IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 19-0298

PATRICK MORRISEY, et al.,

Defendants-Petitioners,

v.

WEST VIRGINIA AFL-CIO, et al.,

Plaintiffs-Respondents.

Appeal from the Order of the Circuit Court of Kanawha County, West Virginia

Civil Action Nos.16-C-959—69

AMICUS CURIAE BRIEF OF THE WEST VIRGINIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF THE RESPONDENTS AND THE DECISION BELOW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Pages

Constitutional Provisions

Statutes

Other Sources

To the Honorable Justices of the West Virginia Supreme Court of Appeals:

INTEREST OF *AMICUS CURIAE*

This appeal raises a significant issue for all employees in West Virginia. The West Virginia Employment Lawyers Association (WVELA)[1] and its member-attorneys represent thousands of employees across the State of West Virginia---including both union and non-union workers. WVELA is an affiliate of the National Employment Lawyers Association (NELA), the only national bar association exclusively comprised of lawyers who represent employees in cases involving employment discrimination, illegal workplace harassment, wrongful termination, denial of employee pay and benefits and other employment related matters. WVELA is comprised of lawyers throughout the state of West Virginia who devote their time and efforts to advising and representing employees in workplace issues.

INTRODUCTION

This brief focuses on a single one of the numerous issues presented by this case: Does Senate Bill 1's prohibition on agency fees substantially abridge the freedom of association for both union and non-union members who are significantly deterred or precluded from joining or remaining in a union because they cannot afford to pay the higher union dues that are necessary to cover the cost of providing representation to the non-paying members of their collective bargaining unit? It is a classic free rider problem. This Court should construe S.B. 1 (W. Va. Code § 21-5G-2) so as to authorize limited, transactional fees whenever non-dues-paying members wish to utilize the services of the union, such as by filing a grievance. This supports the

[1] Pursuant to Rule 30(e)(5), this brief was drafted entirely by present counsel *pro bono*, rather than by counsel for any of the parties in this case, and no one has made any monetary contribution to fund the preparation or submission of this brief.

airing of meritorious grievances and prevents S.B. 1 from forcing dues-paying workers to shoulder the cost of subsidizing grievances (i.e. the speech) of others.

The National Labor Relations Act, 29 U.S.C. 151 et seq. affords America's workers the right to elect representatives by a majority vote. But S.B. 1's carte blanche prohibition of agency fees renders that right an absolute nullity by pricing many working people out of the market for union membership because they have to pay escalated union dues in order to subsidize the litigation of grievances and other services for the free riders. S.B. 1 prevents people from associating in a union, or at the least it necessarily places a substantial financial burden on those dues-paying members. And worse still, S.B. 1 may cause those who can't afford union membership to be compelled to accept and endorse the representation (i.e. the speech) of elected union officials who those non-dues-paying members have not had the opportunity to vote for or against---thus undermining democracy and accountability within the bargaining unit by excluding those who cannot afford to pay the escalated union dues.

All in all, the answer to the question presented above is categorically "yes, insofar as S.B.1 purports to prohibit unions from charging any fees, even for discrete transactions involving direct representation, it significantly abridges the freedom of association without furthering any compelling state interest." We urge this Court to strike down S.B. 1's ban on agency fees altogether. However, in the alternative, the Court should at least heed Justice Alito's guidance (as set forth below) by construing S.B.1 to allow unions to charge representational fees on a limited, transactional basis in those instances when non-dues-paying members of a collective bargaining unit seek on their own volition to utilize the union's services. Those non-paying workers should not get a free ride at the expense of dues-paying members. In the end, inadequate

resources for grievances and arbitrations will harm the associational interests of all workers and will impair the development of the laws that are enforced through bargaining agreements.

SUMMARY OF ARGUMENT

Senate Bill 1 (the "Act" or the "Right- to-Work Law") fails strict scrutiny when considered in light of its necessary effects on the associational rights of both union and non-union workers in West Virginia. The Act substantially abridges or impairs the freedom of association under Art. III, §§ 10 and 16 of the West Virginia Constitution by jacking up the price for workers to join or to remain in a union, i.e. requiring dues-paying union members to subsidize the representation of non-dues-paying members of the same bargaining unit, and making it too expensive and thus preventing workers from associating together to enforce their statutory and contractual rights under the laws of the State of West Virginia and the NLRA through the arbitration of grievances regarding violations of those laws.

