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

JIM JUSTICE, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF WEST VIRGINIA,

Petitioner,

v.

WEST VIRGINIA AFL-CIO, ET AL.,

Respondents.

RESPONDENTS' BRIEF

WEST VIRGINIA AFL-CIO, et al.
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I. INTRODUCTION

This appeal presents a interlocutory challenge to the preliminary injunction issued June 16, 2021, by the circuit court of Kanawha County enjoining the enforcement of House Bill 2009 ("HB 2009"). Petitioner Jim Justice, Governor of the State of West Virginia contends that the circuit court erred in granting the preliminary injunction because Respondents[1] failed to show that they are likely to succeed on the merits or that they will suffer irreparable harm by the enforcement of HB 2009. Petitioner's contentions are without merit.

The order granting the preliminary injunction was based upon the proper standard and was clearly supported by a substantial record that includes, *inter alia*, a verified complaint, the testimony of three witnesses, and six affidavits. In sharp contrast, petitioner presented no evidence at the hearing on the preliminary injunction.

Importantly, the grant the preliminary injunction has maintained the status quo that has been in place – without complaint or disruption – for approximately fifty-five years. The status quo should remain undisturbed while the parties undertake discovery and have a hearing on the merits regarding a permanent injunction.

During the 2021 Regular Session, the West Virginia Legislature enacted HB 2009, which has been euphemistically referred to as the "Paycheck Protection Act" ("the Act"). Rather than protect

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[1]Respondents include 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; CWA Local 2001/West Virginia Alcohol Beverage Control Administration Agency ("WVABCA"); Corporal J. W. Smith Jr., and Jacob Fertig.

the paychecks of public employees in this State, the politically motivated Act selectively prohibits the long-standing practice and contractual right of public employees and their employers to have union dues automatically deducted from their paychecks.

This benign practice has permitted public employees throughout the State to deduct union or labor organization dues from payroll checks for individual employees. There is no evidence of record of a single public employer whoever complained about this agreed-upon arrangement between public employment unions, public employers and the membership or that a single public employer ever cancelled such an arrangement.

The agreements between public employers and public employee unions continue from year to year unless the public employer is notified in writing by an employee or the employee's union or association to cancel the automatic draft and remission of dues. In other words, if the employee or association representative does not cancel the automatic draft, then it remains in place pursuant to the existing agreement.[2] (See affidavits in support of Verified Complain, App. 0047, 0051, 0054, 0059, 0062, 0065, 0067, 0074)

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

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[2]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, as follows:

> 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.

Petitioners Appendix stamped "AG0068" hereinafter "(App.0068)" (App. 0068)

charitable contributions. For example, the list of deductions from board of education employees in Boone County is varied and voluminous. None of these other deductions are prohibited under HB 2009.[3]

Prior to the enactment of 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 as follows:

> 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 that:

> [n]o 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 permitted

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[3]This list includes:

AFLAC Insurance	American Fidelity	American-Amicable Life Ins.
Washington National Inc.	American Heritage Life	Amer. Gen. Life and Accident
Trustmark Ins. Co.	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 Eduction
Judgement-Child Sup Enforc	WV Child Support	Miscellaneous Café Plan
Premerica - 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
WV Service dues		

(App. 0079-0082)

employers to collect union dues – among many other types of deductions for distribution to entities selected by the employee.

The Act has modified the definition of "deductions" under the Wage Payment and Collection Act, which 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. (Emphasis added)

W. Va. Code §21-5-1(g). (App. 0090)[4]

The amended language excludes only the withholding of wages for public employees who have elected (in agreement with their public employer) to withhold union dues. All other wage deductions from public employee wages are still permitted (other than for clubs). 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 still arrange for payroll deductions. Petitioners and their members – as members of public employee unions – are denied the equal treatment of the law while other similarly, if not identically, situated employees are not.

In order to strip *municipal* employees of the right to have their union dues taken directly from their wages by agreement with their employer, the Legislature amended West Virginia Code § 8-5-12

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[4]For ease of reference, quoted herein are the Senate Judiciary Amendments to HB 2009, including the "strike and insert" amendments so as to demonstrate the salient changes to the law at issue. These changes are identical to the language contained in the Enrolled House Bill 2009.

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.

In order to strip *State* employees of the right 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.
>
> * * * *
>
> (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.
>
> * * * *
>
> (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.

In order to strip *county* education employees of the right 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:

> (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.

II. SUMMARY OF ARGUMENT

As the circuit court recognized, 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 including, but not limited to, charitable deductions and private insurance. Moreover, the implementation of the Act will violate equal protection and 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 the Union and pay his or her dues in this manner.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner applied the decision of the circuit court granting a preliminary injunction and denied its request for a stay. Petitioner appealed to this Court and requested a stay.

On August 19, 2021, this Court derred ruling on the request and ordered an expedited briefing schedule and set oral argument pursuant to Rule 20 of the Rules of Appellate Procedure.

IV. STATEMENT OF FACTS

Respondents called three witnesses at the hearing on the preliminary injunction, presented a Verified Complaint, and attached six affidavits to support their petition. Fred Albert, President of Respondent American Federation of Teachers – West Virginia ("AFT-WV"), testified that 98% of his union's dues are collected via payroll deductions – which, of course, HB 2009 will eliminate. Additionally, he stated that 54 of the 55 county boards of education have entered into agreements

with AFT-WV to allow for payroll deductions. Mr. Albert estimated that 90% of AFT-WV's annual budget of about $3,000,000 comes from member dues. (App. 0282-0283)

Mr. Albert testified that if HB 2009 becomes effective it "will have a devastating impact on our operating status"; will necessitate layoffs; and reduce benefits, including opportunities for renewal credits through West Virginia University or West Virginia State University. (App. 0282-0286; 0047) Mr. Albert also anticipates that some members will leave dues unpaid if HB 2009 becomes effective, which will require re-direction of staff to collecting debt rather than servicing union members.

