IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

WEST VIRGINIA AFL-CIO, et al.,
Plaintiffs,

v. **Civil Action Nos. 16-C-959–16-C-969**
Judge Jennifer F. Bailey

GOV. JAMES C. JUSTICE, et al.
Defendants.

ORDER

Pending before the Court are the cross motions for summary judgment on the *Plaintiffs' Amended Petition for Declaratory Judgment and Injunctive Relief.* Based on the briefs submitted, the arguments of counsel at the hearing on cross motions for summary judgment, the record in this matter, and the action of the Legislature amending provisions of the legislation in issue herein during the pendency of this proceeding, the Court makes the following findings and rulings:

FACTUAL AND PROCEDURAL BACKGROUND

1. During the 2016 Regular Session, the West Virginia Legislature enacted Senate Bill 1 (hereafter S. B. 1), referred to in the "all relating to" clause of the bill title and in a new article heading, as the "Workplace Freedom Act" (hereafter "the Act"). The Act is also often referred to as the "right to work" law.

2. S.B. 1 amended two sections of present law, W.Va. Code § 21-1A-1, *et seq.*, commonly referred to as the West Virginia Labor Management Relations Act (LMRA), adopted in 1971 and "patterned" after the provisions of the National Labor Management Relations Act,[1] as

[1] W. Va. Code § 21-1A-1(c).

follows:

(a) First, the amendments eliminated the West Virginia labor law provision that an employee may be required to be a member of a labor management organization (the union) that is "the exclusive representative of all employees...for purposes of collective bargaining with respect to rates of pay, wages, hours of employment or other conditions of employment." [2] In other words, workers covered by a collective bargaining contract may no longer be required by any contract or otherwise to join the union that is representing them.

(b) Second, the amendments also authorize employees to "refrain" from paying any "dues, fees, assessments or other similar charges, however denominated, of any kind or amount" to any labor organization or to any third party such as a charity in lieu of such payment.[3] In other words, a nonmember employee who the union is required to represent can choose to pay no fees, notwithstanding the union's duty to provide them services. For purposes of this Order, such funds will be referred to as "agency fees." Those persons who choose to be nonmembers and "refrain" from paying any fees are commonly referred to as "free riders."

3. S.B.1 also establishes a new article of law, W. Va. Code § 21-5G-1, consisting of eight sections, which include definitions, individual rights, invalidity of contracts, criminal offenses and penalties, civil remedies, exceptions as to certain employees, statutory construction, operative dates, and a severability provision.

4. The essence of the new article established in S.B.1 is that no person may be

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[2] W. Va. Code § 21-1A-5(a). W. Va. Code § 21-1A-4, which requires the union to provide such representation, was not amended by S. B. 1.

[3] W. Va. Code § 21-1A-3. Under the National Labor Relations Act, if a union agreement conflicts with a worker's religious beliefs, the worker cannot "refrain" from paying fees but may opt to donate the equivalency of fees or dues to a non-labor, non-religious charity. See 29 U.S.C. § 169. This new West Virginia code section is in conflict with the federal law.

required, as a condition or continuation of employment, to become or remain a member of a labor organization or to pay dues, fees, assessments or other similar charges, however denominated, of any kind or amount to any labor organization; or pay to 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.[4] This language is similar to the changes made to the 1971 provisions of the West Virginia labor law.

5. S.B. 1 also makes it a misdemeanor criminal offense to violate its provisions, punishable upon conviction of a fine of not less than $500.00 nor more than $5000.00. Additionally, S.B.1 creates civil penalties for any violation or "threatened" violation of this article and authorizes compensatory damages, costs and reasonable attorney fees, punitive damages, and injunctive and other equitable relief.[5]

6. At the time of passage, S.B. 1 applied to "any written or oral contract or agreement entered into, modified, renewed or extended after July 1, 2016: *Provided*, That the provisions of this article shall not otherwise apply to or abrogate a written or oral contract or agreement in effect on or before June 30, 2016."[6]

7. At the time of passage, S.B.1 also included: "Except to the extent expressly prohibited by the provisions of this article, nothing in this article is intended, or should be construed, to change or affect any law concerning collective bargaining or collective bargaining agreements in the building and construction industry."[7] The term "building and construction

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[4] W. Va. Code § 21-5G-2.
[5] W. Va. Code §21-5G-5.
[6] W. Va. Code § 21-5G-7(b). However, with the passage of S. B. 330, (see paragraph 17, infra.) this subsection is now § 21-5G-7(a).
[7] See W. Va. Code §21-5G-7(a)(2016).

industry" was not defined in S.B. 1.

8. At the time of passage, S.B. 1 further defined the term "state" to mean "any officer, board, branch, commission, department, division, bureau, committee, agency, authority or other instrumentality of the State of West Virginia"; however, the word "state" in this context was never otherwise cited in the Act.[8]

9. The Plaintiffs, the West Virginia AFL-CIO; the West Virginia State Building and Construction Trades Council, AFL-CIO; the Chauffeurs, Teamsters, and Helpers Local No. 175; the United Mine Workers of America, AFL-CIO; and the International Brotherhood of Electrical Workers, AFL-CIO, Locals 141, 307, 317, 466, 596, and 968, are "labor organizations" within the meaning of Section 2(5) of the National Labor Relations Act, 29 U.S.C. § 152(5) and West Virginia Code §21-1A-2(5) and, as such, collectively represent thousands of public and private sector employees in the State of West Virginia, and are parties to numerous collective bargaining agreements with employers in the State of West Virginia.

10. The Defendant James C. Justice, the Governor of the State of West Virginia, is sued in his official capacity.

11. The Defendant Patrick Morrisey, the Attorney General of the State of West Virginia, is sued in his official capacity to the extent he would have a role in defending appellate claims relative to the criminal sanctions adopted in the Act. The Attorney General was also granted Intervenor status to represent the State of West Virginia.

12. Subsequent to a hearing on August 10, 2016 wherein this Court heard uncontroverted testimony and considered admitted exhibits presented on behalf of the Plaintiffs,

[8] See W. Va. Code § 21-5G-1(d)(2016).

listened to arguments of counsel, and questioned counsel concerning the possible meaning and application of certain provisions of S. B. 1, particularly as it applied to the "building and construction industry", this Court granted a preliminary injunction sought by the Plaintiffs, thus enjoining implementation of S. B. 1.

13. The parties conducted discovery and filed cross motions for summary judgment which were presented for oral argument on December 2, 2016.

14. On February 24, 2017, this Court entered a Superceding and Final Order Granting a Preliminary Injunction,[9] and three (3) days later, on February 27, 2017, the Attorney General filed a notice of appeal to the Supreme Court.

15. Rejecting the Plaintiffs' contention that the appeal was premature, with summary judgment motions pending, the Supreme Court accepted the appeal.

16. Among other matters set forth as a basis for the injunctive relief originally ordered by this Court, the injunction order cited the S.B. 1 code provision referring to the "building and construction industry," finding that the term was neither defined in the new legislation (which created criminal and civil penalties for disobedience to its provisions) nor anywhere else in the West Virginia Code.[10] Specifically, the preliminary injunction Order reads, in part:

> The ambiguity of this sentence is such that an entire industry, not identified by any legal definition or reference, has no certainty of understanding whether the Act applies to their collective bargaining negotiations or agreements. If it does apply in some manner, then why is this subsection necessary or why does it not just read accordingly if clarity was deemed an issue? If it does not apply, then what is the meaning of "(e)xcept to the extent expressly prohibited by the provisions of this article"...? A mistaken interpretation of the language potentially subjects employers, employees and any of their representatives to criminal prosecution and civil liability, thus constituting irreparable harm. The Court

[9] The superceding order made minor changes to an order entered February 23, 2017.
[10] This Court also cited nearly eighty (80) professions listed as construction trades in Wikipedia to illustrate the ambiguity of this portion of the Act.

finds that the Plaintiffs have more than a substantial likelihood of success on the merits regarding this issue. Moreover, the citizens of this state have more than a compelling interest to understand with clarity how to conduct matters that affect their life, liberty and pursuit of happiness, as well as their freedom to associate, without running afoul of the laws of this state which have been enacted with such ambiguity and uncertainty.

