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

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

Petitioner,

v.

WEST VIRGINIA AFL-CIO, ET AL.

Respondents.

SEP _ 3 2021

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OPENING BRIEF OF PETITIONER

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ASSIGNMENT OF ERROR

The Circuit Court of Kanawha County erred in preliminarily enjoining House Bill 2009 of the 2021 Legislative Session. Respondents have not shown that they are likely to succeed on the merits of their claims or that they will suffer irreparable harm if this Court enforces the law as the Legislature wrote it. On the other hand, an injunction *will* irreparably harm both the State and the public interest by unnecessarily delaying implementation of a presumptively valid law.

INTRODUCTION

The Court has now held—twice—that the West Virginia Constitution does not contain any right to collect union dues. This challenge to West Virginia's Paycheck Protection Act implicates similar interests, yet in a context where any harm to Defendants is even *less* than in those earlier cases. The Court should reach the same result here and uphold the law.

Four years ago, this Court held that there was no basis to preliminarily enjoin the 2016 West Virginia Workplace Freedom Act, which prohibited contracts requiring employees to pay union dues. *See Morrisey v. W. Va. AFL-CIO*, 239 W. Va. 633, 804 S.E.2d 883 (2017) ("*Morrisey I*"). Although plaintiff unions had argued that the law would invite non-union members to "free ride" on collective bargaining and other union services, this Court held that concern did not rise to a constitutional level. It then vacated a preliminary injunction order finding otherwise. *Id.* Just last year, the Court doubled down on that analysis and confirmed that the same law did not violate unions' associational rights, property rights, or liberty interests. *See Morrisey v. W. Va. AFL-CIO*, 243 W. Va. 86, 842 S.E.2d 455 (2020) ("*Morrisey II*").

During the 2021 Legislative Session, the West Virginia Legislature enacted House Bill 2009, commonly known as the Paycheck Protection Act ("the Act"). The Act provides that public employers will no longer automatically deduct from public employees' pay any dues or fees that

those employees owe to unions, labor organizations, and clubs. In other words, rather than requiring the State and other public employers to divert a portion of public employees' earnings to these third parties, the covered groups must bill and collect fees directly—like most other organizations and businesses that provide paid services in the State. The Act does not present the "free-rider" problem that animated *Morrisey I* and *Morrisey II*, much less hinder unions from engaging in any constitutionally protected activity. It provides only that public-employee unions cannot enlist the power of the sovereign to help them get paid.

Respondents, various labor unions and two union members, argue that the Act impermissibly forces unions to establish their own payment and collection methods in order to receive member dues without the State's assistance as intermediary. They insist that the Legislature's decision not to continue requiring public employers to do that work on their behalf violates the West Virginia Constitution and will cause them serious and irreparable harm. And they persuaded the circuit court—which (as in *Morrisey I*) erroneously adopted these arguments and preliminarily enjoined the State from enforcing the Act.

Yet to reach this result, the circuit court applied an obsolete federal analysis that justified injunctive relief based almost entirely on Respondents' assertions of irreparable harm. Injury alone, however, is not enough—Respondents must show that they are likely to succeed on their claims, and they are not. *Morrisey I* and *Morrisey II* underscore that unions have no right to collect union dues in a *broader* context. Federal and other state appellate courts too, including the Supreme Court of the United States, have rejected *specific and indistinguishable* constitutional challenges to statutes that disallow automatic payroll deductions of union dues. The circuit court could not and did not meaningfully distinguish any of these authorities.

Nor is likelihood of success—or lack thereof—the only problem with this injunction. Even setting aside the circuit court's myopic focus on the irreparable harm factor, Respondents will not suffer any such injury. Hundreds of entities statewide bill their members or customers directly. Respondent unions can set up their own system to deduct dues from members' bank accounts if they choose, and Respondent union members can opt into a new auto-pay method just as easily as they authorized deductions from their state paychecks—or even just write a check. Lastly, the circuit court underweighted the public's interest in ensuring that the laws its representatives validly enact are not set aside. Properly balanced, the equities favor the State. Just as it did in *Morrisey I* and *Morrisey II*, the Court should reverse and remand.

STATEMENT

I. The Court Holds No Constitutional Right Exists To Collect Union Dues

The Court's decisions in *Morrisey I* and *Morrisey II* provide a crucial backdrop to this appeal. There, labor unions asserted (and the circuit court agreed) that West Virginia's Workplace Freedom Act, otherwise known as the Right to Work law, violated their rights to free speech and association in the West Virginia Constitution. The unions argued that the Right to Work law hampered their ability to recruit and retain members because the status federal law gave them as exclusive bargaining units meant that they would be required to continue representing all employees after the new law—even those who might choose not to pay union dues. *Morrisey II*, 243 W. Va. at 102, 842 S.E.2d at 471. This Court rejected that argument, vacating both the circuit court's preliminary injunction enjoining enforcement of the law and its later judgment in favor of the unions on the merits of their claims. *Id.* at 90-91, 842 S.E.2d at 459-60.

In *Morrisey I*, this Court concluded that the circuit court "abused its discretion in granting a preliminary injunction" because the "unions failed to establish a likelihood of success on the

merits of their three constitutional claims." 239 W. Va. at 642, 804 S.E.2d at 892. In evaluating the critical factor of the unions' likelihood of success on the merits, the Court emphasized that the unions had "not shown a single [right to work law] that has been struck down by an appellate court." *Id.* at 638, 804 S.E.2d at 888. One year later, the Supreme Court of the United States examined an Illinois law requiring public employees to subsidize a union and concluded that such forced subsidization—the very intrusion West Virginia's Workplace Freedom Act also prevents—violated *employees'* constitutional rights under the First Amendment. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps. Council 31*, 138 S. Ct. 2448, 2459-60 (2018). And following the Supreme Court's decision in *Janus*, this Court confirmed its initial reasoning by holding, again, that unions have no constitutional right to collect dues. *Morrisey II*, 243 W. Va. at 109, 842 S.E.2d at 478.

II. The Paycheck Protection Act Ends The Automatic Collection Of Union Dues For Public Employees

The West Virginia Legislature passed the Act, West Virginia Code § 7-5-25, *et seq.*, in March 2021—nine months after this Court's decision conclusively upholding the Workplace Freedom Act and after *Janus*'s warning about the potential for laws governing public-sector union dues to infringe employees' associational and speech rights. Governor James C. Justice, II, signed the Act into law the same month, and it was set to take effect on June 17, 2021.

In short, the Act amends various provisions of the West Virginia Code to prohibit automatic payroll deductions for public-sector employees' dues and fees to unions, labor organizations, and clubs. For instance, the Act modified the definition of "deductions" found in the Wage Payment and Collection Act. That definition now reads:

> 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 any form of insurance offered by an employer: *Provided, That for a public employee, other than a municipal employee covered by a collective bargaining agreement with a*

municipality which is in effect on July 1, 2021, the term "deductions" shall not include any amount for union, labor organization, or club dues or fees.

W. Va. Code § 21-5-1(g) (emphasis added). The Act further amended other provisions pertaining specifically to state employees, municipal workers, and county-education employees. *See* W. Va. Code § 7-5-25 (applying the Act to county officers and employees), § 8-5-12 (applying the Act to municipal employees), §12-3-13b (applying the Act to state employees), and § 18A-4-9 (applying the Act to teachers and school personnel).

As the preamble to the Act explains, one of the law's core purposes is to "protect[] [the] right of employees to participate in unions, labor organizations, and clubs." *See* Preamble, W. Va. HB 2009 (Mar. 19, 2021). The Act accordingly does not alter the way these entities may communicate with members and prospective members, limit the amount of fees or dues they may charge, nor restrict their activities in any way. Rather, it makes clear that public employers in the State of West Virginia will no longer act as intermediaries when it comes to the financial obligations between unions, labor organizations, and clubs and their respective members. The upshot is that the Act places Respondent unions and other covered entities in the same position as countless companies and organizations across the country for which billing members and customers is simply part of their normal operations.