Similarly, the very task of transferring members from paycheck deduction to another payment method has pulled union employees from their important day-to-day tasks of representing members.[5] (App. 0287-0288)

Elaine Harris, an International Staff Representative for the Communications Workers of America District 2-13 ("CWA"),[6] a respondent herein, testified that HB 2009 will be "devastating" and it presents a real hardship to her members and will have a "financial impact" on the locals. (App. 0313, 0316, 0317, 0326)

Ms. Harris further stated that employees have paid their dues by payroll deduction for

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[5]Mr. Albert testified that AFT-WV has dedicated "five staff members" exclusively to changing dues collection systems as a result of HB 2009. Additionally, the entire AFT-WV staff of about 15 employees are communicating with locals and their members to effectuate the switch in the method of dues collection mandated by HB 2009. Mr. Albert testified: "I would say our entire staff has been involved and myself included, but we have about five who have really been working on this day and night." Over an approximate three-month period, only about 30% of WV-AFT's members have switched to a new method of dues payment. (App. 0298-0300) These fifteen employees are the same employees who service grievances, handle RIF and transfer hearings, address employee discipline, and generally provide services to the union membership, which totals approximately 9,100 members. (App. 0288, 0302)

[6]Respondent CWA represents public employees who work for the West Virginia Division of Corrections and Rehabilitation Services; West Virginia State Troopers; and agents employed by the West Virginia Alcohol Beverage Control Administration.

"probably 40 some years plus." Her Union has been looking at several models to replace payroll deduction for collection of dues, but at the time of the hearing, there was no other method in place for collection of dues.[7] She testified that if HB 2009 goes into effect, jobs and services provided by each union will be at risk and CWA has no method to collect unpaid dues.[8] (App. 0315-0316)

Steve Williams, Mayor of Huntington, West Virginia, also testified. He indicated that Huntington has agreed, via collective bargaining agreements, to payroll deduction. When asked about the cost of this service, Mayor Williams testified that the cost to the City is so insignificant that the city does not "even count how much it would cost."[9] (App. 0303-0304)

Mayor Williams testified that the City of Huntington makes 27 separate deductions from employee paychecks, with three related to union dues. Three deductions relate to child support, retirement, and garnishment. "A total of 12 relate to insurance, United Way, as well as the Fireman's Credit Union." (App. 0306) He observed that when HB 2009 goes into effect for Huntington, the City will no longer be able to deduct union dues from paychecks, but will be able to continue making the other 24 deductions.[10] (App. 0308)

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[7]Ms. Harris testified that the Troopers Association receives $10,000 to $11,000 per month in dues. (App. 0315)

[8]Her union officers are working evenings, nights, and weekends – using their own or earned leave time – to transition to a new method of dues collection. That is , in addition to performing their regular duties.

[9]Mayor Williams testified that the data entry related to union dues takes less than an hour. Once the data is entered, the deduction of dues is a "push of a button and that's it . . . it's just a keystroke." To place the program in perspective, Mayor Williams testified that his administration watches the budget "like a hawk" and the cost of this program is so small that this is the "first time it's ever been questioned as to how much it actually costs." (App. 0304-0305)

[10]He testified:

> Everybody will be able to continue to have deductions for the insurance that they have chose. They will be able to have deductions to pay their debt to the credit union or firefighters will . . . be able to have deductions for their United Way contribution. But once it goes into effect with us on a new union contract, union

Mayor Williams noted that when existing collective bargaining agreements expire, HB 2009 will negatively affect the morale of municipal employees. Employees ask for the various deductions because they support the particular cause (unions, charities) or seek the paid-for benefit (insurance) and appreciate the convenience and reliability that pay reductions provide.[11]

Petitioners also presented affidavits from Bob Brown, Assistant to the President of the American Federation of Teachers ("AFT"); Ms. Harris; James White, Executive Director of Respondent West Virginia School Service Personnel Association; Jacob Fertig, a teacher and union member of Respondent AFT-WV in Kanawha County, West Virginia; Ella Long, an employee of Respondent Boone County Board of Education; and Corporal John W. Smith, Trooper for the State of West Virginia and a member of Respondent West Virginia Troopers Association/CWA Local 2019. Each Affiant described the harm that employees and unions will suffer if the injunction is denied or the absence of harm to public employers if it is granted.

Mr. Brown stated in his Affidavit that the practice of payroll deduction for AFT-WV began in or around 1981 and has continued uninterrupted since that time (App. 0047) and that nearly every member of AFT-WV who is employed by a county board of education has agreed to have his or her dues withheld from paychecks by a county board of education along with charitable deductions, private insurance, and bank deposits. He is unaware of any instance where a board of education has

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> dues will not be able to be collected by the City of Huntington even though individuals have signed that they are giving us permission to deduct those dues.

(App. 0308)

[11]He explained: "They are also making a conscious choice that they want the union dues deducted because they – what I have learned is that our employees want to have some level of certainty." (App. 0307) Mayor Williams further testified that the deduction of union dues is "baked into our system" and provides "certainty" so that employees can focus on work rather than the items to be addressed in the next collective bargaining agreement. (App. 0310)

terminated an agreement to deduct union dues from employee paychecks or any complaint by a public education employer related to the decades-old payroll deduction system. Nor is he aware of any meaningful cost to the public employer to provide the service. This is particularly true since the public employers continue to provide similar services for charitable organizations and private insurance companies.