17. In a completely obvious and public response to this Court's findings as set forth above, on March 17, 2017, while this matter was pending on appeal before the Supreme Court, the Legislature passed Senate Bill 330, which eliminated the term "state" from the definitions section of the Act, and moreover, completely eliminated the entire provision (questioned by this Court) relating to the building and construction industry.[11]

18. Citing concerns of the Legislature making changes to laws while their constitutionality was a matter of litigation (then pending in the Supreme Court), Governor Jim Justice vetoed the legislation on March 28, 2017. The veto was subsequently overridden by the Senate on March 30, 2017 and by the House of Delegates on April 7, 2017, when legislative action was complete. The bill became effective June 15, 2017.[12]

19. After more than six (6) months from the filing of the appeal, the Supreme Court heard oral arguments on September 5, 2017. On September 15, 2017, former Justice Menis Ketchum delivered the sixteen page opinion of the Court which reversed and remanded the matter for this Court "to conduct a final hearing on the merits of the parties' various contentions." *Morrisey v. W. Virginia AFL-CIO*, 239 W. Va. 633, 642, 804 S.E.2d 883, 892 (2017).[13]

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[11] As introduced, the stated purpose of the Senate Bill 330 was "to provide technical corrections to the definition of the West Virginia Workplace Freedom Act and to repeal provisions relating to the statutory construction of the act."
[12] http://www.wvlegislature.gov/Bill_Status/bills_history.cfm?year=2016&sessiontype=RS&input=330.
[13] Much has been said about the delays by this Court. Recognizing the daily demands of a trial court docket and the enormous undertaking of conducting a proper review and analysis of the arguments advanced in these weighty proceedings, including a need to reevaluate these issues as the Legislature continued to make changes and an appeal

20. The September 15, 2017 Supreme Court opinion made absolutely no mention of the fact that part of the very legislation considered by this Court at the time the preliminary injunction was ordered was amended by "corrective" legislation (effective June 15, 2017), while this Court's order granting the preliminary injunction cited, among other matters, this very arbitrary provision which subjected violations to criminal prosecution and other potential legal action.

21. The September 15, 2017 opinion, while criticizing the lower court's reasoning in determining to issue the preliminary injunction, never clarified the standard for a preliminary injunction in this state, as no Syllabus Point has ever been adopted by the Supreme Court setting forth those standards.[14]

22. Subsequent to the ruling of the Supreme Court which directed that "a final hearing" be conducted, all parties advised this Court that they did not seek to present any further evidence or arguments and have agreed there are no disputed issues of material fact.

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was long pending before the Supreme Court, this Court sought assistance under prior leadership of the Supreme Court to have assigned an additional, temporary law clerk to assist with this case. The request was summarily denied.

[14] Former Chief Justice Allen Loughry in a concurring opinion went so far as to chastise this Court for utilizing "an overruled standard for the issuance of an injunction," citing *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 344 (4th Cir. 2009), *cert. granted, judgment vacated*, 559 U.S. 1089, 130 S. Ct. 2371, 176 L. Ed. 2d 764 (2010), and *adhered to in part sub nom. The Real Truth About Obama, Inc. v. F.E.C.*, 607 F.3d 355 (4th Cir. 2010), which has never been adopted by our Supreme Court in any reported decision. His opinion, likewise, makes no reference to the legislative changes to the laws in issue before this Court and adopted by the Legislature subsequent to the granting of the preliminary injunction then under review by the Supreme Court.
Citing the lack of such "clarity" in our state jurisprudence, and the "substantial differences" in the state and federal cases, Justice Workman, in her separate opinion, wrote: "Because the preliminary injunction is an extraordinarily powerful remedy, the majority drops the ball badly by setting forth constitutional conclusions while failing to even clarify our standard for a preliminary injunction. The fact that there are substantial differences in the law governing the proper standard of review of a preliminary injunction in both state and federal courts should have also impelled the majority to put these issues through that 'crucible of the adversarial process.'" *Morrisey v. W. Virginia AFL-CIO*, 239 W. Va. 633, 648, 804 S.E.2d 883, 898 (2017).

Accordingly, the parties agreeing there are no disputed issues of material fact, this Court, as a matter of law, grants the Plaintiffs' Motion for Summary Judgment in part, and denies the Plaintiffs' Motion for Summary Judgment in part. Further, this Court grants, as a matter of law, the Defendant Attorney General's Motion for Summary Judgment in part, and denies the Defendant Attorney General's Motion in part, all as follows.

FEDERAL LABOR LAW

To understand the context in which a "right to work" law like S. B. 1 has been enacted, it is necessary to consider the National Labor Relations Act (NLRA), enacted in 1935, which established most private sector workers' rights to unionize and collectively bargain over wages, benefits and working conditions. Following the enactment of the NLRA, unions typically bargained for contracts that required union membership as a condition of employment. In 1947, the Taft-Hartley Act was adopted which included a provision, section 14(b), authorizing states to enact laws prohibiting union membership as a condition of employment.

Regarding the interplay between the provisions of the federal labor laws and state laws, the Congressional enactments "largely displaced state regulation of industrial relations," and thus, it has long been recognized that states "may not regulate activity that the NLRA protects, prohibits, or arguably protects of prohibits." *Wis. Dep't. of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286, 106 S. Ct. 1057, 1061, 89 L. Ed. 2d. 223 (1986)(citing *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v Garmon*, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1949)). Section 14(b) of the Taft-Hartley Act, however, provides a limited exception:

Nothing in this subchapter shall be construed as authorizing the execution or application

> of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law. 29 U.S.C. § 164 (b). (Emphasis supplied.)

This section of federal law clearly and unequivocally authorizes a part of the enactment of S. B. 1, that is, the prohibition on requiring employees covered by a collective bargaining contract to be members of the labor union representing them. Indeed, the amendments to the 1971 laws as well as the new provisions of W. Va. Code, § 21-5G-2(1) and § 21-5G-3, reflect a sweeping and dramatic change in the public policy of this State, which the West Virginia Legislature, in accordance with the above cited federal law, has the absolute authority to adopt. Accordingly, this Court does not grant any relief that would invalidate those legislative enactments.[15]

The principal issue this Court will now address is the second component of S. B. 1 in issue before this Court, that is, the prohibition, or ban, on agency fees.

FINDINGS OF FACT

1. At the hearing on this Motion, the Plaintiffs established the financial costs to the Teamsters for 2013 – 2016 for providing services to members of the collective bargaining units they represent, including the cost of services provided to union members and nonmembers. Additionally, the Plaintiffs proved the revenue that will be lost to the union and the cost to union members if S. B. 1 is fully implemented. Further, the Plaintiffs provided data from the United States Bureau of Labor Statistics for the years 2014 and 2015 showing the total number of individuals employed, the number of union members, and the number of those workers represented by unions who are not union members.

[15] See discussion, VII Severability, infra, p. 44.

2. The sworn affidavits submitted by Plaintiffs demonstrate that the revenue of the Plaintiff unions and other unions would be significantly reduced if the agency fee prohibition provided in S. B. 1 is implemented (*see* Sumara, Gillette and Koegan affidavits).[16]

3. The Plaintiffs' affidavits also demonstrate that the Plaintiff unions and other unions have historically negotiated union security clauses into their collective bargaining agreements that require both members and nonmembers to pay their fair share of the costs of collective bargaining, contract administration and grievance handling.

4. The Legislature of the State of West Virginia commissioned and relied upon, when enacting West Virginia Code §§ 21-5G-1, *et seq.*, an academic report that found that "the rate of union membership is estimated to fall by around one-fifth as a result of the adoption of RTW policy (based on an average rate of union membership of 10 percent over the entire dataset)". John Deskins, "The Economic Impact of Right to Work Policy in West Virginia" at page 29 (November 2015) retrievable at http://www.legis.state.wv.us/News_release/documents /Right_to_Work_FINAL.PDF, admitted into the record as Plaintiffs' P.I. Exhibit 6. The projection of union membership decline was not disputed, and the Court accepts the projection as reasonable.

5. The defendants presented no witnesses and no documentary evidence.

ANALYSIS

I. INTRODUCTION

[16] The AG challenges the competency of the affidavits because the collective bargaining agreements are not attached; however, the AG acknowledges those agreements were provided to him in response to discovery requests. Due to deadlines in the Scheduling Order agreed to by the parties, the intent of the procedural rules has been met. Other objections by the AG are rejected as this Court finds the affidavits comply with Rule 56 of the West Virginia Rules of Civil Procedure.

The Syllabus point of the Court in *Morrisey v. W. Virginia AFL-CIO*, 239 W. Va. 633, 804 S.E.2d 883 (2017) reads:

> This Court does not sit as a superlegislature, commissioned to pass upon the political, social, economic or scientific merits of statutes pertaining to proper subjects of legislation. It is the duty of the Legislature to consider facts, establish policy, and embody that policy in legislation. It is the duty of this Court to enforce legislation unless it runs afoul of the State or Federal *Constitutions*. Syllabus Point 2, *Huffman v. Goals Coal Co.*, 223 W.Va. 724, 679 S.E.2d 323 (2009).