First, the Act impairs the associational rights of union members and prospective union members by forcing dues-paying union members to pay punitively high dues to cover the share of representational costs that would otherwise be equitably born by the non-dues-paying free-riders. This discourages both union members and prospective union members from joining or remaining in a union, thus chilling and substantially impairing the associational right of all workers to join or remain in a union. Essentially, the Act prices many workers out of the market for the right to associate for securing democracy in the workplace, which is manifestly unjust and harmful to the integrity of this fundamental right of association.

Second, the Act further impairs the associational rights of non-union members because, by making it cost-prohibitive for unions to arbitrate all meritorious grievances, the Act makes it functionally impossible for many workers with meritorious claims under the Human Rights Act

and other laws to associate together in pursuit of a remedy for those claims at all. As this Court is aware, binding arbitration in employment contracts is increasingly common in West Virginia. Under a union contract, a worker can find himself or herself functionally blocked from accessing the circuit courts for the redress of statutory grievances. Non-union workers who are subject to binding arbitration do have recourse to legal assistance from the private bar as they seek to vindicate their rights before private arbitrators. However, union members cannot hire a private lawyer to represent them in an arbitration. They rely on the union to decide whether or not to represent them. As set forth below, the judicially-crafted duty of fair representation does not compel unions to arbitrate every meritorious grievance. Thus, if non-union members in a union workplace wish to pursue remedies for the violation of the civil laws of this State, the Act may place their union in such a resource-constrained environment that those non-union workers may be denied representation and be totally barred from arbitrating their claims.

Furthermore, because S.B.1 makes it financially less feasible for unions to arbitrate grievances, this is also bound to impair the associational rights of the non-union workers who do not work within the bargaining unit. That is because, in today's environment, many workers at non-union workplaces are also employed pursuant to binding arbitration agreements. If such workers bring complaints, they are often *pro se* in those arbitrations. And therefore, as binding arbitration swallows up larger swaths of the American workforce, unions play an outsized role in bringing legal resources to the plaintiff side of employment law.

ARGUMENT

Amicus Curiae submit this brief to address an important issue in this case: whether the freedom of association under the W. Va. Constitution is unduly burdened by the prohibition on agency fees in S.B. 1, the "Right-to-Work Law."

S.B. 1 provides, in pertinent part, as follows:

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

W. Va. Code § 21-5G-2.

Article III, Section 10 of the West Virginia Constitution provides as follows:

No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.

W. Va. Const. Art. III, § 10.

Article III, Section 16 of the West Virginia Constitution provides as follows:

The right of the people to assemble in a peaceable manner, to consult for the common good, to instruct their representatives, or to apply for redress of grievances, shall be held inviolate.

W. Va. Const. Art. III, § 16.

The right to associate with others to advance particular causes is necessarily embedded in the freedoms of speech and press and is accorded fundamental status protected by the strictest of judicial scrutiny. *See e.g., United States v. Robel,* 389 U.S. 258 (1968); *Pushinsky v. Board of Law Examiners,* 164 W. Va. 736, 266 S.E.2d 444 (1980). When a "substantial abridgement of associational freedom" occurs, "the State may prevail only upon showing a subordinating interest which is compelling." *Bates* v. *Little Rock,* 361 U.S. 516, 524 (1960). Of especial relevance here, the Supreme Court has recently elaborated:

> Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns. [*Knox v. Service Employees*, 567 U. S. 298, 309 (2012)]; *United States v. United Foods, Inc.*, 533 U. S. 405, 410 (2001); [*Abood v. Detroit Bd. of Ed.*, 431 U. S. 209, 222, 234– 235 (1977)]. As Jefferson famously put it, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical." A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950) (emphasis deleted and footnote omitted); *see also Teachers v. Hudson*, 475 U. S. 292, 305, n. 15 (1986).
>
> *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S.Ct. 2448, 2464 (2018).