Mr. Brown stated that if HB 2009 becomes effective, it will cause irreparable harm to the unions and their members. Not only will it result in a substantial increase in the number of members who become delinquent in the payment of their dues, but it has already required AFT-WV to re-direct resources to collect dues. The reduction in work performed on normal duties of AFT-WV employees[12] has an adverse impact on the members of AFT-WV and the public education system as a whole. Union representatives will have to spend substantial time collecting unpaid and current dues, and transferring members to a new system for dues collection that has been unnecessary for approximately 50 years.[13]

Ella Long, a 24-year employee of Respondent Boone County Board of Education, has supervised payroll for the last five years. The Boone County Board of Education has approximately 40 deductions from payroll checks for private insurance companies, banks, charitable organizations, labor organizations, and other entities. It does not take long to set up all of the deductions each year. The deductions are automatically deducted by computer. Thus, there is virtually no labor utilized

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[12]Representational duties for AFT-WV include grievance representation, disciplinary representation, RIF and Transfer representation, tasks related to AFT-WV summer school which assists teachers in gaining certification, and other employee representation.

[13]Ms. Harris and Mr. White offered very similar statements in their affidavits attached to the Verified Complaint. (App. 0051, 0054) Both indicated that if HB 2009 becomes effective, it will cause irreparable harm to Respondents.

throughout the year on this task.[14] (App. 0062)

Finally, Respondents Corporal John W. Smith, Jr., and teacher Jacob Fertig stated that if HB 2009 goes into effect, it will cause irreparable harm.[15]

In contrast to Respondents' witness testimony and affidavit, Petitioner failed to present any evidence at the hearing below.

From the record presented, the circuit court properly issued a preliminary inunction finding that Respondents demonstrated a likelihood of success on the merits; that they will suffer irreparable harm without the preliminary injunction; that Petitioner will not be harmed by the issuance of the preliminary injunction; and that the grant of the preliminary injunction benefitted the public.

V. STANDARD OF REVIEW

With regard to appeals of a preliminary injunction, the Court has stated:

> The order under appeal is not a final order and, typically, this Court will not review such an interlocutory order. However, in Syllabus Point 2 of *State ex rel. McGraw v. Telecheck Servs., Inc.*, 213 W. Va. 438, 582 S.E.2d 885 (2003), we held that "*West Virginia Constitution*, article VIII, section 3, which grants this Court appellate jurisdiction of civil cases in equity, includes a grant of jurisdiction to hear appeals from interlocutory orders by circuit courts relating to preliminary and temporary injunctive relief."
>
> We apply the following deferential standards for reviewing an order granting a preliminary injunction:

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[14]Ms. Long is also a union member and has had her dues automatically removed from her paycheck for 25 years. She wishes to continue to do so.

[15]Corporal Smith has been a State Trooper since 2000 and has had his dues deducted from his paycheck since that time without interruption. (App. 0065) He believes that HB 2009 will cause his union to redirect substantial resources toward dues collection rather than important representational tasks for members.

Similarly, Mr. Fertig is a public school teacher in Kanawha County and has had his dues deducted from his paycheck throughout his period of employment. He noted that the paycheck represents money that he has earned and he believes that he should be able to have it deducted from his paycheck as he has for eight years. (App. 0059)

> In reviewing the exceptions to the findings of fact and conclusions of law supporting the granting of a temporary or preliminary injunction, we will apply a three-pronged deferential standard of review. We review the final order granting the temporary injunction and the ultimate disposition under an abuse of discretion standard, ... we review the circuit court's underlying factual findings under a clearly erroneous standard, and we review questions of law de novo.

Syllabus Point 1, *State By & Through McGraw v. Imperial Mktg.*, 196 W. Va. 346, 472 S.E.2d 792 (1996) (citations omitted).

Northeast Natural Energy LLC. et al. v. Pachira Energy LLC, ___ W. Va. ___, 844 S. E.2d 133 (2020).

The record in this case establishes that the circuit court's factual findings were supported by the record below and were not clearly erroneous; the conclusions of law were without errors; and the issuance, scope, and terms of the preliminary injunction were a proper exercise of discretion by the circuit court. State ex rel. United Mine Workers of America. et al. v. Walters, 200 W. Va. 289, 489 S.E.2d. 266 (1997).

VI. RESPONSE TO STATEMENT OF PETITIONER

In its "Statement," Respondent makes several arguments – all without merit – that Petitioner will now address pursuant to Rule 10(d) of the Rules of Appellate Procedure.

I. In Its Amended Order the Court Properly Recognized that Respondents Are Protected by State Constitutional Provisions regarding Equal Protection, Free Speech and Association and Freedom from Impairment of Contracts.

Petitioner asserts that there is no "constitutional right to collect" union dues and that the decisions of this Court in Morrisey v. W. Va. AFL-CIO, 239 W. Va. 633, 804 S.E.2d 883 (2017) ("Morrisey I") and Morrisey v. W. Va. AFL-CIO, 243 W. Va. 86, 842 S.E.2d 455 (2020) ("Morrisey II"), provide a "crucial backdrop" to this appeal.

Petitioner's contention (at one of his brief) that the Morrisey cases held that there is no "constitutional right to collect dues" is absurd on it face. Of course there is. The State could not possibly prohibit unions from collecting dues from it members without colliding with the freedom of association. What the Morrisey courts held is that unions do not have a right to collect fees from objecting nonmembers. As developed below, the present case deals with collecting from members who want to pay fees.[16] Petitioner's reliance, as well as that of *Amicus Curiae*, on Morrisey I and Morrisey II and Janus is misplaced.

First, Respondents do not rely on a constitutional right to collect dues. Rather, Respondents argue claims of equal protection, the right to free speech and association, and the right to freedom from impairment of contracts under the West Virginia Constitution.

Furthermore, Morrisey I and II and Janus are factually inapposite to this case and, therefore, do not provide an appropriate backdrop for consideration of this appeal.