III. Respondents Sue, Insisting That The State Must Collect Dues For Them

Respondents filed a complaint challenging the Act on May 20, 2021, less than a month before the Act's June 17, 2021, effective date. App. 2-92. Along with their complaint, Respondents filed a motion seeking a preliminary injunction. App. 93-176. Respondents claimed in support of the motion that the Act infringes their rights under the West Virginia Constitution to equal protection, free speech and association, and to be free from impairment of existing contracts.

App. 103. Governor Justice, defendant below and Petitioner here, opposed the motion. App. 177-204.

The circuit court held a hearing on Respondents' motion on June 14, 2021. In addition to hearing legal argument on both sides, the court allowed Respondents to present three previously unannounced witnesses. App. 279-330. First, Fred Albert, President of the American Federation of Teachers – West Virginia ("AFT"), testified that removing union dues as an eligible payroll deduction for public employees would "have a devastating impact" on his union. App. 283. Mr. Albert did not detail why he believed this would be the case; indeed, he testified that about 30 percent of union members had already committed to an alternative dues collection method. *Id.* He further explained that his union had identified several methods apart from paycheck deductions to collect members' dues payments, including automatic bank drafts or an automatic credit or debit card deduction platform. App. 291-92. And Mr. Albert acknowledged that AFT has long operated without automatic payroll deductions for a few months each year—the summer months, when schools are not in session and teachers do not receive paychecks. App. 296-97.

Similarly, Elaine Harris, an employee of the Communications Workers of America District 213, App. 312, acknowledged that unions are exploring alternative automatic-deduction dues collection methods, including her own. App. 314-15. She also stressed that union members have always been diligent about paying their dues, and that her union had "never had a problem, to [her] knowledge, of anyone not paying dues." App. 325-26. Ms. Harris did not identify anything in the Act likely to change that longstanding pattern. Quite the opposite: Ms. Harris believed that "there is a desire for [members] to do it"—that is, pay their dues—because members "value[d] the representation and ... also want to meet their obligations." App. 328-29; *see also* App. 329

(testifying that "it's a little offensive to suggest that these honorable men and women would not want to pay [their union dues]").

Finally, Steve Williams, Mayor of Huntington, West Virginia, also testified for Respondents. App. 302. Mayor Williams acknowledged that there will be no immediate change to paycheck deductions for public-sector employees in the City of Huntington under the Act. The Act specifically exempts municipal employees covered by a collective bargaining agreement, W. Va. Code § 8-5-12(c), and the City's current agreements will not expire until July 1, 2022. App. 306-07.

IV. The Circuit Court Enjoins The Act In Its Entirety—But Stays Silent On How This Case Is Different From The Many Similar Cases Before It

Despite testimony that union members were motivated to continue paying their dues and had simple alternate means to do so, and despite the considerable authority in the briefing from courts across the country rejecting the same arguments Respondents raised, the circuit court announced that it intended to issue a preliminary injunction. App. 331. The circuit court stated that Respondents would suffer irreparable harm without an injunction, though it did not explain the specific nature of that harm. *Id.* The circuit court also leaned on its belief that Petitioner and certain members of the West Virginia Legislature had demonstrated their dislike for labor unions. *Id.* Although acknowledging these individuals were "welcome to criticize whomever they please," the court also found the statements to be a relevant part of "judicial scrutiny" when evaluating "a law ... that treats a certain group differently than others." App. 332. The circuit court did not explain how the Act unfairly discriminated between groups, nor make a finding that these statements were egregious enough to enjoin a duly enacted law on the basis of purported animus. Rather, the circuit court noted its view that "the Governor and many members of the Legislature have not hidden their dislike for the labor unions" before summarily concluding that Respondents

had "met their burden of proof with respect to the factors required for this Court to grant a preliminary injunction." App. 331-32.

In a later written order, the circuit court held that the Act "may violate [Respondents'] equal protection[] rights." App. 245. The circuit court also concluded that enforcing the Act may violate Respondents' constitutional rights to free speech, free association, and free, unimpaired contracts; the court worried that the Act could impair members' ability to voluntarily associate with unions and interfere with existing contracts between public employers and unions. *Id.* These issues, the circuit court stated, also gave rise to irreparable harm because of the Act's purported impediment to existing dues collection methods. *Id.* Nevertheless, the circuit court never addressed—let alone distinguished—the dispositive precedent squarely against Respondents' position. The court instead characterized the Act as an outgrowth of anti-union animus and dismissed as illegitimate the State's and the public's interest in the enforcement of validly enacted laws. App. 248. And the circuit court deemed the State's financial and administrative costs from implementing automatic payroll deductions to be exceedingly minimal—while simultaneously concluding that similar administrative burdens posed a threat of irreparable harm to Respondents. App. 249.

V. This Court Grants Expedited Review Of The Decision Below

Petitioner appealed to this Court and moved for a stay in the circuit court. The circuit court denied that motion, again declining to engage meaningfully with the substantial authority supporting the State's position. App. 345-46. The court said only that these precedents were "readily distinguishable jurisdictional caselaw and persuasive—though not binding—federal caselaw." App. 345. As for the public interest considerations, the court stated that it would "not ignore its other obligations under state and federal law to ensure that those laws are just and

constitutional." *Id.* The circuit court also faulted the State for relying on "legal arguments" (rather than witnesses) about the harms stemming from the injunction. *Id.*

Following the circuit court's denial of the motion for stay, the State moved this Court for a stay of the preliminary injunction order. On August 19, 2021, this Court deferred consideration of that request, but ordered the appeal to proceed under an expedited briefing schedule and scheduled argument under Rule 20 of the Rules of Appellate Procedure. *See* Aug. 19, 2021, *Scheduling Order*.

SUMMARY OF ARGUMENT

Respondents won a preliminary injunction of the Act based on the incorrect premise that unions are constitutionally entitled to receive dues through automatic payroll deductions. The circuit court's order impermissibly prevented the Act's implementation on the timetable the Legislature mandated, causing irreparable harm to the State and sowing confusion among public employees, unions, and public employers about the appropriate method for members to pay their union, labor organization, and club dues. The Court should reverse.

I. The circuit court preliminarily enjoined the Act by relying on a now-defunct federal standard. That standard required plaintiffs to raise only "serious, substantial, difficult, [or] doubtful" constitutional questions to enjoin a law as long as they first showed likelihood of irreparable harm. App. 246. That is not enough. No matter what harm plaintiffs may claim, they must establish a likelihood of success on the merits before a court should employ its extraordinary injunctive powers—especially when an injunction directly interferes with governmental functions and statutes that are presumed constitutional.

II. Respondents have failed to show that they are entitled to injunctive relief under the correct standard.

A.1. Respondents cannot demonstrate likelihood of success that the Act violates their equal-protection rights guaranteed by the West Virginia Constitution. In deciding otherwise, the circuit court ignored numerous decisions from federal and state appellate courts—including a decision directly on point from the U.S. Supreme Court—in which equal-protection challenges failed against laws materially identical to the Act. The circuit court likewise erred in concluding that the Act was borne of legislative animus. Respondents have not demonstrated that the Act's passage reflects anything more than an ordinary and legitimate (albeit contested) policy decision.

A.2. Respondents likewise cannot demonstrate likelihood of success that the Act violates their free speech and associational rights. The Act does not impose any restrictions on public employees' rights to join a union, labor organization, or club, nor on any union's right to recruit and retain members. The circuit court again ignored precedent on this point—this time from *this* Court—upholding the greater burdens of the Workplace Freedom Act's prohibition on collecting union dues as a condition of employment. That precedent drives the analysis here, too, and defeats Respondents' speech and associational claims.