"There is no doubt that union workers enjoy valuable rights of association and assembly that are protected by the First Amendment." *Sweeney v. Pence*, 767 F.3d 654, 670 (7th Cir. 2014) (citing *Thomas v. Collins*, 323 U.S. 516, 65 S.Ct. 315 (1945)). Significant concerns are raised about workers' Constitutional rights to freely associate when the government compels dues-paying union members to subsidize the speech of non-dues-paying members of a collective bargaining unit. Those non-dues-paying members seek to speak and/or participate in the collective bargaining and grievance processes even though they are not paying dues. The cost of subsidizing the non-dues-paying members' speech (i.e. participating in bargaining and grievances) imposes a "substantial abridgement" of the associational freedom of workers who are living paycheck to paycheck and cannot afford to subsidize the free riders. A.R. 115-117. There is no compelling state interest that justifies prohibiting unions from charging a transaction-specific representational fee to non-dues-paying workers who come to the union out of their own free will and seek to utilize the representation of the union.

I. The Decision Below Accurately Reads Federal Labor Law to Allow States to Exercise Jurisdiction Over their Own Constitutions and Laws When they Conflict with Taft-Hartley's Right-to-Work Provision

The NLRA does not pre-empt the enforcement by states of the rights arising under their constitutions. Unions and their members have long received constitutional protection for the

freedom of association notwithstanding NLRA pre-emption of state statutes and regulations in other regards. *See e.g. Hague v. CIO*, 307 U.S. 496 (1939) (striking down a permitting ordinance that had obstructed union efforts to organize). The U.S. Supreme Court in *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps.*, Council 31, 138 S.Ct. 2448 (2018) recently yet again recognized that states may examine and enforce their own constitutional dictates to authorize unions to impose limited representational fees for certain transactions involving non-dues-paying, notwithstanding the so-called Taft-Hartley or "Right-to-Work" provisions of the Labor-Management Relations Act of 1947. *Janus*, 138 S.Ct. at 2468.

II. The Decision Below Protects the Associational Rights of Both Union and Non-Union Workers in West Virginia and Is Consistent with *Janus*

This Court recently addressed and acknowledged the state and federal Constitutional protection for individual rights to associate by "band[ing] together" with other citizens to promote desired outcomes on matters of common concern---just what union members and prospective union members seek to do by forming a union. *Wells v. State ex rel. Miller*, 237 W.Va. 698, 791 S.E.2d 361, 377 (W. Va., 2016).

> The First Amendment protects not only an individual's right to associate with the political party of his or her choice, it also protects citizens' right "to band together in promoting among the electorate candidates who espouse their political views." *See California Democratic Party*, 530 U.S. at 574, 120 S.Ct. 2402 (2000) (holding California's proposition which converted State's primary election from closed to blanket primary in which voters could vote for any candidate regardless of voter's or candidate's party affiliation violated political parties' First Amendment right of association)[.]
>
> *Wells v. State ex rel. Miller*, 791 S.E.2d at 377.
>
> It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460, 78 S.Ct. 1163 1171, 2 L.Ed.2d 1488 (1958); *see NAACP v. Button*, 371 U.S. 415, 430, 83 S.Ct. 328, 336, 9 L.Ed.2d 405 (1963); *Bates v. Little Rock*, 361 U.S. 516, 522–523, 80 S.Ct. 412, 416–417, 4 L.Ed.2d 480 (1960). The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization. *Elrod v. Burns*, 427 U.S. 347, 357, 96 S.Ct. 2673 2681, 49

L.Ed.2d 547 (1976) (plurality opinion)[.] "The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Kusper v. Pontikes*, 414 U.S. 51, 57, 94 S.Ct. 303, 307, 38 L.Ed.2d 260 (1973).

Tashjian v. Republican Party of Connecticut , 479 U.S. 208, 214, 107 S.Ct. 544, 548, 93 L.Ed.2d 514 (1986) (additional citation omitted) (quoted by *Wells v. State ex rel. Miller*, 237 W.Va. 698, 791 S.E.2d 361 (W. Va., 2016) (Davis, J., dissenting)).