This pronouncement of the roles of these two branches of government is indeed worthy of the highest consideration and is, of course, the rule of law Courts of this state must follow in reviewing any legislative enactments.[17]

Based upon these well-established precepts, the Court considers the following serious constitutional challenges raised by Plaintiffs as to S.B. 1's ban on agency fees:

(1) S.B. 1 violates Plaintiffs' associational rights under Article III §§ 7 and 16 of the West Virginia Constitution because it unjustifiably and excessively burdens the Plaintiffs' ability to recruit and retain members and to effectively represent members, and further that it penalizes members for joining or remaining in a union;

(2) S.B. 1 violates Article III § 9 of the West Virginia Constitution by depriving the Plaintiffs and other unions of their property without just compensation and due process because it prohibits the Plaintiffs and other unions from charging nonmembers for representative services that the Plaintiffs and other unions are required by federal and state law to provide to nonmembers; and

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[17] At the time the *Morrisey* opinion was authored, this trial judge likely had more experience working in the legislative branch of this state's government than any judicial officer, having worked eleven sessions as Counsel, primarily for the Judiciary Committee, of the West Virginia House of Delegates, and one session and nine years full time as Counsel to the West Virginia Senate Judiciary Committee. With that experience, I authored and edited countless legislative proposals, produced legal opinions, and represented the Legislature in litigation, including cases

(3) S.B.1 imposes arbitrary restraint on the Plaintiffs' liberty in violation of Article III § 10 of the West Virginia Constitution.[18]

The following discussion initially addresses each of the Plaintiffs' constitutional claims and then discusses defenses to those claims advanced by the Attorney General ("AG") and *amici*. Lastly, other remaining issues addressed by the parties are considered.

Before assessing the parties' arguments, the Court notes that the prohibition on the assessment and collection of agency fees is not backed by a substantial body of case law, particularly with regard to the challenges raised in the Amended Petition. As the AG points out, right to work laws have been around for decades and have been routinely upheld by the courts, including the United States Supreme Court. *E.g., Lincoln Federal Labor Union v. Northwestern Iron & Metal Company*, 335 U.S. 525 (1949). Most of the cases, however, including *Lincoln Federal*, addressed only whether the states could prohibit union shops (which require employees to join a union after being hired) and did not address the principal question presented to this Court, whether S. B. 1's bar of agency fees is constitutional. Court challenges to fee bans have occurred in recent years in some of the states. The most cited case, from the Seventh Circuit, upheld a fee ban, and includes a very forceful dissent by Chief Judge Wood. *Sweeney v. Pence*, 767 F.3d 654 (7th Cir. 2014). The Indiana Supreme Court has also sustained the Indiana Right to Work law. *Zoeller v. Sweeney*, 19 N.E.3d 749 (Ind. 2014).

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pending before the Supreme Court.

[18] In considering the arguments advanced by Plaintiffs regarding their state constitutional claims, this Court is guided by the long standing recognition in the jurisprudence of this state that "[t]he provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded by the Federal Constitution. Syl. Pt. 2, *Pauley v. Kelly,* 162 W.Va. 672, 255 S.E.2d 859 (1979), Syl. Pt. 1, *State v. Bonham,* 173 W.Va. 416, 317 S.E.2d 501 (1984), Syl. Pt. 1, *Women's Health Ctr. of W. Virginia, Inc. v. Panepinto*, 191 W. Va. 436, 446 S.E.2d 658 (1993). The Plaintiffs' constitutional rights at stake in this case demand no less discernment.

Indiana is in the 7th Circuit, along with Wisconsin, where a trial court, ruling in favor of a union challenge, was reversed on appeal. *International Association of Machinists District 10 v. State of Wisconsin,* 903 N.W.2d 141 (Wisc. Ct. App. 2017) *and see International Union of Operating Engineers Local 139 v. Schimel*, 863 F.3d 674 (7th Cir. 2017)(7th Circuit upholding a District Court's dismissal of a union challenge to the Wisconsin law finding that there was no preemption nor a takings under the U.S. Constitution following the *Sweeney* decision). A district court in Idaho also upheld Idaho's ban. *International Union of Operating Engineers, Local 370 v. Wasden*, No. 4:15-CV-00500-EJL-CWD (D. Idaho 10/24/16). In *Zuckerman v. Bevin*, No. 2018-CA-000289-MR, 2018 WL 5994824 (Ky. Nov. 15, 2018), *reh'g denied* (Feb. 14, 2019), the Supreme Court of Kentucky affirmed a lower court which denied a challenge to the "right to work" laws.[19]

While those cases were each addressed within the framework of the various statutes and Constitution of each state, it is important to consider that none of those cases address the West Virginia Constitution, and further, certainly no West Virginia Court is bound by a ruling of the Seventh Circuit Court of Appeals or the Supreme Court of another state. The only Court the Supreme Court of this state is bound to follow is the Supreme Court of the United States, and, although that Court has recently addressed the prohibition of agency fees in the public sector,[20] it has never addressed and certainly not upheld a ban on agency fees for private sector unions. Further, the Plaintiffs' liberty and association claims appear to be novel claims largely untouched

[19] Much of the discussion in both the opinion and the dissents revolved around the unique provisions of Section 59 of the Kentucky Constitution which prohibits certain local and special acts; however, ultimately the legislation affecting private sector unions was upheld.

[20] *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (decided June 27, 2018). See, V Janus, *infra.* p. 42.

by judicial consideration.[21] These issues are, therefore, worthy of full consideration rather than a summary dismissal and a reliance on *Sweeney v. Pence*.

II. PLAINTIFFS' CONSTITUTIONAL CLAIMS

A. Rights of Association

Article III, § 16 of the West Virginia Constitution expressly states that the freedom to consult for the common good shall be held inviolate. United States and West Virginia Supreme Court decisions have also held that 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. *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). It is important to examine these decisions in light of the effect of the agency fee prohibition of S. B. 1.

In a series of cases that grew out of the massive Southern resistance to the Supreme Court's desegregation rulings in *Brown v. Board of Education*, the Court firmly established that the freedom of association imposes an extremely heavy burden on the state to justify measures that discourage membership in lawful organizations and that impair their lawful missions. The cases dealt with Southern strategies that chilled membership in the NAACP and diminished the organization's effectiveness in desegregating public facilities.

The series began with *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), which thwarted a law suit filed by the State's Attorney General to oust the organization from Alabama for its failure to comply with a state statute that required any association doing business in the

[21] The Court notes with appreciation the competency in oral argument and briefing of all counsel in this case; however, it is certainly not lost on this Court that perhaps the most preeminent scholar on constitutional law in this state serves as one of co-counsel to Plaintiffs.

state to file qualification papers providing the names and addresses of all of its members and agents. The Court first noted that the argument that the State had not taken "direct action" against associational rights was not determinative because abridgement of such rights could follow from varied forms of governmental action. *Id.* at 461. Justice Harlan's opinion for a unanimous Court then relied on the obvious: "compelled disclosure of [the NAACP's] membership is likely to affect the ability of [it] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and the consequences of this exposure." *Id.* at 462-63. Alabama could muster no interest that could justify such a burdensome disclosure requirement. Similarly, *Bates v. Little Rock*, 361 U.S. 516 (1960), struck down the city's 1957 amendment to its occupation license tax that required any organization operating in the municipality to file with city "a statement as to dues, assessments, and contributions paid, by whom and when paid." *Id.* at 518. The freedom of association, said Justice Stewart for another unanimous Court, is "protected not only against heavy-handed frontal attack, but also from being stifled by more subtle interference," *id.* at 523, although he did not explain what was subtle about Little Rock's tactic. He pointed to the evidence showing that "the public disclosure of the membership lists discouraged new members from joining the organization and induced former members to withdraw." *Id.* at 524. When such a "substantial abridgement of associational freedom" occurs, "the State may prevail only upon showing a subordinating interest which is compelling." *Id.* The city lacked any interest that approached that level.

The Court similarly applied strict scrutiny to invalidate other Southern strategies that

burdened an association's ability to recruit and retain members and that discouraged individuals from joining organizations. *E.g., Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963) (Florida legislative committee's subpoena *deuces tecum* for all of the NAACP's membership records created an unconstitutional chilling effect on associational rights); *Louisiana ex rel. Gremilion v. National Association for the Advancement of Colored People*, 366 U.S. 293 (1961) (Louisiana statute requiring all nonprofit organization to file annually a list of the names and addresses of all its members and officers in the state violated freedom of association of the organizations and their members); *Shelton v. Tucker*, 364 U.S. 479 (1960) (Arkansas law requiring every public-school teacher in the state to disclose all of their organizational memberships and contributions violated the First Amendment).