In Morrisey I and II, this Court addressed a challenge to the so-called "Right to Work" statute that prohibited unions and employers from entering into collective bargaining agreements that compelled employees to join a union or that compelled non-union employees to pay union dues. In particular, Morrisey I and II focused on agency fees, or fees withheld by an employer of an employee *who is not a union member* and then pays the fees to the union. In other words, the "Right to Work" statute eliminated requirements that employees pay union dues either by compulsory union membership or by compulsory payment of dues by nonunion members. In this case, it is beyond cavil that all dues paid are voluntary.

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[16]Similarly, Petitioner cites Janus v. American Federation of State, County and Municipal Employees, Council 31, 138 S. Ct. 2448 (2018), to provide further support for the contention that unions have no constitutional right to collect dues.

In assessing the likelihood of success on the merits prong of the preliminary injunction factors in Morrisey I, this Court focused upon several salient facts. First, it considered that Section 14(b) of the Taft Hartley Act specifically allowed states to pass so-called right to work statutes. Second, this Court considered that the persuasive authority presented to it overwhelmingly demonstrated a likelihood of success on the merits for the State.

The facts of this case differ diametrically from those in Morrisey I and II. Rather than promote employee choice – the point of the law at issue there – House Bill 2009 allows those who have already *chosen* to join a union to continue with automatic dues deductions as has occurred for more than fifty years in some instances.

Plainly stated: in Morrisey I and II, the unions sought to compel payment of union dues from non-union members who were enjoying the benefits of union activity without paying for it. Here, (and in stark contrast), Respondents seek to enable those who have already elected to pay dues to continue to have them withheld as they have been for years. The rights they seek to protect arise from their right to equal protection under the law, freedom of speech and association, and the right to be free from the impairment of contracts. Obviously, those precious constitutional rights (not a so-called right to collect union dues as Petitioner inaccurately argues) continue to exist and have been properly found by the circuit court to protect Respondents' interests.[17]

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[17]In Morrisey I and II, this Court properly found "that membership and dues are the lifeblood of any labor organization." Morrisey I, 239 W. Va. 633, 804, S.E.2d. 883 at 891. As will be discussed in more detail *infra*, it is this reliance on dues by labor organizations that form the very basis for Respondents' successful and meritorious claim of irreparable harm. Janus is similarly distinguishable. In Janus, the United States Supreme Court struck down an Illinois law that permitted public sector unions to assess compelled dues to nonmembers. The Supreme Court found that this law unconstitutionally required nonmembers to subsidize labor organizations whose views they did not share. Again, the facts in Janus are inapposite to those presented in the present case for the reasons set forth above. Moreover, while the issuance of the Janus case in between Morrisey I and II may have had a bearing on the letter, it is simply irrelevant to this case because this case does not involve the involuntary payment of union dues.

In this case, Respondents simply seek to be treated like numerous other entities – such as banks, insurance companies, and charitable organizations – which continue to be able to have wages withheld. In attempting to overlay the holdings in Morrisey I and II, Petitioner has actually underscored the stark contrast between this case and those holdings. Simply put, this case is not Morrisey III.

VII. ARGUMENT

I. The circuit court applied the proper legal standard in issuing the preliminary injunction.

Petitioner first asserts that the circuit court applied an "abrogated legal standard" in granting the preliminary injunction. This is simply incorrect and represents a misreading of the Amended Order granting the preliminary injunction. Indeed, the Amended Order cites and relies upon the very cases the Petitioner suggests it should: Jefferson County Board of Education v. Jefferson County Education Association, 183 W. Va. 15, 393 S.E.2d 653 (1990) and Hart v. National Collegiate Athletic Association, 209 W. Va. 543, 550 S.E.2d 79 (2001).

At page 9 of the Amended Order, the court included an "Analysis Regarding Motion for Preliminary Injunction" and relied upon Jefferson County and Hart for the analysis in paragraphs 17 and 18. The court's order states:

> 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 Spreme 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 sough, 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)

(App. 246) That is also precisely the analysis that this Court cited and applied in Morrisey I., 239 W. Va. at 638, 804 S.E.2d at 888.

The court below concluded that "[e]ach of the [f]actors in the instant matter weigh in favor of granting the motion for a preliminary injunction." (App. 247) Importantly, the circuit court applied all four factors required by (Jefferson County and Hart). Specifically, at paragraphs 20 through 28, the circuit court addressed the likelihood of irreparable harm to each party and concluded that the likelihood of harm to Respondents represents "an extreme unbalance of the comparable interests." (App. 249) The circuit court, applying Jefferson County and Hart, then stated that "Petitioners can demonstrate a substantial likelihood on the merits." Thereafter, the circuit court recounted – *in paragraphs 29 through 76*, or 23 pages – the reasons why Respondents are likely to succeed on the merits. Finally, the circuit court concluded that "[t]he Public Interest Will Be Best Advanced by Granting the Preliminary Injunction." (App. 272)

It is clear that the Amended Order is based upon the proper standard; cited to the salient cases *relied upon by Petitioner in his own brief*, (Jefferson County and Hart); and thoroughly applied the proper standard in a 24-page, well-reasoned analysis. To claim otherwise is to simply ignore the plain language of the Amended Order.

Petitioner's hyper-technical argument belies the weaknesses in Petitioner's appeal. In fact,

the circuit court addressed this very issue at Footnote 3, as follows:

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.
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> *Feller v Brock*, 802 F.2d 722, 727 (4th Cir. 1986), quoting *Blackwelder*, 550 F.2d at 196.
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> 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. The circuit court, Petitioner and Respondents all relied on Jefferson County and Hart in their analysis. In the end, it is clear that the circuit court relied upon the proper standard granting the preliminary injunction.

Morrisey I was decided after the federal precedent altering federal analysis, and this Court reaffirmed and applied the Jefferson County/Hart analysis.