The U.S. Supreme Court has also observed that:

> [i]t is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments. *Tashjian, supra*, 479 U.S. at 214, 107 S.Ct. at 548 ; *see also Elrod v. Burns*, 427 U.S. 347, 357, 96 S.Ct. 2673 2681, 49 L.Ed.2d 547 (1976) (plurality opinion). Freedom of association means not only that an individual voter has the right to associate with the political party of her choice, *Tashjian, supra*, 479 U.S. at 214, 107 S.Ct. at 548 (quoting [*Kusper v. Pontikes*, 414 U.S. 51, 94 S.Ct. 303, (1973)]), but also that a political party has a right to "'identify the people who constitute the association,'" *Tashjian, supra*, 479 U.S. at 214, 107 S.Ct. at 548 (quoting *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122, 101 S.Ct. 1010 1019 (1981) *); cf. NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–462, 78 S.Ct. 1163 1172 (1958), and to select a "standard bearer who best represents the party's ideologies and preferences." *Ripon Society, Inc. v. National Republican Party*, 173 U.S.App.D.C. 350, 384, 525 F.2d 567, 601 (1975) (Tamm, J., concurring in result), cert. denied, 424 U.S. 933, 96 S.Ct. 1147, 47 L.Ed.2d 341 (1976)." *Wells v. State ex rel. Miller*, 237 W.Va. 698, 791 S.E.2d 361 (W. Va., 2016)

Eu v. San Francisco Cnty. Democratic Cent. Comm., 489 U.S. 214, 224, 109 S.Ct. 1013, 1020–21 (1989).

What can this Court do in order to reconcile S.B. 1 with the longstanding, moderate, and important jurisprudence regarding freedom of association? Justice Alito, writing for the majority in *Janus*, suggested that the burdens that come from representing non-dues-paying workers could be eliminated (or at least made to be less significant) if companies and unions employed a fee-for-service model for non-dues-paying members. This Court should consider adopting the following framework suggested by Justice Alito, consistent with S.B. 1:

> [W]hatever unwanted burden is imposed by the representation of nonmembers in disciplinary matters can be eliminated "through means significantly less restrictive of

associational freedoms" than the imposition of agency fees. [*Harris v. Quinn*, 573 U. S. ____] (slip op., at 30) (internal quotation marks omitted). Individual nonmembers could be required to pay for that service or could be denied union representation altogether. [FN 6 There is precedent for such arrangements. Some States have laws providing that, if an employee with a religious objection to paying an agency fee "requests the [union] to use the grievance procedure or arbitration procedure on the employee's behalf, the [union] is authorized to charge the employee for the reasonable cost of using such procedure." E.g., Cal. Govt. Code Ann. §3546.3 (West 2010); *cf.* Ill. Comp. Stat., ch. 5, §315/6(g) (2016). This more tailored alternative, if applied to other objectors, would prevent free ridership while imposing a lesser burden on First Amendment rights.].

Janus, 138 S.Ct. at 2468.

a. S.B. 1 impairs the associational rights of union and non-union workers by forcing dues-paying union members to pay punitively high dues to cover the costs incurred and benefits derived by free-riders.

Union members have set forth extensive testimony in this case regarding the impacts of Right-to-Work laws on union costs, fees, and enrollment that need not be restated here. A.R. 487-496 (Declaration of Curt Koegan); 544-94 (Testimony of Ken Hall). Regardless of whether, as an empirical matter, union membership declines due to the higher union dues caused by S.B. 1's coerced subsidization of the grievances and speech of non-dues-paying members, nonetheless the question for purposes of the constitutional analysis is whether the higher dues cause a "substantial abridgement" of the freedom of association, and whether the freedom of association in these situations should be subordinated to a compelling state interest. *See Bates,* 361 U.S. at 524. We urge that there is no compelling interest that justifies the substantially heightened cost of union membership, the alienation of non-dues-paying members from the opportunity to elect the leaders who negotiate and arbitrate on behalf of the non-dues-paying members, and the impairment of the union's ability to defend and develop the statutory and contract laws that are in place to protect workers.

b. S.B.1 impairs the associational rights of non-union members in a second way because, by making it cost-prohibitive for unions to arbitrate all meritorious

grievances, the Act makes it essentially impossible to litigate any claims affecting only the rights of the minority or non-union members.

The Duty of Fair Representation is oft-discussed in the litigation of the Right-to-Work laws. However, the Duty of Fair Representation is largely a judicially-crafted doctrine and not an immutable federal statute that provides a specific assurance that unions will arbitrate every one---or even most---of the meritorious grievances that are brought forward by union or non-union workers in a union workplace. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Ramey v. District 141, Int'l Assoc. of Machinists and Aerospace Workers*, 378 F.3d 269 (2d Cir. 2004).