A.3. And Respondents cannot demonstrate likelihood of success that the Act violates the Contract Clause of the West Virginia Constitution. Respondents have failed to identify any specific contracts that the Act will allegedly impair. Even doing Respondents' work for them and assuming that such contracts exist, Respondents still failed to show that the Act would substantially and unreasonably interfere with them.

B. Respondents' failure to establish that their claims are likely to succeed is reason enough to reverse, but the circuit court's analysis of the harms was flawed, too. The circuit court erred by taking at face-value Respondents' contention that enforcing the Act would lead to a widespread delinquency of union dues, thereby causing catastrophic financial consequences for public-sector

unions. Respondents certainly did not provide evidence that this speculative harm would be irremediable and irreparable; if anything, their evidence established just the opposite.

C. The circuit court likewise failed to give appropriate weight to the irreparable harm to the State and the public when courts enjoin duly enacted laws. Contrary to the circuit court's skepticism, substantial authority underscores the importance of the public's interest in seeing that the laws its representatives enact are enforced.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Court has already set this case for argument on October 26, 2021, under Rule 20 of the West Virginia Rules of Appellate Procedure.

STANDARD OF REVIEW

This Court applies "a three-pronged deferential standard of review" when reviewing "the exceptions to the findings of fact and conclusions of law supporting the granting of a temporary or preliminary injunction." Syl. pt. 1, *State ex rel. McGraw v. Imperial Mktg.*, 196 W. Va. 346, 472 S.E.2d 792 (1996). In particular, the Court reviews "the final order granting the temporary injunction and the ultimate disposition under an abuse of discretion standard," "the circuit court's underlying factual findings under a clearly erroneous standard," and "questions of law de novo." *Id.*

ARGUMENT

I. The Circuit Court Improperly Applied An Abrogated Legal Standard When Granting The Preliminary Injunction.

The circuit court applied an incorrect and overruled standard in reaching its decision to grant Respondents a preliminary injunction. App. 246. That standard overlooks just how important it is for a plaintiff to establish that his or her claims are likely to succeed before obtaining

preliminary relief—especially in cases where the plaintiff seeks to set aside a statute. Specifically, the circuit court determined that

> [t]he first step is to balance the likelihood of irreparable harm to Petitioners against the likelihood of harm to Respondent, and if a decided imbalance of hardship should appear in Petitioners' favor, the likelihood-of-success standard is replaced by one that considers whether the Petitioners have raised questions going to the merits that are serious, substantial, difficult, and doubtful as to make them fair ground for litigation and, thus, for more deliberate investigation.

Id. (quoting *Blackwelder Furniture Co. v. Seilig*, 550 F.2d 189, 195 (4th Cir. 1997)). The circuit court then concluded that, "[b]ecause the Petitioners bear such an imbalance of the hardships in this case, the inquiry on the merits need only be to determine whether the 'plaintiff[s] ha[ve] raised questions going to the merits so serious, substantial, difficult, and doubtful, as to make them fair ground for litigation and, thus, for more deliberate investigation.'" *Id.* (citation omitted).

There are two key problems with the *Blackwelder* test: It does not require plaintiffs to show likelihood of success on the merits, and it treats the balance of harms as the most important factor in the preliminary-injunction analysis. And there is no question these are flaws, as *Blackwelder* is a federal case, and the Supreme Court and the Fourth Circuit both abrogated its test over a decade ago. In *Winter v. Natural Resources Defense Counsel, Inc.*, 555 U.S. 7 (2008), the Supreme Court held that a movant must establish a likelihood of success on the merits for the issuance of a preliminary injunction *in addition to* a likelihood of irreparable injury. *Id.* at 20-21. After *Winter*, the Fourth Circuit expressly overruled *Blackwelder* because it stood "in fatal tension with ... *Winter*," which the court understood requires a "plaintiff [to] clearly demonstrate that it will *likely* succeed on the merits." *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346–47 (4th Cir. 2009) (emphasis added).

More problematic for this state-law case, *this* Court's precedents dictate a test consistent with *Winter*, not *Blackwelder*. In *Morrisey I*, the Court held that the circuit court abused its

discretion by issuing a preliminary injunction "[i]n the absence of a likelihood of success on the merits"—the same error the court below made here. 239 W. Va. at 642, 804 S.E.2d at 892. One of the concurring justices even addressed *Blackwelder* head on, explaining why it is an "out-dated standard" and commenting that a circuit court's decision to use that standard "to enjoin a presumptively constitutional enactment" was "unseemly, at best." *Id.* at 645-46, 804 S.E.2d at 895-96 (Loughry, C.J., concurring). Nor was *Morrisey I*'s approach an outlier: The Court routinely treats likelihood of success on the merits as a prerequisite for a preliminary injunction. *See, e.g.*, *Martin v. Unsafe Bldgs. Comm'n of Huntington*, No. 18-0778, 2020 WL 261738 (W. Va. Jan. 17)(memorandum decision) (affirming denial of a preliminary injunction where the petitioner did not establish a likelihood of success on the merits).

Further, the circuit court did not mistakenly apply *Blackwelder*'s now-invalid legal standard; it did so willfully and without explanation. The court explicitly acknowledged that the standard has been abrogated and even cited the correct test, App. 247 & n.3, yet went on to apply *Blackwelder* anyway. App. 245. Further, the lower court's fleeting references to "likelihood of success," App. 246, cannot salvage its approach. At most the court paid lip service to the correct standard; by treating potential irreparable harm as the first and most important factor and then considering only whether the Act "may" present constitutional issues, App. 245, its analysis is firmly grounded in obsolete law.

This legal error is reviewed *do novo*, and because it shaped the rest of the circuit court's approach it infected everything in the analysis that followed. The Court could reverse on this basis alone. In any event, it need not show any deference to the circuit court's misguided decision.

II. Respondents Failed To Meet Any Of The Requirements For Issuance Of A Preliminary Injunction.

As the parties seeking the injunction, Respondents bear the burden of proof to justify it. *See Camden-Clark Mem'l Hosp. Corp. v. Turner*, 212 W. Va. 752, 760, 575 S.E.2d 362, 370 (2002). And under the correct standard, a circuit court must consider four factors when deciding 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." *Morrisey I*, 239 W. Va. at 638, 804 S.E.2d at 888 (quotation omitted). All four factors are important, but as explained above, absence of the first is fatal. This is also a deliberately demanding test, especially in cases involving state laws: "As a general rule[,] equity ... will not interfere by injunction with the duties of any department of the government except under special circumstances and when necessary to the protection of property or other rights against irreparable injury." *Backus v. Abbott*, 136 W. Va. 891, 900, 69 S.E.2d 48, 53 (1952). Because Respondents failed to satisfy any of these requirements, the Court should reverse.

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

This Court has left no doubt: Court "*must* consider ... plaintiffs' likelihood of success on the merits." *Hart v. Nat'l Collegiate Athletic Ass'n*, 209 W. Va. 543, 547-48, 550 S.E.2d 79, 83-84 (2001) (quoting *Jefferson Cnty. Bd. of Educ. v. Jefferson Cnty. Educ. Ass'n*, 183 W. Va. 15, 24, 393 S.E.2d 653, 662 (1990)). The likelihood-of-success factor is a particularly high bar in cases attacking state statutes, as here, because "there is a presumption of constitutionality with regard to legislation." Syl. pt. 6, *Gibson v. W. Va. Dept. of Hwys.*, 185 W. Va. 214, 406 S.E.2d 440 (1991). Indeed, "any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question," syl. pt. 1, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740,

143 S.E.2d 351 (1965), which means a successful plaintiff must show likelihood of unconstitutionality "beyond a reasonable doubt," *Morrisey I*, 239 W. Va. at 638, 804 S.E.2d 888. Respondents failed to make an adequate showing on the merits under this standard—or even under the circuit court's more permissive approach, for that matter. Instead, just as in *Morrisey I*, the circuit court "abused its discretion in granting a preliminary injunction" because the "unions failed to establish a likelihood of success on the merits." *Id.* at 642, 804 S.E.2d at 892.