The proper standard was applied below.

II. Respondents met all of the Requirements for Issuance of a Preliminary Injunction.

As noted, the circuit court applied the very standard propounded by Petitioner in his Opening Brief:

> "(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).

Respondent will now address the four factors to be considered for grant of the preliminary injunction.

A. Respondents demonstrated a likelihood of success on the merits.

It is clear from a review of the Amended Order that the circuit court carefully considered the arguments of the parties and properly determined that Respondents demonstrated a likelihood of success on the merits. Indeed, pages 12 through 35 of the Amended Order (App. 0249-0272) thoroughly addressed this very issue, relying primarily on the decisions of this Court applying the West Virginia Constitution. In contrast, Petitioner relies upon out-of-state and federal cases that are readily distinguishable from the instant matter.

1. The Circuit Court properly concluded that Respondents are likely to succeed on their Equal Protection Claims.

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[.]" This Court 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 W.Wa., 195, W. Va. 573, 594, 466 S.E.2d 424, 445 (1995)(*quoting* Robertson v. Goldman, 179 W. Va. 453, 369 S.E.2d 888 (1988)); accord Israel v. West Virginia Secondary Schools Activities Comm'n, 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 this Court in Kyriazis v. University of West Virginia et al, 192 W. Va. 60, 67, 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
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> . . .
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> 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.

Accord, Appalachian Power, 195 W. Va. at 573, 594, 466 S.E.2d 424, 445.[18]

a. Because the Act adversely and selectively affects Petitioners' speech, associational, and existing contractual rights, the Act's classification scheme is constitutionally suspect, the established standard requires, for the Act to be valid, that its meaning be necessary to accomplish a Compelling State Interest.

As will be discussed, *infra*, 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 (collective bargaining agreements vs. other contracts). Because each of those bases implicate fundamental rights, Petitioner must, according to this Court's precedent, demonstrate that the Act is necessary to accomplish a compelling state interest for the Act to survive. E.g., Kyriazis, *supra*.

The Act targets Respondents because of the content of their public advocacy, past and present. The Act, on its face, expressly excludes *unions* and *labor* organizations, *i.e.*, Respondents. While the term "labor unions" is not used in the Act, the inference is clear that "labor unions" are

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[18]The Court has also established an intermediate standard relating to classifications based upon gender or illegitimacy. *See* Israel, *supra*. Because those classifications are not at issue here, it is unnecessary to consider the intermediate standard in this case.

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 collective bargaining agreements with public employers – in other words, that the exclusion would also include groups like Respondents - 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 turn a blind eye to not only the text of the Act but also to reality not to conclude that this Act was aimed at groups whose messages were disfavored by our State's Legislature.

Indeed, the conclusion that the Act is a content-motivated attack on Respondents and like groups is reenforced by the fact that the law focuses on their lifeblood for essential activities – union dues – and thus their continued ability to get their messages out. Organizing around important workplace issues, providing representation to aggrieved union members, and supporting statutory and policy changes to support the interest of their members all involve free speech activity. At the same time, all of these activities require the financial support provided by union dues. Without question, the Act is designed to throttle union activity by limiting its capacity to raise revenues.

The Act violates a line of decisions that has invalidated penalties on the exercise of constitutional rights in the absence of 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 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.[19]

This case is no different. The State has authorized a benefit (i.e., 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 targets for benefit denial the requests of only those employees who have engaged in lawful and constitutionally protected associational memberships. That is the only purpose that public employers are *prohibited* from providing payroll deductions for. In that way, the exception penalizes employees because of their exercise of their constitutional rights.

In a similar vein, this 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[20] 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.

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[19]*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. See e.g., Memorial Hospital v. Maricopa County, 415 U.S. 250 (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 found to be 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 held to unconstitutionally penalize 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*, W. Va. Const. Article VI, § 57; *see also* Saenz v. Roe, 526 U.S. 489 (1999).

[20]Article III, § 3 in its entirety provides,

> Government is instituted for the common benefit, protection and security of the 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 shall 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 public weal."

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 Panepinto, "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 Parsons and Panepinto, the State offered a program that was not required 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 in its respect for fundamental rights. So, too, in this case while the State is not required to provide for employee-designated payroll deductions, 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.

In addition, HB 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, but 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 contracts created by CBAs, no legitimate explanation comes to mind why narrower yet equally valid employment agreements about payroll deductions should not be similarly respected.

The only legitimate state interest that can be identified to support the Act's exclusion of petitioners from payroll deduction arrangements is to save the cost associated with the collection and payment of union dues. However, the evidence presented below clearly showed that this cost is *de minimis* and entails, perhaps, the value of a few keystrokes to implement the benefit. No contrary evidence was presented. Critically, under HB 2009, other deductions are permitted to occur. For instance, charitable contributions and private insurance may still be deducted. 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. See e.g., Dunn v. Blumstein, *supra*; Shapiro v. Thompson, *supra*.

b. No rational, legitimate purpose sustains the Act.

Assuming, arguendo, that the rational relationship test is applied, the Act is still constitutionally is flawed. 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 Respondents assert that fundamental rights are at stake, they also insist that the Act cannot pass muster even under the rational relationship test.

"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 person 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.)

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.

Accordingly, a classification will fail to pass constitutional muster where there is no rational basis on which to conclude that the classification will achieve any legitimate 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).

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 persons affected." Romer, 517 U.S. at 634.[21]

Similarly, here – as noted above – "the extreme imbalance of the comparable interests strongly imply 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." There is much contemporaneous

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[21] *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 inexplicable 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.").

evidence to support that conclusion.