As the Court is aware, important duties are entailed in a union's work of negotiating contracts and administering the terms of those contracts to protect the various pressing interests of the members on the job:

> The designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money. The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required. Moreover, in carrying out these duties, the union is obliged fairly and equitably to represent all employees ..., union and nonunion, within the relevant unit.

Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 552-53, 111 S.Ct. 1950, 1976, 114 L.Ed. 2d 572 (1991) (Scalia, J., concurring, in part, and dissenting, in part) (emphasis added) (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 221-22, 97 S.Ct. 1782, 1792-93, 52 L.Ed. 2d 261 (1977) (additional quotations and citations omitted; footnote omitted)).

The financial realities of having to represent non-contributing non-members under the Right-to-Work Law are such that unions will be financially compelled to decline to arbitrate meritorious claims based on cost-related factors. A.R. 115-117 (summarizing evidence of costs that limit a union's ability to arbitrate without agency fees). Indeed, the Supreme Court has

recognized this risk: when a union controls the grievance process, it may, as a practical matter, effectively subordinate "the interests of [an] individual employee . . . to the collective interests of all employees in the bargaining unit." *Alexander v. Gardner-Denver Co.*, 415 U. S. 36, 58, n. 19 (1974); *see Stahulak v. Chicago*, 184 Ill. 2d 176, 180–181, 703 N. E. 2d 44, 46–47 (1998); *Mahoney v. Chicago*, 293 Ill. App. 3d 69, 73–74, 687 N. E. 2d 132, 135–137 (1997) (union has "'discretion to refuse to process'" a grievance, provided it does not act "arbitrar[ily]" or "in bad faith" (emphasis deleted)).

If this Court does not take Justice Alito's indicated direction by clarifying and declaring the appropriateness of representational service fees, several perils will ensue and will impair the associational rights of West Virginians. First, unions might simply elect to pursue fewer cases to arbitration, which in turn suppresses the enforcement of the West Virginia Human Rights Act, W. Va. Code §5-11-1 et seq., and other substantial public policies that may only be enforceable through the binding arbitration agreements under labor contracts. Second, the National Labor Relations Board could move to weaken or reverse the current, judicially-created duty to represent all workers in the bargaining unit equally. *See Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 202–03 (1944); *Furniture Workers Div.*, 291 N.L.R.B. 182, 183 (1988) (noting judge-made origins of duty of fair representation); *Columbus Area Local, Am. Postal Workers Union*, 277 N.L.R.B. 541, 543 (1985); *Int'l Ass'n of Machinists & Aerospace Workers, Local Union No. 697*, 223 N.L.R.B. 832, 835 (1976). If that were to occur, very little in the way of structure or leverage would remain in order to protect the rights of the non-dues-paying members of a bargaining unit.

Courts created the Duty of Fair Representation in order to protect the rights of the minority---in essence, to protect the associational rights of the minority.

In *Steele*, the Court reasoned as follows:

> we think that Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of a craft, to represent the craft, did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority.

Steele at 199.

By pressuring unions to forego the arbitration of grievances in order to save limited funds for the highest-impact forms of collective advocacy that benefit the largest share of union members, the Legislature would be conferring plenary power on the union to sacrifice the rights of the minority for the benefit of some larger group of union members. The duty of fair representation is not necessarily legally sufficient on its own to compel the union to do otherwise. *Cf. Ford Motor Co.* 345 U.S. at 338 ("Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected.") The coerced sacrifice of minority rights is exactly what the freedom of association was intended to guard against. This Court should see this Act for what it is as a menace to the freedom of association.

With several changes that the Legislature could make, the Act might become more protective of associational rights. For instance, the Act could be amended to provide that non-union workers are free to hire private counsel to zealously represent them in arbitration at the expense of those claimants. However, at the present time, the Act cannot survive strict scrutiny in light of the breadth of the preemption of associational rights posed by the Act's total exclusion of a voice for the minority whenever the union decides not to arbitrate a claim.

c. The Decision Below Correctly Balanced the Policies of S.B. 1 with the Substantial Public Policies of other West Virginia Laws

Unions devote formidable resources and professional effort to litigating our employment statutes and developing the principles underpinning the common law of employment in our state. Non-union workers who seek to enforce our employment laws in non-union workplaces also rely on the resources and advocacy of unions to develop and maintain the law via arbitration proceedings. If our employment laws do not remain responsive to present realities---i.e. if unions can't afford professional representatives to pursue meritorious grievances---then those laws will become stale, ineffective, and unresponsive to the needs and interests of workers in both union and non-union workplaces.