1. The Circuit Court Erroneously Concluded That Respondents Are Likely To Succeed On Their Equal Protection Claim.

Respondents are exceedingly *un*likely to prove beyond a reasonable doubt that the Act violates the West Virginia Constitution's equal protection guarantee. Article III, Section 3 provides, in relevant part, that "[g]overnment is instituted for the common benefit, protection and security of the people, nation or community." W. Va. CONST. art. III, § 3; *see also United Mine Workers of Am. Int'l Union by Trumka v. Parsons*, 172 W. Va. 386, 398, 305 S.E.2d 343, 354 (1983) (characterizing this provision as an equal protection clause). Article III, Section 10 mandates that "[n]o 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; *see also Appalachian Power Co. v. State Tax Dep't*, 195 W. Va. 573, 594, 466 S.E.3d 424, 445 (1995) ("[This provision] incorporates the right to equal protection."). The circuit court misapplied these equal protection provisions to the Act in several critical ways.

First, the circuit court ignored a wealth of caselaw from federal and state appellate courts across the country that have uniformly upheld laws nearly identical to the Act against constitutional equal protection challenges. The fact Respondents brought this case under the West Virginia Constitution is no reason to cast this precedent aside. Article III, sections 3 and 10 do not single out unions or union members for special protection, and this Court evaluates state equal

protection claims consistent with federal jurisprudence. *See, e.g., Israel v. W. Va. Secondary Schs. Activities Comm'n,* 182 W. Va. 454, 462, 388 S.E.2d 480, 487 (1989) (adopting United States Supreme Court's analysis when evaluating gender-based discrimination claims). Even the circuit court tacitly confirmed the relevance of federal authority—while it elided the most directly on-point authorities, it repeatedly relied on *other* federal cases in its analysis. App. 238-74. In short, many courts have rejected constitutional challenges materially identical to Respondents', and those courts' analyses are fully persuasive here.

To begin, the Supreme Court of the United States dispensed with a near-identical claim in *City of Charlotte v. Local 660, International Association of Firefighters*, 426 U.S. 283 (1976). Like West Virginia here, the City of Charlotte allowed paycheck "withholding[s] for taxes, retirement-insurance programs, savings programs, and certain charitable organizations," yet disallowed deductions for firefighters' union dues. *Id.* at 284, 287. The Court began by rejecting the argument that "respondents' status as union members or their interest in obtaining a dues checkoff" would "entitle them to special treatment under the Equal Protection Clause." *Id.* at 286. Instead, the Court evaluated the City's choice of what withholdings to include—or not—under "only a relatively relaxed standard of reasonableness." *Id.* The City cleared that hurdle easily: Its decision reflected "a reasonable method for providing the benefit of withholding to employees in their status as employees, while limiting the number of instances of withholding and [the] financial and administrative burdens" that would follow if the list were extended too broadly. *Id.* at 288. In other words, the Supreme Court held that it is constitutionally reasonable for governments to limit paycheck withholdings based on the same "financial and administrative burdens" that the circuit court rejected out of hand in this case as *de minimis*. App. 248-49.

The Eighth Circuit applied *Charlotte* to reject similar equal protection claims as well. There, the Arkansas law at issue prohibited union dues payroll deductions even while allowing the government to "withhold items other than union dues." *Ark. State Highway Emp. Local 1315 v. Kell*, 628 F.2d 1099, 1102-04 (8th Cir. 1980). As Respondents do here, the *Kell* plaintiffs claimed the law's disparate treatment "constitute[d] discriminatory conduct in violation of the Equal Protection Clause." *Id.* The plaintiffs also tried to distinguish *Charlotte* by arguing that Arkansas had "refused to continue withholding dues for the purpose of impairing the union," and that any other justifications were "pretextual." *Id.* at 1103. The Eighth Circuit, however, held that *Charlotte* "made clear" that plaintiffs' claim was subject to "relaxed, reasonableness" review, which the Arkansas law satisfied—regardless of plaintiffs' aspersions of the intent behind it. *Id.* at 1103-04.

The U.S. Supreme Court and the Eighth Circuit do not stand alone. The Fourth Circuit, for instance, rejected First Amendment and equal protection challenges to a prohibition on payroll deductions for union dues that allowed deductions for charities, based on the common-sense idea that equal protection does not create an "affirmative obligation ... to assist [the union] by providing payroll deduction services." *S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1257, 1263-64 (4th Cir. 1989). The Sixth Circuit has held similarly, for similar reasons—more than once. *See Bailey v. Callaghan*, 715 F.3d 956, 960 (6th Cir. 2013) (rejecting First Amendment and equal protection challenges to Michigan statute prohibiting school payroll deductions for union dues); *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 319, 322 (6th Cir. 1998) (holding ban on payroll deduction for union political contributions does not violate First Amendment and Equal Protection Clause). State courts have too. *See Iowa State Educ. Ass'n v. State*, 928 N.W.2d 11, 18 (Iowa 2019) (rejecting an equal protection claim arising from challenge to an amendment to the Iowa

Constitution disallowing payroll deductions for union dues); *W. Cent. Mo. Reg'l Lodge No. 50 v. Bd. of Police Comm'rs*, 916 S.W.2d 889, 892-93 (Mo. Ct. App. 1996) (rejecting equal protection challenge to city's policy allowing payroll deductions for United Way and the Kansas City Police Credit Union, but not unions).

All these cases address equal-protection challenges attacking the same type of prohibition on union payroll deductions the Legislature enacted here. *In every one*, the courts found nothing constitutionally suspect about removing the State as an intermediary for the payment of union dues. Yet the circuit court did not even attempt to distinguish these reasoned and on-point decisions—it simply ignored them. This Court should correct that error.

Second, traditional equal-protection analysis readily confirms the courts' unanimous agreement. The Act is not subject to heightened scrutiny because there is no constitutional right to paycheck deductions for union dues. *See Pizza*, 154 F.3d at 321-22 (holding that the "parties have no constitutional right to checkoffs"). And because the Act does not affect any other fundamental right or suspect class—even the circuit court did not suggest it does—it must only be rationally related to a legitimate state interest. *See Kyriais v. Univ. of W. Va., et al.*, 192 W. Va. 60, 67, 450 S.E.2d 649, 656 (1994).

The Act presents no equal-protection concern under rational basis review. The burden for establishing the legitimacy of a legislative act is modest; "any *conceivable* legitimate governmental interest will do." *Bailey*, 715 F.3d at 960 (citation omitted). "In other words, a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). Even if a court worries a particular law is "needless" or "wasteful," that subjective

assessment will not defeat the law under the rational basis test. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955).

Here, the State has a legitimate interest in avoiding the slippery slope of providing automatic payroll deductions for any purpose that an employee requests. *See Charlotte*, 426 U.S. at 286-87 (finding that interest in "avoiding the burden of withholding money for all persons or organizations that request a checkoff" satisfies reasonableness standard and thus survives constitutional scrutiny). The Legislature must draw the line somewhere, after all, and avoiding the costs and administrative burdens from an overly expansive list is a rational goal. *Id.* It is also rational for the State to extricate itself from a position as intermediary between union and union members given the U.S. Supreme Court's admonishment about the potential for violating *employees'* constitutional rights if the State missteps. In *Janus*, the Court not only held that requiring public employees to subsidize a union violates nonmembers' First Amendment rights, but emphasized the importance of ensuring that the employees who do choose to pay union dues give knowing and affirmative consent. 138 S. Ct. at 2459-60. With employees' rights at stake, it is not irrational for the State to decide to get out of the game altogether.