In the recent past, Petitioner publicly expressed 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, Petitioner disapproved and returned Enrolled Committee Substitute for Senate Bill 239. Petitioner 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.[22]

Since that time, however, in the run-up to the Act, Petitioner and his legislative supporters overtly attacked unions in West Virginia. Government leaders referred to union leadership pejoratively as "union thugs" and developed a legislative agenda that may be accurately characterized both as "anti-union" and "anti-employee." The record below fully develops the recent acts of hostility by Petitioner and the Legislature toward unions, including press reports and bills passed or proposed. (See circuit court findings in this regard at App. 0260 - 0261)

Even assuming that the Act was motivated by a desire to save on the costs of allowing payroll

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[22]Petitioner 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.
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> 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.

(App. 0083)

deductions, the Act still fails the rational basis test. When cutting costs or benefits for legitimate reasons, the State cannot accomplish that end by arbitrary 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. Nor 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).[23]

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 making exclusions. 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.[24]

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 distinctions between

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[23]"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." Lyng, 485 U.S. at 376-77 (internal citations and quotation marks omitted).

[24]And if costs really were a concern, the State could require cost-sharing as a requirement for continued eligibility.

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).

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.")

Here, the statute specifically treats those public employees with collective bargaining agreements differently than those without.[25] Moreover, payroll deductions may, under the Act, continue to be made for other non-union purposes. As such, there is no rational relationship between the Act and any legitimate purpose.

Petitioner relies on a series of cases that may be distinguished from this case. Petitioner first cites City of Charlotte v. Local 660, International Association of Firefighters, 426 U.S. 283 (1976), asserting that it is a "near-identical claim" with that of Respondent. A review of City of Charlotte

[25]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.

demonstrates that its not on all fours with this case and may be easily distinguished from the instant matter. In City of Charlotte, the Supreme Court addressed an instance where unions requested that a municipality withhold union dues. The City declined (as it had for years)[26] and the union brought an action in federal court raising only an equal protection claim. While the union prevailed in federal district court and before the Fourth Circuit, the Supreme Court found that a "relatively relaxed standard" applied and that the City offered three justifications: (1) that North Carolina law prohibited the City from entering into a contract with a municipal union and a dues check off would constitute such an agreement; (2) that the City wished to maintain dues check off as a subject for collective bargaining; and (3) that the City will allow withholdings only when it benefits all employees *to avoid withholding wages for all requests*. In support of the third justification, the City presented evidence (affidavits) to establish that it was unduly burdensome and expensive to withhold wages for all who request it.

The Supreme Court found that the third justification satisfied the "relatively relaxed" standard emphasizing that the City did not draw a line to exclude individual deductions, but to avoid the cumulative burden of deducting from wages every time a request was made. Notably, the Supreme Court declined to address the other two justifications presented by the City.

In stark contrast to City of Charlotte, there is *no evidence of record here* to establish any justification for the Act. Petitioner has offered not a shred of evidence to show that it may prevail on this issue – while the City in City of Charlotte established one justification through evidence and two others (one, a state law) that the Court did not even have to reach. Here, the record is devoid of any evidence or statutory authority to explain the purpose of the Act. In contrast, Respondents

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[26]In City of Charlotte it is clear that the practice of payroll deduction had never occurred. Whereas here, it has been in effect for more than five decades in some places.

have established, without contradiction, that administration of payroll deduction costs virtually nothing; that there have been no complaints about the practice or its cost; and that it benefits morale and employee relations.[27] Rather than support Petitioner's claim, City of Charlotte actually bolsters Respondent's claims that it is likely to prevail on the merits.

Petitioner also relies on several out of state cases such as Ark. State Highway Emp. Local 1315 v. Kell, 628 F.2d 1099, 1102-04 (8th Cir. 1980) to assert that the same "relaxed reasonableness"standard must apply in this case. Kell is also distinguishable from the instant matter.[28]

In Kell, the union raised a federal protection and First Amendment claim. Importantly, the highway department – like the City of Charlotte – presented evidence in the form of a "Minute Order" to establish that there was, in fact, added clerical and office expense to support the relaxed standard. Additionally, there was evidence of concern that the payroll deduction benefitted only a minority group.[29]

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[27]While this distinction alone renders Petitioner's reliance on City of Charlotte misplaced, Respondents also note that the Supreme Court was not addressing an instance where a statute was at issue (instead, it was addressing a request from a union); no claims were made under a free speech or association rights; and there was no history of dues deductions as in this case. Indeed, the only employer to testify, Mayor Williams, lauded the practice of payroll deduction of union dues.

[28]It must be noted that Petitioner asserts at page 17 of it Opening Brief that "the Arkansas law at issue prohibited union dues payroll deduction even while allowing the government to "withhold items other than union dues." Petitioner misrepresents the facts of Kell. Rather, Kell addressed an instance where Arkansas Statutes Annotated, Section 13-349(B) permitted "deductions from the payrolls of state employees . . . for a number of purposes, including the payment of union dues when requested in writing by the employee." *Id.* at 1100. The highway department – not a statutory change or new law – opted to cease the practice. Unlike the instant matter, there was no statute at issue prohibiting payroll deduction.

[29]Other cases cited by Petitioner can be distinguished on the same basis. In Iowa State Educ. Ass'n v. State, 928 N.W.2d 11 (Iowa 2019), there was no free speech or association claim or a contracts clause claim and the unions in that case failed to challenge the state's premise that rational basis for the underlying statue was cost-savings. In S. C. Educ. Ass'n v. Campbell, 883 F.2d 1251 (4th Cir. 1989), there was no prior history of payroll deduction for the union (and those like it); the Legislature did not terminate an existing practice, but simply declined to extend statutory authority; and the case did not include a contracts clause challenge. It must also be noted that the

Petitioner also cites Toledo Area AFL-CIO Council v. Pizza, 154 F.3d 307 (6th Cir. 1998), to support its position regarding equal protection and free speech. The prohibited wage check-off in that case, however, involved deductions for political causes.[30] The State has an obvious and important interest in maintaining politically neutral government. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601 (1973); United States Civil Service Comm'n v. National Assoc. of Letter Carriers, 413, U.S. 548 (1973); W. V. Constitution, Art. III, § 16 ("The right of the people ... to consult for the common good ... shall be held inviolate.")