It must be noted that, while the "duty of fair representation" does indeed place real financial burdens and obligations on unions, that duty does not prevent the impairment of associational rights because that duty merely prohibits the most extreme misconduct by unions. The duty of fair representation does not compel the union to arbitrate every meritorious grievance. Other parties in this matter have argued that the interests of the public policies aren't impaired since the union has a duty to represent all grievants. However, as noted, there is a very high bar for breaching the duty of fair representation---so much so that a union could forego arbitrating numerous meritorious claims each year and most likely never breach the duty of fair representation. A breach of the duty of fair representation occurs when the Union acts based on improper motivation or in a manner which is arbitrary, perfunctory or inexcusably neglectful. But when unions cannot afford to represent the non-dues-paying members of their bargaining units, they may often have a bona fide, non-discriminatory reason for declining to pursue a grievance.

d. This Honorable Court Should Heed Justice Alito's Guidance in *Janus* by Construing S.B. 1 to Allow Unions to Assess a Limited Transactional Fee for Service Whenever a Non-Dues-Paying Member of a Collective Bargaining Unit

Desires to Use Costly Union Services Such as Receiving Representation in a Grievance.

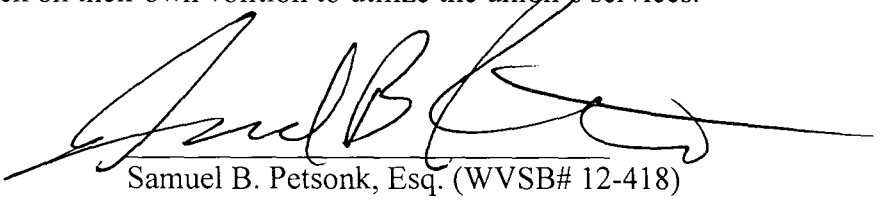
This Court should not construe S.B. 1 to prohibit representational fees that are charged on a limited transactional basis (so-called fee-for-service model for non-dues paying workers in union workplaces). Indeed, the language of the S.B. 1 does not on its face even prohibit such transactional fees. Rather, S.B. 1 only prohibits a more blunt type of universal agency fee if it is charged "as a condition for continuation of employment."

This Court should clarify and declare that unions are not prohibited by S.B. 1 from doing that which the statute does not preclude by its terms. Even if this Court rules that a universal, flat-rate agency fee may be prohibited by the Right-to-Work Law under our Constitution, nevertheless such a prohibition does not, and should not, prohibit unions from requiring, on a transactional basis, the payment of specific representational costs for free riding members who wish to utilize the representation of the union. This Court should find that unions may levy a narrowly-tailored transactional representational fee whenever a non-dues-paying member of a collective bargaining unit wishes to avail himself or herself of union services such as representation in a grievance.

"[A] statute which is facially unconstitutional need not be destroyed, but if possible, such statute should be judicially construed so as to comport with constitutional limitations." *Weaver v. Shaffer*, 170 W.Va. 107, 290 S.E.2d 244, 248 (1980); cited by *Deeds v. Lindsey*, 179 W.Va. 674, 371 S.E.2d 602, 606 (W. Va., 1988). As set forth by Justice Alito, a reasonable fee for representation is appropriate and indeed, in the view of these amici, necessary, in order to protect the fundamental right of workers to associate freely under Article III, §§ 10 and 16 of the West Virginia Constitution.

CONCLUSION

For all of these foregoing reasons, and any others appearing to the Court, we urge that the Court should strike down S.B. 1's ban on agency fees altogether. And in the alternative, we urge that the Court should at least heed Justice Alito's admonition in *Janus* by construing S.B.1 to allow unions to charge representational fees on a transactional basis when non-dues-paying members of a collective bargaining unit seek on their own volition to utilize the union's services.



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