Third, there is no merit to the circuit court's concern that the Legislature treated similarly situated entities—labor organizations and non-labor-related entities—unequally. The circuit court relied on federal *district* court cases, App. 263, yet ignored the appellate decisions discussed above upholding challenges to statutes virtually identical to the Act. The laws at issue in *Charlotte* and the Fourth Circuit's decision, for instance, allowed deductions for certain charities and non-profits but not unions—similar distinctions to those the Legislature drew here. *Compare* W. Va. Code § 21-5-1(g), *with Charlotte*, 426 U.S. at 288; *Campbell*, 833 F.2d at 1255. And the cases on which the circuit court relied are readily distinguishable. For example, the circuit court looked to a

decision from the Western District of Tennessee examining a statute that required deducting union dues for firefighters in some counties but not others. *Int'l Ass'n of Firefighters Loc. 3858 v. City of Germantown*, 98 F. Supp. 939, 948 (W.D. Tenn. 2000) (cited at App. 263). The circuit court also relied on a Northern District of Georgia decision examining a practice that denied payroll deductions for police union dues but allowed deductions for firefighter union dues. *Truck Drivers & Helpers Loc. 728 v. City of Atlanta*, 468 F. Supp. 620, 623 (M.D. Ga. 1979) (cited at App. 263). But these decisions are of no moment because they involved different and unjustified treatment among similarly situated *unions*—the Act treats all unions the same.

To be sure, the circuit court relied on some decisions from courts of appeals, but they are also readily distinguishable. In contrast to the decisions above that address statutes disallowing deductions for union dues, the decisions the circuit court cited cover a range of unrelated topics—the denial of tax benefits to a veteran because of his membership in a group that advocated the overthrow of government, eligibility for welfare benefits, and indigent access to nonemergency medical care. *See* App. 254-58 (citing *Speiser v. Randall*, 357 U.S. 513 (1958); *Shapiro v. Thompson*, 394 U.S. 618 (1969); and *Mem. Hosp. v. Maricopa Cty.*, 415 U.S. 330 (1972)). The cases do not discuss the specific factors present here, nor purport to question or overrule any of the decisions that do.

The circuit court also erroneously concluded that the Act discriminates between employees with collective bargaining agreements and those without. App. 263. The Act's general provisions are specifically tailored to ensure equal treatment of all unions, labor organizations, and clubs; the law also provides a limited grace period for municipalities with existing collective bargaining agreements that provide for paycheck deductions. *Id.* The circuit court offered no support for the idea that drawing *temporary* distinctions between entities with collective bargaining agreements

and those without violates equal protection—to the contrary, it supports the reasonable legislative goal of minimizing precisely the type of contract interference concerns Respondents raise elsewhere.

Fourth, the circuit court was wrong that the Act is infected with unconstitutional animus toward public-sector unions. This argument begins from the assumption that unions will lose money if the State stops processing paycheck deductions and unions must bill members directly; a dubious proposition, as explained more below. Even assuming it has some validity, though, nothing in the record supports finding animus here.

Animus is a high standard to displace the ordinary equal protection analysis—the only explanation for the law must be a desire to target specific entities or individuals for disfavored treatment. In *Romer v. Evans*, 517 U.S. 620 (1996), for example, the Supreme Court held a law was improperly motivated by animus where voters adopted a state constitutional amendment prohibiting state or local governments from passing legislation to protect persons based on their sexual orientation. The Court could discern *no* legitimate reason for the challenged amendment, and the law was "inexplicable by anything but animus." *Id.* at 632; *see also Hearne v. Bd. of Educ. of City of Chicago*, 185 F.3d 770, 775 (7th Cir. 1999) (explaining that legislation does not become "constitutionally defective because one of the reasons the legislators voted for it was to punish those who opposed them during an election campaign"). Here, however, the Act emphasizes that its purpose is to support and sustain unions, *See* Preamble, W. Va. HB 2009 (Mar. 19, 2021), and the State has offered legitimate and non-discriminatory justifications for the Act that reviewing courts "must accept" under rational-basis review. *Trump v. Hawaii*, 138 S. Ct. 2392, 2421 (2018); *see also Kell*, 628 F.2d at 1102-04 (applying "relaxed, reasonableness" standard even where plaintiffs argued the law's "purpose" was to "impair[] the union").

The "evidence" on which the circuit court relied is not to the contrary. For example, the court cited comments Petitioner made about teachers and educational policy during the COVID pandemic—statements about vaccinations for West Virginia teachers, decisions about school closures, and comments about remote education. App. 260. None of these comments reflects an intent to harm public-sector unions and the record shows no connection between these general statements and Petitioner's decision to sign the Act. The circuit court also took into account *other legislation* concerning charter schools, educational savings accounts, and the rules regarding public-employee work stoppages. In the court's eyes, this legislative slate amounted to "attacks" on public education employees sufficient to infer that animus was the driving force behind an entirely separate Act. App. 261. Yet there are several steps missing between passing education-related laws and deliberately and improperly trying to defund public-sector unions through a mechanism like the Act. What this mode of analysis actually betrays is the circuit court's own policy preferences: There is a lively debate in this State (and nationwide) whether policies like these promote or hinder the quality of public education. Challenging a law "based on [a] perception of [its] effectiveness and wisdom" is not enough to sustain an animus charge. *See Trump*, 138 S. Ct. at 2421. This Court is clear that even where laws "are harsh or even cruel," "under our constitutional framework" the Legislature's policy decisions "are its own." *State ex. rel. Beirne v. Smith*, 214 W. Va. 771, 779, 591 S.E.2d 329, 337 (2003) (quotation omitted).

Much more is needed to invalidate a presumptively constitutional law than baseless speculation that some lawmakers harbored ill-will toward some public-sector unions. Together with the wealth of authority against their position, this failing makes it virtually certain Respondents will not be able to prove their equal protection claim beyond a reasonable doubt.

2. The Circuit Court Erroneously Concluded That Respondents Are Likely To Succeed On Their Free Speech And Associational Rights Claim.

Respondents also cannot meet their burden to show likelihood of success proving that the Act violates their free speech and associational rights. Article III, sections 7 and 16 of the West Virginia Constitution state:

> No law abridging the freedom of speech, or of the press, shall be passed; but the Legislature may, by suitable penalties, restrain the publication or sale of obscene books, papers, or pictures, and provide for the punishment of libel, and defamation of character, and for the recovery, in civil actions, by the aggrieved party, of suitable damages for such libel, or defamation.
>
> . . .
>
> 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, §§ 7, 16.

The circuit court erred in finding any viability to Respondents' claims under these provisions.

Once again, precedent is squarely on the State's side. Federal appellate courts have rejected speech and associational claims in the precise context at issue here. The Sixth Circuit, for instance, emphasized that there is "no constitutional right to checkoffs"—and thus "it cannot be said that the state has impinged in any way on the First Amendment rights of public employees and their unions by prohibiting public employers (in effect, itself) from administering checkoffs." *Pizza*, 154 F.3d at 321-22; *see also Bailey*, 715 F.3d at 960 ("[T]he Act merely directs one kind of public employer to use its resources for its core mission rather than for the collection of union dues. That is not a First Amendment concern."). As with the equal-protection analysis, the circuit court's order does not distinguish this authority, either.