NAACP v. Button, 371 U.S. 415 (1963), struck down Virginia's somewhat different tactic for obstructing the association's effectiveness in desegregating public schools and facilities. The State had enacted a statute prohibiting the solicitation of legal business and fomenting litigation and applied it to the NAACP's practices of recruiting plaintiffs to challenge school segregation and of paying attorneys to prosecute the cases. The Court held that the activities of the NAACP were "modes of expression and association protected by the First and Fourteenth Amendments" that Virginia could not prohibit. *Id.* 428-29. Litigation for the NAACP was not just a process for resolving differences; rather, it was "a means for achieving the lawful objectives of equality of treatment by all government" and was "thus a form of political expression." *Id.* at 429. Given the intense resentment and opposition in Virginia to civil rights efforts, "a statute broadly curtailing group activity leading to litigation may easily become a weapon of oppression." *Id.* at 435-36. "Precision of regulation must be the touchstone in an area so closely touching our most

precious freedoms." *Id.* at 438.

Unions and their members, of course, have long received constitutional protection for their exercise of associational rights. *Hague v. C.I.O.*, 307 U.S. 496 (1939), for example, struck down a permitting ordinance that had been used to block unions' organizing efforts. In *Thomas v. Collins*, 323 U.S. 516 (1945), the Court held that a Texas statute requiring labor union organizers to register with the State as a condition for soliciting membership in their unions could not constitutionally be applied to stop or punish a speech advocating union membership by a union president to a large audience. "The right [to] discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly." *Id.* at 532. In that case, the Texas "restriction's effect, as applied, in a very practical sense was to prohibit Thomas not only to solicit members and memberships, but also to speak in advocacy of the cause of trade unionism in Texas, without having first procured the [registration] card." *Id.* at 536. The Court also applied the *Button* decision to protect unions' First Amendment right to provide their members with an attorney to represent them in workers' compensation cases. *United Mine Workers of America, Dist. 12*, 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964). The states' labeling the provision of the services as engaging in the unauthorized practice of law could not justify the burden it placed on unions to deliver effective services to their members and on the members' rights to petition for redress of grievances.

The federal cases described above provide a floor for interpretation of the Article III protections in §§ 7 and 16, and our Supreme Court has stated that "the West Virginia Constitution offers limitations on the power of the state" to curtail the rights of association and

speech "more stringent than those imposed on the states by the Constitution of the United States." *Pushinsky*, *supra*, 164 W. Va. at 745, 266 S.E.2d at 449; *accord, West Virginia Citizens Action Group v. Daley*, 174 W. Va. 299, 311, 324 S.E.2d 713, 725 (1984); *see also Woodruff v. Board of Trustees*, 173 W. Va. 604, 319 S.E.2d 372 (1984).

Application of the foregoing principles to the S.B. 1– to its prohibition of agency fees in § 21-1A-3 and § 21-5G-2(2) and to its penalties in §§ 21-5G-4 and 5 for entering into contracts containing them – reveals that the Act unnecessarily and unconstitutionally imposes an excessive burden on Plaintiffs' associational rights.

Membership is obviously the lifeblood of any labor organization. Members' dues provide unions with nearly all of their revenues for operating expenses, PI Tr. 15-16; PI Exs. 1 & 2, and members' commitment and participation give the organizations their capacity to represent workers effectively in dealing with employers. S. B. 1 seriously hampers the unions' ability to recruit new members and retain old ones. PI Ex. 6 at 29; Affidavit of Curt Koegen. Both the federal and our state laws require that a union must fairly represent all workers in the collective bargaining unit, including those who are not members of the union. That duty is a corollary of the conferral in 29 U.S.C. § 159 and W. Va. Code § 21-1A-5 on the union of the status as the employees' exclusive agent; that is, if the law bestows exclusive powers on a private organization, then that organization must adhere to equal protection principles. *E.g.*, *Vaca v. Sipes*, 386 U.S. 171 (1967); *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944). Those principles forbid union discrimination against nonmembers and against persons who do not support the union's political and ideological messages. If unions cannot exact agency fees, employees would be able to receive, without any cost to them, the full benefit of the union's

services in negotiating and administering the contract. And if workers can get those services for free, they would have no incentive to join the union or remain a member. Id. In fact, those who do join or stay in a union would be paying a penalty for the privilege because their dues would have to be raised to underwrite the union's services provided to the free riders. PI Tr. 15-17; PI Exs. 1 & 2; Affidavit of Curt Koegen.

The ultimate effect of the agency fee ban on unions' associational rights imposes every bit as much of a burden on their ability to recruit and retain members as did the disclosure requirements in the NAACP cases. It also hinders the unions' effectiveness as much as the restrictions in *Button* and *UMWA v. Illinois*. It must be remembered that, "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton*, 364 U.S. at 488. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Button*, 371 at 438.

In this case, West Virginia clearly has legitimate and substantial interests in protecting workers from being forced to support political and ideological messages with which they disagree or to join an organization they do not support. Those interests, however, can be, and have been, fully accomplished without taking the additional steps of prohibiting agency fees, and giving free riders something for nothing. Federal law already requires unions to reimburse its members working under union shop contracts for that portion of their dues spent on advocacy of causes with which they disagree. *E.g., Beck v. Communications Workers of America*, 487 U.S. 735 (1989); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). Therefore, a ban on

agency fees does not further any concern of the State about forced advocacy.

As previously mentioned, the AG argues that the Supreme Court decision in *Lincoln Federal Labor Union No. 19129 v. Northwestern Iron & Metal Company*, 335 U.S. 525 (1949), settled the freedom of association issues regarding challenges to right to work legislation. Plaintiffs have countered that *Lincoln Federal* does not control this instant matter because it did not address the issues raised by a ban on agency fees. According to the AG, "It is no answer to reply that *Lincoln Federal* did not explicitly address a provision prohibiting agreements that provide for mandatory fees." AG's Memorandum at 23. This Court agrees with the Plaintiffs that it *is* an answer. Not only did the Supreme Court not "explicitly" address the issue, and not only was the issue "not a focus of the [*Lincoln Federal*] litigation," *id.*, but the issue was never even mentioned in the case. The Court described the case as a challenge to state laws that "provide that no person . . . shall be denied an opportunity to obtain or retain employment because he is or is not a member of a labor organization." 335 U.S. at 527-28. The statutory provisions at issue in the case as quoted by the Court did not mention anything about agency fees. *Id.*, notes 1 & 2. A decision of the Supreme Court, or of any other court, that does not mention the critical constitutional issue in this case, or even an analogous one, cannot provide controlling authority.

Thus, the Court finds that the Plaintiffs do not seek relief that would force any association on anyone. Rather, they seek the opportunity to impose and collect fees that essentially function as taxes on collective bargaining unit members for the costs of "legislative" and governmental services. *Steele*, 323 U.S. at 202.

The Court holds that S. B. 1's ban on contracts requiring all collective bargaining unit members to pay a fee for a union's representation services, enforced through exposure of unions

and individuals to criminal penalties and civil liability, violates the associational rights of unions and their members as protected by Article III, §§ 7 and 16 of the West Virginia Constitution.

B. Unconstitutional Taking

As explained above, federal and state laws require unions to provide equal services and representation to all members of the collective bargaining unit. If allowed to take effect, S. B. 1 will prohibit unions and employers from assessing nonmembers of the union for any services that the union provides to the bargaining unit, including those provided to the nonmembers. The Plaintiffs have demonstrated that it costs money to negotiate and administer a contract. Union officials have to be paid, union representatives have to be paid, union lawyers have to be paid, union staff have to be paid, accountants have to be paid, grievances and arbitrations have to be paid for, as do all the expenses (rent/mortgage, supplies, equipment, etc.) of running an office. Union dollars, almost totally reliant upon members' dues, have to pay for all of those services and expenses. Prohibiting a union from collecting appropriate fees from nonmembers effects a taking of property; it takes money from the union, and derivatively from its members, and essentially gives it to the free riders. PI Tr. 15-17; PI Exs. 1 & 2; Affidavit of Curt Koegen.[22] The Act therefore violates Article III, § 9 of the West Virginia Constitution, which provides that "[p]rivate property shall not be taken or damaged for public use without just compensation."