2. The Circuit Court properly concluded that Respondents are likely to succeed on their Free Speech and Associational Rights Claim.

United States and West Virginia Supreme Court decisions have also 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. *See e.g.*, United States v. Robel, 389 U.S. 258 (1968); Pushinsky, *supra.* The Act takes aim at Respondents' and public employees' ability to associate to advance workers' causes.

In a series of cases that grew out of the massive Southern resistance to the Supreme Court's

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evidentiary record in Campbell was comprised of testimony from legislators who voted on the bill. The court of appeals focused upon this issue at length and took umbrage with the inquiry into legislative motivation. Of course, no such issue exists herein. In Bailey v. Callaghan, 715 F.3d 956 (6th Cir.) the Michigan statute specifically indicated that the prohibition of deduction of union dues by public school employers was designed to preserve public school resources whereas, no such language exists here and the Sixth Circuit did not address a contracts clause claim. In W. Cent. Mo. Reg'l Lodge No. 50 v. Bd. of Police Comm'rs, 916 S.W.2d 889 (Mo. Ct. App. 1996) there was no history of payroll deduction; the issue arose from a request for the service, not a new statute; and the evidence in that case indicated that a rational basis existed with regard to concerns regarding unlawful collective bargaining; expenses and resources; and potential violations of police policy.

[30]Moreover, a thorough review of Pizza reveals that its analysis of the contract claim brought therein provides ample additional support for Respondents' contract claim herein. Noting the "high value" the Framers of the Constitution placed upon contractual rights, the Sixth Circuit found that the state's application of its wage checkoff ban to existing contracts (in this instance, collective bargaining agreements) was a substantial impairment of existing contractual rights. Respondents will further discuss this issue *infra*.

desegregation rulings in Brown v. Board of Education,[31] 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 striking.

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 Supreme 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.

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

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[31] 347 U.S. 483 (1954).

the 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. NAACP, 366 U.S. 293 (1961) (Louisiana statute requiring all nonprofit organizations to file annually a list of the names and addresses of all its members and officers in the state violated freedom of association of the organizations and their members).

The State of Arkansas's somewhat different 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.

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

The case returned to the 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.

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 Comm, 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.

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 not be constitutionally 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 American, Dist. 12 v. Illinois Bar Assn., 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.

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 than those imposed on the states by the Constitution of the United States." Pushinsky, 164 W. Va. at 744, 266 S.E.2d at 449; *accord*, West Virginia Citizens Action Group v. Daley, 174 W. Va. 299, 311, 324 S.E.2d 713, 725 (1984); *see also* Woodruff v. Board of Trustees, 173 W. Va. 604, 319 S.E.2d 372 (1984).

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.

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.

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 Illinois Bar Assocation. It must be remembered that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." Shelton, 364 U.S. at 488. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." Button, 371 at 438.

In this case, assuming that a valid economic concern actually exists (though no evidence was presented establishing that it does exist), 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.

Petitioner cannot demonstrate a substantial countervailing purpose to support this legislation. At best, implementation of the Act will reduce the work on some public employers in only the slightest manner.

3. The circuit court properly concluded that Respondents are likely to succeed on their Contract Clause Claim.

Article III, § 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 this Court,

> [i]n 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][32]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).

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 voluntary agreements reached between public employers and public employees and their unions provide for the employers to withhold union dues and pay them over to the unions. (App. 0047, 0051, 0054, 0059, 0062, 0065, 0067, 0074) 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.

Given that there will be a substantial impairment of the contractual rights at issue, Shell instructs that the next step of the test is to determine whether there is a significant public purpose behind the legislation. As has already been established, there is no significant or 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 that 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

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[32]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).

legitimate public purpose.

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.

Since there is no significant legitimate pubic purpose for the Act, Shell indicates 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*.

As it relates to the factors necessary to support the impairment of contracts claim, Petitioner claims that Respondents have not identified any contracts that might be impaired. Clearly, this misstates the record. Each and every agreement between a public employees union and a public employer represents a contract. Each party offers consideration and the agreement has bound the parties for years. It is of no moment that some agreements may be written and others exist orally and through past and continuing practice. Respondents have offered ample, uncontroverted evidence consisting of testimony, e-mail, and other documents, that these agreements exist. In contrast, Petitioner has offered no evidence regarding the many agreements that have functioned statewide

for decade upon decade.

Petitioner next argues that any impairment of such contracts is not "substantial." It is clear that the Act not only substantially alters these agreements, but it eviscerates the agreement to permit payroll deduction of dues.[33]

Finally, Petitioner argues that the circuit court "overreached by enjoining the Act in its entirety." Here, Petitioner ignores the fact that each agreement between public employers and public employee unions represented a contract that has now been unlawfully eliminated. In other words, the circuit court's ruling had the proper breadth because the Act impacted all of the agreements at issue.

As noted, the decision of the Sixth Circuit in Pizza clearly supports Respondents' claims. In Pizza, the court addressed the Ohio law that mandated that the statutory wage checkoff ban superseded any preexisting agreement between public employers and labor organizations granting unions the right to wage checkoffs for political causes. Like Petitioner, the state in Pizza argued that this change did not present a substantial impairment. The court disagreed:

> A substantial impairment may exist even where there has not been a "[t]otal destruction of contractual expectations." Ibid. If a substantial impairment exists, the "severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected."

