement in a brief asserting the same.

Repeated insistence that harms are "not measurable," Resp. Br. 43, is no excuse, either; there must be some explanation why. Even the circuit court recognized that Respondents' purported injury would be in the form of potentially delinquent union dues—also known as money. App. 245. Respondents say the same. *See, e.g.*, Resp. Br. 42. Thus, to measure any harm, Respondents need only tally the amount of unpaid dues. This ready calculation defeats an injunction because if the speculative harms Respondents claim ever come to pass, they will be "susceptible of remedial damages." *Wiles v. Wiles*, 134 W. Va. 81, 90, 58 S.E.2d 601, 606 (1950). Respondents are also wrong, Resp. Br. 42, that the State's potential sovereign immunity defense automatically transforms monetary injuries into irreparable harms. The same could have been said in *Morrisey I*, and courts have rejected the argument that "damages in a suit against a defendant with sovereign immunity are irreparable *per se*." *Air Transp. Ass'n of Am., Inc. v. Exp.-Imp. Bank of the U.S.*, 840 F. Supp. 2d 327, 335 (D.D.C. 2012).

Respondents bear the burden, and they have failed to prove that they will suffer immediate, irreparable harm if the Act takes effect. The Court should reverse on this basis, too.

IV. The Public Interest Weighs In Favor Of Dissolving The Preliminary Injunction.

Finally, the State has a weighty interest in seeing its laws enforced. *Beard v. Worrell*, 158 W. Va. 248, 263, 212 S.E.2d 598, 606 (1974) (noting it is "in the interest of sound public policy to preserve the predictability of the law"); *accord Am. Hosp. Ass'n v. Hansbarger*, 594 F. Supp. 483, 487 (N.D. W.Va. 1984) ("The State of West Virginia has an interest in seeing that its laws are implemented without interruption.") That interest is reason enough to deny the injunction. Unlike Respondents' purported harms, the injunction "adversely affect[s] a public interest for whose impairment, even temporarily, an injunction bond *cannot* compensate"—so it is "in the public interest [to] withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff." *Yakus v. United States*, 321 U.S. 414, 440 (1944) (emphasis added). Respondents muster no response other than saying that the public also has an interest in "having effective public employment unions," Resp. Br. 44, but this claim brings their arguments full circle. As all the above shows, the Act will *not* impair the effectiveness of public employment unions or the constitutional rights of union members. The circuit court was wrong to sacrifice the public's legitimate interests in the name of preventing illusory harms.

CONCLUSION

For all these reasons, the Governor respectfully requests that this Court dissolve the preliminary injunction and remand with instructions to conduct further proceedings consistent with this Court's opinion.

Respectfully Submitted.

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Petitioner,

v.

WEST VIRGINIA AFL-CIO, ET AL.

Respondents.

CERTIFICATE OF SERVICE

I, Lindsay S. See, do hereby certify that a true and exact copy of the foregoing ***Petitioner's Reply Brief*** has been served on counsel of record by depositing true and exact copies thereof, via United States Mail, with first-class postage prepaid and properly addressed on this 30th day of September, 2021.

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