Recent decisions confirm the intuitive sense that requiring a private citizen or entity to give money to another private citizen is a taking. *Phillips v. Legal Foundation of Washington*,

[22] *See also* Sumara Affidavit, in which she testifies that the revenue of CWA Locals would be reduced by $52,000 in the next two years, and the revenue of the CWA national headquarters would be reduced by $36,000 over the next two years if private sector nonmembers no longer paid their fair share of collective bargaining, contract administration and grievance handling costs as permitted by S.B.1. These costs would be paid by members in order to provide the required services. *Accord*, Gillette Affidavit, stating that the cost of a current grievance and arbitration proceeding for a nonmember will cost approximately $5,000.00.

524 U.S. 156 (1998), confronted a takings challenge to a state's practice of using the interest generated by lawyers' trust accounts (IOLTA) for the support of legal services for the poor. The Court held that the interest on the accounts was the private property of the persons owning the principal. *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), then held that those persons had suffered a taking of their property – their money – for public use when it was paid into the state account. *Accord, Calder v. Bull*, 3 U.S. (3 Dallas) 386, 388 (1798) (Chase, J., concurring) (the Constitution should not tolerate "a law . . . that takes property from A. and gives it to B."). No compensation was due in *Brown*, however, because no net losses could be proved. That is not the case with the S.B. 1. The union's losses are easily calculable; in fact, current law requires unions to calculate annually what is the *pro rata* share of union expenditures that is devoted to contract negotiation, administration, and other workplace services and the share spent on external speech. *Hudson, supra*. The amount spent on bargaining unit work would be the value bestowed upon each free rider under the S.B. 1 and that amount times the number of free riders in the collective bargaining unit will constitute the net losses of the unions and its members, namely, the taking of their property.

Indeed, one's labor is one's property. Other states have reached a consensus that labor performed for money is property. The Supreme Court of Alaska, for example, has held:

> [E]xcluding personal services from the [takings] clause's provisions is manifestly unreasonable. It has long been recognized that "labor is property. The laborer ha[s] the same right to sell his labor, and to contract with reference thereto, as any other property owner.

DeLisio v. Alaska Superior Court, 740 P.2d 437, 440-43 (Alaska 1987) (citing as support

authorities from Kansas, Indiana, Missouri, Utah, and the English common law[23]); *see also McNabb v. Osmundson*, 315 N.W.2d 9, 22-23 (Iowa 1982) (the right of reasonable compensation for services "was described as complete, without further legislative enactment, and a fundamental rule of right, foundationed on the constitutional mandate that private property shall not be taken without just compensation"); *Sudberry v. Royal & Sun Alliance*, 2006 WL 2091386 (Tenn. Ct. App. 7/27/2006) (an individual "has a property interest in his labor"); *County of Dane v. Smith*, 13 Wis. 585, 587-89 (1861) (the State cannot "command the time and services of the citizen . . . and then say that he shall receive no pay for them").

The West Virginia Supreme Court has aligned Article III, § 9 law with these principles. Both *Jewell v. Maynard*, 181 W. Va. 571, 383 S.E.2d 536 (1989), and *State ex rel. Partain v. Oakley*, 159 W. Va. 805, 227 S.E.2d 314 (1976), held that forcing lawyers to represent criminal defendants at a rate that did not allow them at least some profit was a taking of their property without just compensation. A lawyer's time, the Court recognized, is her livelihood, her bread and butter, and forcing her to expend that time without adequate remuneration deprives her of a tangible asset. The Court in those cases did concede that a lawyer's professional obligation as an officer of the court might confer some power on the State to impose on a lawyer's time, *see* Code of Professional Responsibility Rule 6.1 (lawyer's duty to provide *pro bono* service), but that qualification has no application to unions.

For the foregoing reasons, S. B. 1, if implemented, would take union's property without any compensation.

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[23]The cited cases included *State ex rel. Scott v. Roper,* 688 S.W.2d 757 (Mo.1985) (en banc)*; Ruckenbrod v. Mullins,* 102 Utah 548, 133 P.2d 325 (1943); *Coffeyville Vitrified Brick & Tile v. Perry,* 69 Kan. 297, 76 P. 848(1904); and *Webb v. Baird,* 6 Ind. 13 (1854).

C. Plaintiffs' Liberty Interests

Article III, §§ 3 and 10 of the West Virginia Constitution safeguard individual "liberty." *E.g., Women's Health Center of W. Va., Inc. v. Panepinto*, 191 W. Va. 436, 446 S.E.2d 658 (1993). "[L]iberty as used in the Constitution is not dwarfed into mere freedom from physical restraint of the person of the citizen, but is deemed to embrace the right of a man to be free in the employment of [his] faculties . . . subject only to such restraints as are necessary for the common welfare [and] to live and work where he will." *Ex parte Hudgins*, 86 W. Va. 526, 103 S.E. 327, 330 (1920). To survive due process scrutiny, "it must appear that the means chosen by the Legislature to achieve a proper legislative purpose bear a rational relationship to that purpose and are not arbitrary or discriminatory." *Thorne v. Roush*, 164 W. Va. 165, 168, 261 S. E2d 72, 74 (1979); *accord, State ex rel. Harris v. Calendine*, 160 W. Va. 172, 233 S.E.2d 318 (1977). Thus, in *Hudgins*, the Court invalidated a statute that made it a crime for any able-bodied male between 16 and 60 and not attending school to fail to engage in lawful employment or business for at least 36 hours a week. One has a liberty interest in choosing to live and work – or not to work – where he will. *Thorne v. Roush* struck down a law that required a one year apprenticeship after barber school to qualify for a state license as a barber. The program contained no standards to be met nor test to be passed and "appear[ed] on its face to do no more than provide a labor pool to be exploited by previously licensed practitioners." 164 W. Va. at 170, 261 S.E.2d at 75; *see also Bailey v. Alabama*, 219 U.S. 219 (1911) (statute ostensibly designed to enforce contracts to provide labor operated to create a peonage system in violation of the 13th Amendment).

The provisions of the S.B. 1 contravene the principles established by these cases. The new law will require unions and union officials to work, to supply their valuable expertise, and to

provide expensive services *for nothing*. That is, in a word, arbitrary. The prohibition on agency fees in S. B. 1, therefore, is in violation of Article III, §§ 3 and 10 of the West Virginia Constitution.

III. DEFENDANTS' AND AMICI'S RESPONSES

A. Relevance of the Union's "Choice"

The Attorney General's arguments in opposition to the Plaintiffs' Constitutional challenges and in support of his Motion for Summary Judgment, rest on the assertion that a union has a "choice": (1) it can seek status as the exclusive bargaining representative, and thus be obliged by the duty of fair representation to represent all members of the collective bargaining unit, including those who refuse to pay for the representation; or (2) it can eschew exclusive representation and represent only union members. The existence of the "choice," the AG then apparently maintains, eliminates any concerns about S. B. 1's intrusion on unions and their members' property and associational rights. The Court is not persuaded by this argument.

A union does have "choices." It can decide to cease its existence, in which case S. B. 1 would have no effect on it or its members. Or, as the AG suggests, the union could decide to forego its *raison d'etre* – that is, to bargain collectively with an employer on behalf of workers. It would choose that option if it did not seek certification as the exclusive bargaining representative for a bargaining unit and then represent only union members. Selection of that "choice" would terminate the union's ability to bargain with the employer because, without NLRB certification as a majority representative, the employer would have no duty to bargain with the union. In the absence of a legally imposed duty to bargain, private sector employers do not negotiate with unions. Foregoing certification could also expose a union to being ousted by a

rival union who does attain certification and exclusive bargaining status. A third option, of course, is to maintain its existence and to do what unions do by acquiring NLRB certification as a majority representative and thereby gaining status as the exclusive bargaining representative for the bargaining unit. Then, and only then, can it meaningfully negotiate on behalf of the unit's workers.

That the unions have a choice to exist or not, however, matters not to the Plaintiffs' claims in this case. Property owners *always* have choices about whether to acquire, dispose of, or keep property. David Lucas was not forced to spend close to a million dollars on beach front property in South Carolina, but once he purchased the property, the Constitution protected his investment from governmental actions that would deprive it of value. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The Pennsylvania Coal Company had a choice not to purchase mineral rights in the anthracite coal region of Pennsylvania, but after it did, government could not enact laws preventing it from realizing its investment. *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922). Similarly, as the AG notes, unions have a choice not to assume the mantel of exclusive bargaining representative, but once they do, they cannot, consistently with Article III, § 9, be forced to expend their services and resources on behalf of individuals who do not pay for them. *Jewell v. Maynard*, 181 W. Va. 571, 383 S.E.2d 536 (1989); *State ex rel. Partain v. Oakley*, 159 W. Va. 805, 227 S.E.2d 314 (1976).