Pizza, 154 F.3rd 307, 323

The court then stated:

> Applying this mode of analysis to the present case, it is clear that subsection (I) of section 3599.031 operates as a substantial impairment of the state's contractual relationship with public employee unions whose CBAs expressly grant the right to

[33]Petitioner further suggests that to the extent the Act does impair contractual rights, that it safeguards "vital interests of the people." However, Petitioner offers no vital interests to be protected by the Act.

> checkoffs for political purposes. The measure totally obliterates the affected workers' contractual expectation that the state will allow them to use this highly effective method of political fundraising for the term of the CBA.

Id.

Observing that the state wished to rid the workplace of partisan politics, the court found:

> The fact that ridding the workplace of the taint of partisan politics survives rational basis scrutiny for purposes of our equal protection analysis does not mean that it justifies a very substantial impairment of a pre-existing contract. Something more than the showing made to survive rational basis scrutiny is required to justify such an impairment. The hurdle is even higher given the state's obvious self-interest and the lack of any evidence as to what actually motivated the state to seek to abrogate its contractual obligation

Id. at 326.

> The state has been permitting checkoffs for quite some time. Throughout this time, it has been willing to tolerate or been unaware of the evils it now claims are associated with permitting public employees and their unions to utilize checkoffs for political causes. If the state has known of, but tolerated, theses problem throughout this time, it can tolerate them a bit longer until its contractual obligations expire. If the state's concern is the result of a recent epiphany, it has failed to persuade us that the newly discovered danger of checkoffs justifies the extreme solution of substantially impairing existing contracts.

Id. at 326-327.

The Pizza analysis applies here and, standing alone, demonstrates that Respondents have a likelihood of success on the merits.

B. Respondents clearly established that they will suffer Irreparable Harm if HB 2009 goes into effect while Petitioner has offered no evidence of any harm to it if the statute is enjoined.

Petitioner generally alleges that Respondents assert only compensable financial harms, speculative harms and *de minimis* harms. Even a cursory reading of the record renders these assertions false. Rather, the harms to Respondents were described, among other things, as

"devastating" and threatening to the very operation and existence of the unions at issue.[34]

If the Act is allowed to take effect, Respondents will have to forego their regular representational activities and redirect precious resources toward new methods of collecting union dues.

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 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.

Petitioner's specific assertions with regard to damages in this case miss the mark. It is clear that their will be irreparable harm to Respondents on multiple levels. Conversely, Petitioner has offered no evidence of any countervailing harm.

Petitioner contends that the harms presented – lost dues and additional expenses – are ones that may be easily recouped at the end of this case. However, Petitioner overlooks the hurdles – such as a claim of sovereign immunity – it will face at that juncture. In other words, solvency is not the issue as Petitioner suggests. Rather, it is the unavailability of any method to collect the financial damages.

In addition, the damages go well beyond financial ones. The testimony clearly pointed to, *inter alia*, lost services; job loss; deflection away from the core mission to dues collections; lost

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[34]It must be noted at the outset that Petitioner has presented no evidence of any harm to it if the preliminary injunction is issued.

benefits; and closure of unions. The inherent harm in the loss of these services is not measurable by an exact dollar figure. The services provided at a grievance or RIF hearing, for example, are needed at the time – not when a claim can be made years later for lost dues.

Nor are the harms speculative. Rather, they are immediate and real. Mr. Albert and Mrs. Harris testified to the massive injuries their unions will sustain that will be "devastating" to their operations. Mr. Albert testified that 90% of its AFT-WV's revenues come from member dues via payroll deduction. It cannot seriously be argued that the removal of payroll deduction does not present imminent and likely harm – even if a small percentage of about 30% of the membership has changed dues payment methods.

Finally, the harms described in the evidence presented below are substantial and certainly not *de minimis*. Again, witnesses specifically testified to financial and non-compensable harm that would be caused by the Act. Petitioner offered no evidence to the contrary.

As more fully demonstrated above in Respondents' discussion of the merits, at stake for Respondents in this motion is their fundamental right to equal protection of the laws. One must ask, why will other deductions from public employment wages be permitted but union dues are suddenly outlawed? (0047, 0051, 0054, 0059, 0074)

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 obvious and only target of the Act are Union and club dues. No other entity is adversely affected by this Act. This Act comes in the wake of several years of anti-union animus from the Petitioner 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 mean-spirited, unnecessary legislative proposals (some that became law and some that did not) that were blatant attacks on union and their constituency.

In contrast to the constitutionally weighty interests that Respondents have at stake, the threat of harm to the State if the motion was granted is, at most, *de minimis* and, more likely, nonexistent.

Any purported financial interest of the State in ending paycheck deductions pales when compared to the fundamental rights at stake herein for Respondents. Indeed, the extreme imbalance of the comparable interests strongly imply 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.

C. The public interest is best advanced and protected by continuing the preliminary injunction until a hearing on the merits for a permanent injunction if fully adjudicated.

The public interest analysis in this case follows from the balance of harms discussed above. The public interest is advanced by the protection of Respondents' fundamental constitutional rights of equal protection, contract, and association. The public interest is also promoted by having effective public employment unions, whose operation will be seriously impacted 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.

VIII. CONCLUSION

Respondents respectfully request that the status quo of decades be preserved; that the preliminary injunction remain in place; and that this matter be remanded to the circuit court for discovery and a hearing with regard to the underlying Verified Complaint for a permanent injunction.

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

JIM JUSTICE, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF WEST VIRGINIA,

Petitioner,

v.

WEST VIRGINIA AFL-CIO, ET AL.,

Respondents.

CERTIFICATE OF SERVICE

I, Jeffrey G. Blaydes, do hereby certify that I have served a copy of the foregoing RESPONDENTS' MOTION TO EXCEED PAGE LIMIT, by placing a true copy, postage prepaid, in the United States mail, on this 20th day of September, 2021, upon the following:

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