Worse still, the circuit court ignored this Court's recent opinions in *Morrisey I* and *Morrisey II*—which held in an appeal from a preliminary injunction (as here), then again on appeal

from final judgement, that prohibiting collection of union dues as a condition of employment does "not violate any right of association under art. III, sections 7 and 16 of the West Virginia Constitution." Syl. pt. 1, *Morrisey II*, 243 W. Va. 86, 842 S.E.2d 455; *see also Morrisey I*, 239 W. Va. 633, 804 S.E.2d 883. Critically, the Court held that "the circuit court's reliance upon Civil-Rights era cases in finding an infringement upon the Labor Unions' claimed association rights under the circumstances presented in this matter is misplaced." *Morrisey II*, 243 W. Va. at 106, 842 S.E.2d at 475. Yet not only did the circuit court fail to cite or attempt to distinguish the *Morrisey* cases, the court built its analysis on *the very same Civil-Rights era cases* this Court found inapposite when rejecting arguably stronger constitutional claims. *Compare* App. 267-70 (citing, *e.g.*, *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449 (1958); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *Shelton v. Tucker*, 364 U.S. 479 (1960)), *with Morrisey II*, 243 W. Va. at 106, 842 S.E.2d at 475 (rejecting circuit court's reliance on same cases). The circuit court thus committed the same analytic error the Court corrected in *Morrisey I* and *II*.

If anything, there is even less justification for that error here: If it is constitutionally sound to prohibit collecting dues from nonconsenting employees *at all*—even where unions will have to provide some services to those employees for free—it is difficult to see how removing one *method* by which unions may collect dues is any different. The circuit court disagreed by characterizing the Act as an "attack" on union dues that "imposes every bit as much of a burden on [unions'] ability to function" as the "disclosure requirements in the NAACP cases." App. 272. This is a stunning comparison. One such "NAACP case," *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), involved a law that required a civil-rights organization to reveal the identities of all its members in a time of supercharged racial conflict. That disclosure would have had serious and life-altering consequences for the NAACP's members; evidence established that it would have

"exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* at 462. The Supreme Court appropriately concluded that likelihood of such grave harms could dissuade people from joining the NAACP altogether. *Id.* at 462-43. In contrast, Respondents suggest that they may have to divert resources to pursue dues payment from members directly, and potentially adjust programing in the event collections go down. App. 103 These are the same "burdens" that any voluntary organization faces when collecting fees; they are categorically different from the life-or-death burdens at stake in the Civil Rights cases—much less "every bit" as dangerous.

In reality, the Act does nothing to restrict or otherwise infringe associational and speech rights. It does not hinder employees' or unions' rights to speak freely or to associate with any union (or other organization for that matter) of their choice. Again: the Act merely removes the State as an intermediary in the collection process for union, labor organization, and club dues. Unions remain free to recruit and retain members and to provide any services they choose. Far from operating as a broadside attack on unions, in fact, the Act includes a rule-of-construction provision specifically designed to avoid any potential limits on union and employee rights. *See* W. Va. Code § 21-5-3(g) ("Nothing in this chapter shall be construed to interfere with the right of an employee to join, become a member of, contribute to, donate to, or pay dues or fees to a union, labor organization, or club."); *see also West Virginia Legislative Coverage,* The West Virginia Channel (Mar. 16, 2021), https://www.youtube.com/watch?v=_1za4vHgElY (approx. 44:00-48:00; statement of the Senate Chairman of the Judiciary explaining this provision).

Nonetheless, the circuit court erroneously concluded that the Act would hamper unions' ability to maintain an ongoing money flow, and thus limit their ability to recruit and retain members and engage in expressive activity. But even assuming these harms are likely, they are

not *constitutional* injuries. The U.S. Supreme Court, for example, has rejected challenges to laws that merely "tend[] to impair or undermine ... the effectiveness of the union." *Smith v. Ark. State Hwy. Emp., Local 1315*, 441 U.S. 463, 465–66 (1979). At most, this is all the Act might do. Further, there is no constitutional right to help from the State in conducting a union's day-to-day operations: The "legislature's decision not to subsidize the exercise of a ... right does not infringe the right." *Morrisey I*, 239 W. Va. at 644, 804 S.E.2d at 894 (quotation omitted); *see also, e.g.*, syl. pt. 1, *Morrisey II*, 243 W. Va. 86, 842 S.E.2d 455 (same); *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 549–50 (1983) (holding that "the Constitution 'does not confer an entitlement to such funds as may be necessary to realize all the advantages'" of speech and associational rights (quoting *Harris v. McRae*, 448 U.S. 297, 318 (1983))).

At bottom, Respondents are not challenging a law that stops unions or their members from speaking as they choose or associating with whomever they like. They are challenging the State's decision to stop providing a special service that the West Virginia Constitution never required it to offer in the first place. The circuit court provided no support for its apparent conclusion that once the Legislature goes beyond the constitutional floor it must forever continue expending the State's resources to benefit those same entities. Because there is none, and such a rule would lead to untenable results, the Court should reverse.

3. The Circuit Court Erroneously Concluded That Respondents Are Likely To Prevail On Their Contract Clause Claim.

Respondents also failed to show that they are likely to succeed on their claim that the Act violates Article III, Section 4 of the West Virginia Constitution, commonly known as the Contract Clause. That provision states that "[n]o bill of attainder, ex post facto law, or law impairing the obligation of a contract, shall be passed." W. Va. Const. art. III, § 4. As with their two preceding claims, Respondents' Contract Clause challenge fails for several independent reasons.

This Court undertakes a three-step test to determine if a legislative act violates the Contract Clause:

> The initial inquiry is whether the statute has substantially impaired the 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.

Shell v. Metro. Life Ins. Co., 181 W. Va. 16, 17, 380 S.E.2d 183, 184 (1989).

Respondents cannot succeed under this test; *first*, they have not identified any contracts that might be impaired—let alone "substantially." In support of their preliminary injunction motion, Respondents provided six unsigned documents as examples of purported contracts the Act allegedly impairs. App. 153-64. One of these documents is a Memorandum of Agreement between the Wayne County Board of Education, the West Virginia School Service Personnel Association, and the West Virginia Education Association; it outlines the terms of employment for school bus drivers. App. 153-59. The remaining five documents are unsigned form applications for membership in various unions. App. 160-64. Yet none are valid contracts on their face. A contract consists of "an offer and an acceptance supported by consideration." *Dan Ryan Builders, Inc. v. Nelson*, 230 W. Va. 281, 287, 737 S.E.2d 550, 556 (2012) (citation omitted). And "to be effective, an acceptance of a contractual offer must be unequivocal." *John D. Stump & Assoc., Inc. v. Cunningham Mem'l Park, Inc.*, 187 W. Va. 438, 444, 419 S.E.2d 699, 705 (1992) (citation omitted). There is no need to parse the six documents' terms for every requisite element because none of them are signed. Respondents have thus failed to provide elementary evidence of

acceptance—or in other words, they have not shown that the template documents were ever used to enter into binding agreements between specific, identifiable parties.

The "contracts" are also insufficient to support Respondents' claim because—even in their template forms—they do not involve the parties with authority to enter into binding agreements concerning payroll deductions for union fees. The five membership applications are form agreements between a union and an employee. These parties can make many promises to each other; a commitment to deduct union fees from the employee's paycheck is not one of them. Because the Act directs public-sector *employers* not to deduct certain dues or fees from public employees' paychecks, it accordingly does not interfere with any right that could exist in an agreement between employees and their *union*.

Potential agreements between a union and an employer, such as the Memorandum of Agreement, are likewise insufficient. At most, these parties can agree to perform automatic payroll deductions *if* an employee authorizes them. Even assuming the Memorandum of Agreement is a valid contract, then, the Act would not impair any duties the parties owed to each other under it—at least without separate evidence of employee authorization that is missing from the record here. Additionally, this agreement expressly contemplates that West Virginia law will shape its terms: It provides that "West Virginia Code shall be the controlling authority regarding conditions of employment." App. 153. Thus, the Memorandum of Agreement subjects any potential contractual terms to relevant West Virginia law, including a law like the Act making certain tasks legally impossible to perform.