Nor does the existence of a "choice" make a difference on Plaintiffs' associational and liberty claims. Justice Holmes famously wrote, in upholding a rule limiting police officers' political activities, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. . . . The servant cannot complain, as he takes the

employment on the terms which are offered him." *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892). *See also Adler v. Board of Education*, 342 U.S. 485, 492 (1952) (public employment may be conditioned upon the surrender of constitutional rights; public employees "are at liberty to retain their beliefs and associations and go elsewhere"). That concept – that a public benefit may be conditioned on the surrender of an individual's constitutional rights (the "right-privilege doctrine") – "has been uniformly rejected." *Keyishian v. Board of Regents*, 385 U.S. 589, 606 (1967), *quoting Keyishian v. Board of Regents*, 345 F.2d 236, 239 (2nd Cir. 1965). "[O]ur modern unconstitutional conditions doctrine holds that government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*, 518 U.S. 668, 674 (1996), *quoting Perry v. Sindermann*, 405 U.S. 593, 597 (1972). "For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which (it) could not command directly." *Id., quoting Speiser v. Randall*, 357 U.S. 513, 526 (1958) (internal quotation marks omitted); *accord, e.g., Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 133 S. Ct. 2321, 186 L. Ed. 2d 398 (2013); *Keyishian, supra*. In each of these cases, the Court struck down a condition limiting speech or associational rights that the state had attached as a prerequisite to the receipt or maintenance of some public benefit.

S.B. 1 does precisely that. In order for a union to do what unions do and negotiate and administer collective bargaining agreements on behalf of workers, it must obtain NLRB certification as a majority union and then, under NLRA § 9 assume exclusive responsibility for

the bargaining unit and satisfy the duty of fair representation. S.B. 1 then adds as a condition, with criminal and civil penalties attached for noncompliance, that the union cannot enter into any agreement assessing a services fee on members of the collective bargaining unit who, essentially, do not want to pay the fee. As explained, that condition severely burdens the union's associational rights and those of its members. The condition constricts a union's ability to recruit and retain members, and it assesses a penalty on members for joining because their dues will include a premium to pay for the services provided to the freeloaders. The fee ban thus imposes an unconstitutional condition on the exercise of associational rights. *Agency for International Development, supra*. And it does not matter that the union was neither required to seek, nor entitled to, the benefit of exclusivity.

B. Nonmembers' Associational Rights

The AG and *amici* contend at various points that the Plaintiffs seek relief that would force unwanted association on individuals or that would compel membership in an organization that an individual does not want to join. *E.g.*, AG's Memorandum at 23 ("Plaintiffs' claims would seek to compel nonmembers to participate in the union assembly"). That, the AG says, would violate the First Amendment associational rights of workers who do not want to join a union. The Court agrees that if those assertions were true, such a result would be problematic. They are not, however, accurate. Plaintiffs do not seek a ruling that the State cannot prohibit contracts that require union membership as a condition of continued employment. Rather, they seek a ruling that precludes the State from banning contracts that require workers who receive the services of a union to pay for those services. The distinction is fundamental.

The AG has cited the Supreme Court's decision in *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963), for its statement that union membership has been whittled down to a financial relationship, *i.e.,* paying dues or fees. That decision, however, was an interpretation of a National Labor Relations Act provision, § 8(a)(3), which allows for agreements requiring "membership" in a union after thirty days of employment but also providing that "membership" could not mean anything more than the payment of initiation fees and monthly dues. In that context, of course, the Court would give "membership" it narrowest interpretation to avoid constitutional issues. The case had naught to do, however, with the meaning of "membership" within the scope of what are constitutionally protected "associations." Plaintiffs contend they are not seeking any relief that could have the effect of forcing workers to become members of any organization they do not want to join, to "participate" in any associational activity, or to support any speech unrelated to contract processes.

Requiring workers to pay for the union services they receive is not requiring them to become union members. "Members" pay the full dues, vote in union elections, participate in union governance, and support the union's causes with their time and money. By contrast, workers who disagree with the union can opt to pay only the agency fees that support the union's contract negotiation and enforcement and choose not to become a union member. Such a worker cannot be required to "participate" in the union. In fact, the union would not allow it. Dissenting workers (those in disagreement with the union) are protected in vocally opposing the union and in associating with others to decertify and unseat a union.

Commc'ns Workers of Am. v. Beck, 487 U.S. 735, 738, 108 S. Ct. 2641, 2645, 101 L. Ed. 2d 634 (1988), recognized the distinction. *Beck* held that an employee in a union shop workplace

could not be forced to contribute dues to support the union's external advocacy with which the worker disagreed. Rather, § 8(a)(3) could be enforced to require only the support of the union's negotiation and administration of collective bargaining agreements. The Court clearly noted the distinction between members and nonmembers. At the outset of its decision, the Court stated, "In June 1976, respondents, 20 employees who chose not to become union members, initiated this suit." *Beck* at 739. It then identified the issue in the case:

> Today we must decide whether this provision also permits a union, over the objections of dues-paying *nonmember* employees, to expend funds so collected on activities unrelated to collective bargaining, contract administration, or grievance adjustment, and, if so, whether such expenditures violate the union's duty of fair representation or the objecting employees' First Amendment rights.

Id. at 738 (emphasis added).

Most fundamentally, the AG's and the *amici*'s concerns about the rights of nonmembers to avoid being forced to support with agency fees an organization with which they disagree overlook the regime established by the NLRA and West Virginia's LMRA. Those statutes establish a workplace democracy that operates like any democracy – the majority rules. That is, workers in an organized workplace vote, and then the majority governs. The workplace thus operates just like the democracy contemplated by the federal constitution and the constitution of every state. Citizens vote to elect their rulers, the rulers implement their policies, and all citizens – including those who voted against the prevailing regime and who disagree with it – must pay taxes to support the elected government. Meanwhile, they are protected in voicing their disapproval of the regime and in seeking to convince the majority at the next election to oust the regime and replace it with a different one.

The NLRA and the State's LMRA contemplate the same governance. Workers in a collective bargaining unit vote whether to have a union and which union they want. Once a union attains majoritarian status, it represents the workers in negotiating with the employer and in creating and enforcing the workplace's law – the collective bargaining agreement. Those members of the bargaining unit who disagree with the union are protected in expressing their dissenting views, *see* NLRA §§ 7, 8(b), and 9, 29 U.S.C. §§ 157, 158(b), and 159 and the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 401, *et seq.*, and they are protected in seeking to form a new majority to decertify the union or to seek other representation. A majority vote determines whether that will occur.

In other words, bargaining unit members who disagree with their union stand in the same stead as voters who disagree with their elected leaders. They must pay for their government while they work for a different result at the next election.

C. Davenport v. Washington Educational Association

The AG has on several occasions quoted *Davenport v. Washington Education Association*, 551 U.S. 177, 185 (2007), as saying "that unions have no constitutional entitlement to the fees of nonmember-employees." E.g. AG Response Memo at 16. The quotation is accurate, but when it is read in its context, its meaning is quite different from its unadorned quotation.

Davenport unanimously sustained against a First Amendment challenge to a Washington statute that required public-sector labor unions to receive express authorization from a nonmember before spending that nonmember's agency shop fees for election-related purposes. The reference to "the fees of nonmembers" in the quote that the AG relies on referred to that portion of the fees allocable to election-related spending. That conclusion is made abundantly

clear by the sentence that follows the quote: "We have never suggested that the First Amendment is implicated whenever governments place limitations on a union's entitlement to agency fees *above and beyond* what *Abood* and *Hudson require*." 551 U.S. at 185 (emphasis added). At the time these arguments were advanced before this Court, *Abood* and *Beck* required fees to cover the costs of contract administration and negotiation, fees that would prevent the free rider problem that S. B. 1 creates.[24] Hence, when *Davenport* is read in its appropriate context, the case actually supports Plaintiffs' argument that the State cannot force unions to carry free riders.

D. Other States' Right to Work Laws

The AG asserts that S.B. 1 is a "mine-run state right-to-work law" and that some 19 other states have laws containing a provision which prohibits unions from collecting agency fees from nonmembers. (AG Response, pp 1-2) The AG further asserts that the Plaintiffs have failed to support their statements regarding the unique provisions of S. B. 1. While, as the Plaintiffs have noted, there are other states that have enacted so-called right-to-work-laws, the language of the states is not uniform and a review finds that S.B. 1 includes statutory language not included in many of the laws cited by the AG (*see* AG Reply, p. 2 ftnt 1)

S. B. 1, at new West Virginia Code § 21-5G-2 provides:

A person may not be required, as a condition 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

[24] *Abood*, was reversed by the United States Supreme Court in *Janis, supra*, which held that requiring agency fees from nonconsenting public sector employees violated the First Amendment. See also, V Janus, p.42.

That is, a person may not be required, as a condition of employment to: become a member, pay to the union any dues, fees or assessments or pay to a charity or any third party an equivalent or pro rata share of member dues, fees or assessments. A number of other states do not go so far.

For example, while the Alabama code prohibits employers from requiring membership in a labor organization as a condition of employment (Alabama Code § 25-7-32), the provision on the payment of agency fees is limited to payments to a labor union or labor organization. "No employer shall require any person as a condition of employment or continuation of employment, any dues, fees, or other charges of any kind to any labor union or labor organization." (Alabama Code § 25-7-34)) In contrast S. B. 1 extends that prohibition to equivalent or pro rata portion to charities or third parties. The National Labor Relations Act is also in conflict with this provision and likely preempts any such provision.[25]

Likewise, a number of states follow the Alabama model and prohibit payments to labor unions, labor associations or labor or employee organizations and do not include the broader language of S.B. 1. Arkansas (i.e. Arkansas Code §11-3-303), Georgia (Georgia Code §34-6-22), Iowa (Iowa Code §731.4), North Carolina (North Carolina general Statutes §95-82), Virginia (Virginia Code §40.1-62), Tennessee (Tennessee Code §50-1-203), Wyoming (Wyoming Statutes §27-7-11)).

Other states use somewhat ambiguous language. These states include: Nebraska, which prohibits payment of "a fee either directly or indirectly to a labor organization (Nebraska Revised

[25] Indeed, under 29 U.S.C. § 129, as previously stated, even persons whose religions are in conflict with the union agreement are not exonerated from fees but rather may be required to donate the equivalency of fees or dues to a third party charity.

Statutes § 48-217); Texas, which provides that a labor union, labor organizer and others "may not collect, receive or demand, directly or indirectly, a fee as a work permit or as a condition for the privilege to work from a person who is not a member of the union" (Texas Statutes and Code §101.111); South Carolina, which makes it unlawful for an employer to require an employee as a condition of employment to "pay any fees, dues, assessments, or other charges or sums of money to a person or organization" and for a labor organization to "directly or indirectly" participate in an agreement or practice which has the effect of requiring" the payment of dues, fees or any other charges "to a labor organization" (South Carolina Code §41-7-30); and Utah, which prohibits employers from requiring any person to pay "any dues, fees, or other charges of any kind to any labor union, labor organization or any other type of association as a condition of employment or continuation of employment" (Utah Code § 34-34-10).

In fact, few states include language that is similar to the broad language of S. B. 1 concerning payments to third parties. *See* Indiana (Indiana Code § 22-6-6-8); Idaho (Idaho Code §44-2003); Oklahoma (Oklahoma Constitution Art. 23, § 23-1A(B)(4)); and Wisconsin (Wisconsin Statutes § 111.04); and Kentucky (Kentucky Revised Statutes § 336.130).

A reading of the state statutes makes it clear that the AG's assertion that S. B. 1 is a run of the mill 'right-to-work statute' is simply not accurate.

E. Just Compensation

The AG contends that, even if S. B. 1 effects a taking, the Plaintiffs have received just compensation through the "substantial benefits" that accrue to them from § 9's grant of exclusive bargaining power. The AG puts forward this contention while at the same time placing no evidence in the record to support it. Without any facts, this Court cannot determine that § 9

provides "just" compensation. Plaintiffs, on the other hand, have adduced hard evidence, based on the report relied upon by the Legislature, P.I. Exhibit 6 (Deskins, "The Economic Impact of Right to Work Policy in West Virginia"), of what their lost income will be if S.B. 1 is implemented. P.I. Tr. 12-38 (Testimony of Ken Hall); P.I. Exhibits 1 & 2; Affidavits of Lynford Lovell & Susan Samara. A showing of actual loss that will be caused by S.B. 1 cannot be countered by some ephemeral claim that federal law might bestow some unquantified countervailing benefit. The only basis for the AG's assertion are citations to *Sweeney v. Pence*, 767 F.3d 654, 661 (7th Cir. 2014), and *Zoeller v. Sweeney*, 19 N.E.3d 749, 753 (Ind. 2014). *Sweeney* cited no facts, no justification, and no authority for its assertion, which was *obiter dicta*,[26] as well as *ipse dixit*. *Zoeller* did not even mention the argument.

Moreover, and maybe more importantly, there is no basis in reason to conclude that the grant of exclusivity is just compensation for requiring a union to carry free riders. To be sure, § 9 does confer substantial benefits on a union that achieves majority status. It allows such a union to force the employer to the bargaining table and gives the union some leverage in negotiating wages and benefits for bargaining unit workers. Just as certainly, though, the NLRA imposes significant duties and burdens on unions who achieve exclusive status. It must abide by the restrictions in § 8(b), 29 U.S.C. § 158(b), and it must service all employees fairly and equally, regardless of their membership status. *Steele*, *supra*. In sum, § 9 and federal labor law does provide for a *quid pro quo*. It bestows power and leverage on the union through exclusivity while

[26] It was *dicta* because the court had first concluded that the plaintiffs had not raised the issue of an unconstitutional taking and, therefore, they had forfeited the claim. 767 F.3d at 666. Nevertheless, the majority proceeded to address the issue on the merits without argument from the parties and, in doing so, completely bungled it. *See Sweeney v. Pence*, 767 F.3d 654, 671-77 (7th Cir. 2014) (Wood, C.J., dissenting). The more accurate analysis of the takings issue is that of the dissent, in this Court's view.

exacting § 8(b) compliance and fair representation duties from the union. *That* is an even trade-off. What S. B. 1 does, however, is to require unions to submit to a regime in which their *quid* must be reduced by the costs of bearing the burden of free riders, which, the evidence shows, will result in real money losses. That arrangement is hardly just compensation.

Justice Scalia captured the situation well in his separate opinion in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 556, 111 S. Ct. 1950, 1978, 114 L. Ed. 2d 572 (1991)

[27] (concurring in judgment in part and dissenting in part):

> Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them; or, looked at from the other end, where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost. The "compelling state interest" that justifies this constitutional rule is not simply elimination of the inequity arising from the fact that some union activity redounds to the benefit of "free-riding" nonmembers; private speech often furthers the interests of nonspeakers, and that does not alone empower the state to compel the speech to be paid for. What is distinctive, however, about the "free riders" who are nonunion members of the union's own bargaining unit is that in some respects they are free riders whom the law requires the union to carry – indeed, requires the union to go out of its way to benefit, even at the expense of its other interests. In the context of bargaining, a union must seek to further the interests of its nonmembers; it cannot, for example, negotiate particularly high wage increases for its members in exchange for accepting no increases for others. Thus, the free ridership (if it were left to be that) would be not incidental but calculated, not imposed by circumstances but mandated by government decree.

F. Federal Preemption

The *amicus* brief of the National Right to Work Legal Defense and Education Foundation argues that, if this Court ruled for the Plaintiffs and decided that the West Virginia Constitution invalidates S. B. 1, such interpretation would be in conflict with federal law and would therefore

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[27] *Lehnert* dealt with limitations on public sector unions' ability to use dissenters' contributions for lobbying and other political activities. This case must now be considered in light of *Janus*, infra.

be preempted by virtue of the Supremacy Clause in Article VI of the United States Constitution. *See* Brief *Amicus Curiae* at 16-20. The Court rejects the argument.

The effect of a ruling in favor of the Plaintiffs and invalidating S. B. 1 would permit unions and management to agree that all members of a collective bargaining unit should be assessed for the union's costs of contract negotiation and enforcement. That could hardly be in conflict with federal law when it is expressly authorized by the NLRA. Section 8(a)(3) of that Act expressly provides "[t]hat nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement." A state law saying that management and labor can agree to assess bargaining unit members with a fee can hardly be said to be in conflict with § 8(a)(3). The section specifically says that federal law shall not be construed to preclude union shops. Case law has held that such agreements cannot go further than requiring the payment of agency fees – fees to pay for those costs incurred by the union in negotiating and administering a collective bargaining agreement. *E.g., Beck v. Communications Workers*, *supra*; *Hudson*, *supra*. Thus, a ruling for the Plaintiffs in this case would be precisely what § 8(a)(3) authorizes. Section 14(b) of the Act allows the states to qualify the 8(a)(3) proviso, but has no preemptive effect on the Plaintiffs' constitutional claims.