In sum, Respondents fail to point to any legally binding contracts, much less ones between the parties capable of administering and consenting to payroll deductions. The Act cannot interfere

with any duties related to the (hypothetical, fully executed) Memorandum of Agreement or membership applications because these documents fail to describe any duties relevant to the Act.

Second, the Act would not impermissibly interfere with these documents even if they were valid contracts. Far from "substantial" impairment, the Act calls at most for "minimal alteration." *State ex rel. W. Va. Reg'l Jail & Corr. Facility Auth. v. W. Va. Inv. Mgm't Bd.*, 203 W. Va. 413, 508 S.E.2d 130, 134 (1998). After all, even in the circuit court's view, the Act does not fundamentally change the relationship between employers, employees, and unions. *See* App. 265 (explaining that the Act would purportedly affect existing agreements only with respect to provisions calling for automatic deductions). The Act says nothing about pay, working conditions, grievance-resolution methods, or any of the dozens of other provisions that are frequently central to collective bargaining agreements or other contracts involving unions and employees. Nor does the Act regulate whether or how much unions may charge their members in dues. It simply closes off a single, state-facilitated mechanism for paying the fees unions set.

The Act also satisfies the remaining steps in the *Shell* analysis—which consider the challenged legislation's "purpose" and whether any "adjustment of the rights and responsibilities of contracting parties" is "reasonable ... and appropriate to the public purpose justifying the legislation's adoption." *Shell*, 181 W. Va. at 17, 380 S.E.2d at 184. This Court recognizes that the State has a "sovereign right" to protect the general welfare, such that even "impairment[s] of contract within the constitutional prohibition" can be sustained where a "public concern" for that welfare drives the offending legislation. *See Orr v. Cty. Comm'n of Cabell Cty.*, 178 W. Va. 276, 279, 359 S.E.2d 109, 112 (1987). And the touchstone under this framework is reasonableness. *Shell,* 181 W. Va. at 17, 380 S.E.2d at 184. As a result, when private parties "contract about matters that are subject to state regulation, [they] suffer no constitutional impairment of contractual

obligations when the legislature *reasonably* changes the regulations through its police power." Syl. pt. 5, *Sec. Nat. Bank & Tr. Co. v. First W. Va. Bancorp., Inc.*, 166 W. Va. 775, 277 S.E.2d 613 (1981). It is also enough to satisfy this test—and thus defeat a claim of "violation of the contract clause"—where "parties were on notice about the possibility of future regulation." *Id.* at 781, 277 S.E.2d at 616.

Further, *Shell* explained that when construing the Contract Clause, the Court has "generally accepted the United States Supreme Court's interpretation of the similar provision contained in Article I, Section 10, Clause 1 of the United States Constitution." Syl. pt. 1, 181 W. Va. 16, 380 S.E.2d 183. And in that vein, the Supreme Court has similarly emphasized that the test for abridging contracts is not whether the legislation has the effect of modifying existing contracts *at all*—otherwise legislatures would be disabled from doing their jobs because almost any law could be at risk. Rather, "the state ... continues to possess authority to safeguard the vital interests of its people," and "[i]t does not matter that legislation appropriate to that end has the result of modifying or abrogating contracts already in effect." *City of El Paso v. Simmons*, 379 U.S. 497, 508 (1965); *see also Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 447 (1934) (explaining that the "contract clause is not an absolute and utterly unqualified restriction of the state's protective power").

The Act clears the "reasonablencss" bar because, as explained above, there are legitimate and rationale purposes supporting the Legislature's decision to remove the State as an intermediary for payment of union, labor organization, and club dues and fees. Respondents also cannot plausibly claim they lacked notice the Legislature might regulate in this space. The circuit court noted that the only reason public employers started withholding union dues was because the West Virginia Wage Payment and Collection Act specifically authorized paycheck deductions. App.

241-42. A right that lives because of a statute can likewise die by it. For that reason, Respondents were on notice that future legislation might affect the State's prior and voluntary practice. After all, there is no Contract Clause concern "when a government employer modifies an employment policy which was originally promulgated by the government employer at its own discretion." *Collins v. City of Bridgeport*, 206 W. Va. 467, 475, 525 S.E.2d 658, 666 (1999). Nor is there a constitutional violation where "prior regulation of an industry is related to the subject of the contract so as to put the parties on notice of the possibility of future regulation on the same subject." *Shell*, 181 W. Va. at 22, 380 S.E.2d at 189.

Finally, even if Respondents could demonstrate that the Act substantially and unreasonably interferes with one or more actual contracts, the circuit court would still have overreached by enjoining the Act in its entirety. Respondents are not likely to succeed on this claim; but if they were, at most the appropriate remedy would be an injunction limited to those specific and pre-existing contracts. The circuit court, however, enjoined the Act even with respect to contracts or agreements that *have not been written*. This broad-brush approach improperly invades the province of the Legislature because "[t]here can be no impairment of contractual obligations which did not exist at the time the challenged statute was enacted." *See Shell*, 181 W. Va. at 20, 380 S.E.2d at 187; *see also id.* ("[T]he Contract Clause prohibits only those statutes which impair existing contracts."). The very most Respondents could achieve on this claim is an injunction tailored to valid contracts pre-dating the Act between parties with power to agree to payroll deductions—and then only until those contracts expire. There is no support for even that targeted relief, much less for the circuit court's sweeping injunction.

* * * *

Ultimately, Respondents have not shown that they are likely to succeed on the merits of any of their constitutional claims. The Act is presumed to be constitutional, and the weight of authority in this State and from other state and federal courts only bolsters that presumption. "In the absence of a likelihood of success on the merits," the circuit court erred and its injunction must be set aside. *Morrisey I*, 239 W. Va. at 642, 804 S.E.2d at 892.

B. Respondents Did Not Establish That The Act Will Cause Them Irreparable Harm.

Respondents have another problem aside from the merits: They failed to show that the Act will imminently and materially harm them. To obtain a preliminary injunction, Respondents were required to "demonstrate the presence of irreparable harm." *Jefferson Cnty. Bd. of Educ.*, 183 W. Va. at 24, 393 S.E.2d at 662. As with likelihood of success on the merits, falling short on the "imminent irreparable injury" prong is "also generally fatal to injunctive relief." *Hechler v. Casey*, 175 W. Va. 434, 440, 333 S.E.2d 799, 806 (1985). Here, the circuit court credited alleged financial damages based on the idea that "implementation of the Act" will "burden [Respondents unions'] ability to collect dues" by requiring them to redirect resources toward that end. App. 245. Yet Respondents' claims are speculative, and monetary damages are almost never irreparable. The circuit court erred finding that Respondents will suffer "irreparable and severe injury" without a preliminary injunction. App. 247.

1. Respondents Allege Only Compensable Financial Harms.

There is a demanding standard for *financial* harm to be irreparable; financial loss must be "not susceptible of remediable damages," or "incapable of measurement by any ordinarily accurate standard." *Wiles v. Wiles*, 134 W. Va. 81, 90, 58 S.E.2d 601, 606 (1950). Put another way, "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date"

typically defeats "a claim of irreparable harm." *Sampson v. Murray*, 415 U.S. 61, 90 (1974). "Mere injuries" are not enough, "however substantial." *Id.*

Respondents' alleged financial harm does not pass muster. Respondents and the circuit court recognized that the purported injury would be in the form of potentially delinquent union dues—that is, money. App. 245. The unions might also incur additional expenses when setting up new collection methods—again, financial costs. To be sure, Respondents likely do not know the exact amount of these losses and expenses now, but there is no reason to think they would be difficult to discern later if Respondents ultimately prevail. Courts, after all, routinely calculate and award damages for monetary loss. Nor have Respondents alleged extraordinary circumstances making their ability to collect remedial damages unlikely. There is no risk, for example, that the State will become insolvent or otherwise unable to make good on a court judgment. Respondents also do not argue (much less support with evidence) that their feared losses are great enough that *they* might become insolvent in the time it takes this case to reach final judgment. Thus, an injunction is inappropriate because the harm Respondents claim is "susceptible of remedial damages." *Wiles*, 134 W. Va. at 90, 58 S.E.2d at 606.

2. Respondents Allege Only Speculative Harms.

Moving on from the special hurdles Respondents face in this monetary-harm case, they also cannot show that their alleged irreparable harm is "neither remote nor speculative, but actual and imminent." *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 812 (4th Cir. 1991) (citation omitted). It is not enough to claim "a *risk* of irreparable harm"; Respondents "ha[ve] the burden of proving a clear showing of *immediate* irreparable injury." *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 530 (4th Cir. 2003) (citation omitted; emphases added); *see also, e.g., Charleston Nat'l Bank v. Thomas*, 143 W. Va. 788, 794, 105 S.E.2d 184, 188 (1958)

(finding movant failed to establish irreparable injury where the asserted harm was "too speculative or uncertain"). Respondents have not shown that they face any immediate danger.

The circuit court credited Respondents' concern about "redirect[ing] precious resources toward new methods of collecting union dues." App. 247-48. This fear, in turn, flowed from an assumption that "substantial[ly]" more union members would become delinquent in their dues payments if the Act went into effect"; only then would unions potentially be forced to curtail programs or undertake additional collections efforts. App. 135, 138-39, 143, 146, 149, 152. Missing from this causation chain, however, is *evidence* that this hypothetical collections catastrophe is both likely and imminent. And proving both is Respondents' burden to bear. *See Camden-Clark Mem'l Hosp.*, 212 W. Va. at 760, 575 S.E.2d at 370 ("[I]n any ... hearing in which a preliminary injunction is sought, the party seeking the injunction would bear the burden of demonstrating the various factors justifying preliminary injunctive relief, such as the likelihood of irreparable injury to it if an injunction is denied." (citation omitted)).

None of Respondents' witnesses support the theory that in the immediate future enough members will stop paying their dues to materially affect unions' bottom lines. No evidence suggests that employees will terminate their union membership or default on dues payments without paycheck deductions. If anything, the record supports the opposite conclusion: One witness admitted that by the time of the preliminary injunction hearing 30 percent of the union's membership had *already* committed to an alternate dues-collection method. App. 283. Another insisted that union members would do everything they could to pay their dues, testified the union had never had a problem with members not paying, and even professed offense at the suggestion that members might allow their dues to enter arrears. App. 328-29. Both of these witnesses also testified that unions are actively working on alternative payment methods for their members. App.

289, 314-15. As for the third witness, he admitted that the Act's temporary exception for active municipal collective-bargaining agreements covers the unions relevant to his testimony until July 1, 2022, App. 306—meaning potential nonpayment could not be an imminent threat for at least a year. App. 306.

Finally, the asserted harms defy common sense. The circuit court's decision ignores that countless businesses and other organizations across the country and the world operate successfully without automatic deductions from their customers' or members' pay. Even in the union context, there is no evidence that the many similar laws in other States—which as discussed above, have all been upheld—have led to anything approaching the calamitous harm Respondents argue the Act makes inevitable. Thus, Respondents' claim that they will suffer imminent financial harm when the Act goes into effect is sheer speculation.

3. Respondents Allege *De Minimis* Harms.

Even if Respondents could show that their alleged harms are non-compensable and reasonably certain, the *amount* of financial injury at stake would be too small to justify the extraordinary remedy of a preliminary injunction. *See, e.g., Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1295 (D.C. Cir. 2009) (affirming denial of a preliminary injunction where movant established only "minimal harm" that was "purely economic"); *Murrow Furniture Galleries, Inc. v. Thomasville Furniture Indus., Inc.*, 889 F.2d 524, 526 (4th Cir. 1989) (holding preliminary injunction was unjustified where, among other failings, the asserted harm was "limited").

None of Respondents' witnesses testified with any specificity how great unions' new costs might be. But Respondents essentially complain that when the Act goes into effect they will have to bear the costs of ordinary bill collection, and these ordinary business expenses are not crippling. A union can collect dues in many ways—making a phone call, mailing a letter, sending an email, setting up an online payment option, or even using their own automatic deductions from

employees' bank accounts. Indeed, millions of for-profit and not-profit entities—even those advancing important constitutional interests—have remained in operation despite the need to collect fees without special assistance from the State. Newspapers and political advocacy groups play important societal roles and share many of the speech and associational interests Respondents raise here; they also bill their subscribers directly and fundraise effectively without an automatic paycheck draw. Respondents have not shown why they would be an exception.

The circuit court erred in concluding otherwise—apart from the lack of evidence, its analysis is self-defeating. The circuit court dismissed as "negligible" the *State's* administrative costs to collect dues on Respondents' behalf through automatic payroll deductions. App. 248. Yet it also characterized Respondents' alleged burden when undertaking the same collection task as "irreparable and severe." App. 247. Again, the circuit court had no evidence of actual costs for any of the parties before it, making it impossible to speak to the amounts with certainty. But in any event, administration costs cannot be "negligible" when borne by one party but "irreparable" when borne by the other. Either this type of harm is equally substantial for all parties, or minimal for both. Either way, this factor would not tip the scale in Respondents' favor.

C. The State Suffered Irreparable Injury From Of Preliminary Injunction, And The Public Interest Weighs In Favor Of Dissolving It.

In contrast to Respondents' reparable, speculative, and minimal harms, the State *has* suffered irreparable harm from the circuit court's injunction. "Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S.Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)).

A preliminary injunction is a judicial override of the legislature's decision about the necessity or propriety of a law; this extraordinary remedy is justified only where the statute's invalidity is a "clear[] case[]." *Charleston Transit Co. v. Condry*, 140 W. Va. 651, 659, 86 S.E.2d 391, 396 (1955); *see also Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 690, 408 S.E.2d 634, 640 (1991) ("[I]n light of the constitutionally required principle of the separation of powers among the judicial, legislative and executive branches of state government, W. Va. Const. art. V, § 1, courts ordinarily presume that legislation is constitutional, and the negation of legislative power *must be shown clearly*." (emphasis added)). Respondents' claims are a far cry from a "clear case," making the harm to the State from setting the Act aside even weightier.

Similarly, the public interest generally weighs in favor of enforcing duly enacted state laws. *See Kipps v. Ewell*, 538 F.2d 564, 566 (4th Cir. 1976) (noting the "public interest in the forthright enforcement of criminal laws"); *Strange v. Searcy*, 135 S. Ct. 940 (2015) (mem.) (Thomas, J., dissenting from denial of a stay) (noting that the public interest weighs in favor of enforcing state laws). Consistent law enforcement leads to predictable legal rights and responsibilities, and it is therefore "in the interest of sound public policy to preserve the predictability of the law." *Beard v. Worrell*, 158 W. Va. 248, 263, 212 S.E.2d 598, 606 (1974). The circuit court ignored these important public interests, and its injunction harms the public by blocking the enforcement of a presumptively valid state law, creating unfounded and unnecessary uncertainty about the Act's validity.

With appropriate value restored to the public's and the State's interests, and with Respondents' alleged harm cut down to its actual (minimal) weight, the equities are firmly on the side of the Act.

CONCLUSION

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

Respectfully Submitted,
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 21-0559

HONORABLE 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, Lindsay S. See, do hereby certify that a true and exact copy of the foregoing ***Petitioner's Brief and accompanying Appendix*** has been served on counsel of record by depositing true and exact copies thereof, via United States Mail, with first-class postage prepaid and properly addressed on this 3rd day of September, 2021.

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