NLRB v. North Dakota, 504 F. Supp. 2d 750 (D.N.D. 2007), upon which *amici* rely heavily, is not to the contrary and, if anything, suggests that S. B. 1 is preempted, not the West Virginia Constitution. (Plaintiffs have not argued that federal law preempts S.B. 1). The Court therefore sees no need to address the issue. *But see Sweeney v. Pence*, *supra* (Woods, C.J.,

dissenting)). In North Dakota, a right to work state, the District Court considered whether a statute that required employers and unions to assess nonmembers of a union for the costs of a union's representation in a grievance or arbitration proceeding was preempted by the NLRA. Union members were not, however, required to pay for such representation. The court concluded the statute was preempted because the mandatory assessment could affect a nonmember's exercise of his or her rights under §§ 7 and 8(a) to decide whether to join or not to join a union. Per the statute, union and management were not permitted to come to a different arrangement. By contrast, invalidating the agency fee ban in S. B. 1 would leave a union and management free to decide whether to assess agency fees of *all* members of a collective bargaining unit, whether they are union members or not. Not only would that not discriminate against nonmembers nor create any incentive either to join or not to join a union, but it would promote the goals of the NLRA in reserving to management and labor the discretion to arrange the workplace in a manner that they find most effective and fair.

IV. PLAINTIFFS' S. B. 1-SPECIFIC ARGUMENTS

A. Article VI, § 30's Single Object Clause

The Plaintiffs assert that S.B. 1 violates Article 6, §30 of the West Virginia Constitution by embracing more than one object.

Article 6, §30 of the West Virginia Constitution provides:

> **Acts to embrace but one object -- Time of effect.**
>
> No act hereafter passed shall embrace more than one object, and that shall be expressed in the title. But if any object shall be embraced in an act which is not so expressed, the act shall be void only as to so much thereof, as shall not be so expressed, and no law shall be revived, or amended, by reference to its title only; but the law revived, or the section amended, shall be inserted at large, in the new act. And no act of the Legislature, except such as may be passed at the first session under this constitution, shall take effect until the

expiration of ninety days after its passage, unless the Legislature shall by a vote of two thirds of the members elected to each house, taken by yeas and nays, otherwise direct.

This section is designed to promote fair and effective legislative practices. The single object requirement – that an Act may legislate on only one subject – prevents logrolling, the attachment of riders that could not otherwise gain a majority of votes, and the mischievous practice of sneaking regulatory matters past unwary legislators and citizens. *See, e.g.*, Michael W. Catalano, *The Single Subject Rule: A Check on Anti-Majoritarian Logrolling*, EMERGING ISSUES IN STATE CONSTITUTIONAL LAW 3 (1990); Millard H. Ruud, *No Law Shall Embrace More Than One Subject*," 42 MINN. L. REV. 391 (1958); *Kincaid v. Mangum*, 189 W. Va. 404, 432 S.E.2d 74 (1993); *State ex rel. Walton v. Casey*, 179 W. Va. 485, 370 S.E.2d 141 (1988).

The title of S. B. 1 states that provisions of the bill are "all relating to establishing the West Virginia Workplace Freedom Act...,"[28] (new article, §§ 21-5G-1, *et seq.*), and the bill also amends and reenacts West Virginia Code §§ 21-1A-3 and 4, two sections of the West Virginia (LMRA). Plaintiffs contend the bill failed to alert members of the Legislature and of the public that critically important provisions regarding unions' effective representation of workers were being eliminated because, they argue, "Workplace Freedom Act" simply did not capture that legislative object.

Article VI, §30 has two purposes: (1) to ensure that a bill's title is sufficient to inform legislators and the public about the bill's contents; and (2) to prevent legislative logrolling.

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[28] Former Justice Ketchum in referring to S. B. 1's title stated an interesting fact: "The Legislature euphemistically titled Senate Bill 1 as the 'Workplace Freedom Act,' and in the same way calls it a 'right to work' law." *Morrisey at* 637. Webster's 1913 Dictionary defines "euphemism" to mean the "substitution of agreeable or inoffensive expression for one that may offend or suggest something unpleasant." No properly trained legislative drafter would include a euphemism in a title to any bill, much less one establishing sweeping changes to the labor laws of the state, in part codified since 1971.

Kincaid v. Mangum, *supra*; *see generally* Michael W. Catalano, *supra*; Millard H. Ruud, *supra*. The AG argues that S. B. 1's title is sufficient as it "expresses" its "object" in the title and Plaintiffs have not contended otherwise.

Indeed, the "requirement of expressiveness" contained in Article VI, § 30 is not difficult to satisfy. Syl. Pt. 2, *State ex rel. Walton v. Casey*, *supra*. The standard is met "[i]f the title of an act states its general theme or purpose and the substance [of the act] is germane to the object expressed in the title...." *McCoy v. VanKirk*, 201 W. Va. 718, 730, 500 S.E.2d 534, 546 (1997)(quoting Syl. Pt. 1, *State ex rel. Graney v. Sims*, 144 W. Va. 72, 105 S.E.2d 886 (1958)); *see also* Syl. Pt. 2, *Walton, supra*.

Our Supreme Court has determined, in reviewing a challenged act amending a preexisting statute, that the title of the amending act need only "simply refer to the section of the original act which it is intended to amend, and this will be a sufficient compliance with section 30 of article 6 of the constitution." Syl. Pt. 1, *Heath v. Johnson*, 36 W. Va. 782, 15 S.E. 980 (1892). Further, this Court is required to "construe the language and title of the act in 'the most comprehensive sense favorable to its validity.'" *McCoy*, 201 W. Va. at 730, 500 S.E.2d at 546 (quoting Syl. Pt. 2, *State ex rel. Graney v. Sims*, 144 W. Va. 72, 105 S.E.2d 886 (1958)).

Most recently, in *State ex rel. Blankenship v. Warner*, No. 18-0712, 2018 WL 4904729, at *7 (W. Va. Oct. 5, 2018), the Supreme Court in upholding a challenged title, wrote, in part:

"The general principles set forth in *City of Wheeling ex rel. Carter v. Casualty Co.*, 131 W.Va. 584, 48 S.E.2d 404 (1948), govern this case. In *Wheeling*, this Court explained:

> In considering whether an act of the Legislature violates the constitutional requirement concerning its title, the provision of the Constitution must be construed liberally in favor of the act, and generally the language in a title to an act should be construed in the most

> comprehensive sense favorable to the validity of the act. The provisions of Section 30, Article VI of the Constitution of this State, will be liberally construed to sustain a legislative enactment and all doubt will be resolved in favor of the constitutionality of the statute."

Considering the foregoing, although S. B. 1 does not have a particularly well-crafted "all relating to" provision in the title, the "object" of this bill was to adopt a "right to work" law. The changes in the two sections of the 1971 West Virginia labor statutes were necessarily changed for consistency with the prohibitions established in the new article, W. Va. Code §§ 21-5G-1, *et seq.*, created in S. B. 1. [29]

Accordingly, the AG is entitled to summary judgment on Plaintiffs' claim that the Act fails to comply with Article VI, Section 30 of the West Virginia Constitution.

B. Application of S. B. 1 to the Building and Construction Trades

The Plaintiffs assert that by its own terms S.B. 1 does not apply to contracts entered into in the building and construction industries. The argument was advanced based upon the original provisions of S. B. 1 § 21-5G-7(a) which provided:

> Except to the extent expressly prohibited by the provisions of this article, nothing in this article is intended, or should be construed, to change or affect any law concerning collective bargaining or collective bargaining agreements in the building and construction industry.[30]

This language has subsequently been stricken by the West Virginia Legislature as the result of the enactment of S. B. 330.[31] With the subsection in issue contained in § 21-5G-7(a) (2016) now deleted in its entirety, Plaintiffs' argument that the language contained in that subsection exempts them from the operation of the Act thus became moot on June 15, 2017, the

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[29] I agree, however, with the Plaintiffs' assertion that the remedies for violation of the "new provisions" remain in the "unchanged provisions" of the 1971 laws and are not consistent with the new Act.

[30] *See* this Court's discussion, paragraphs 16, 17, and 18, pp. 5-6, *supra.*

[31] *Compare* W. Va. Code § 21-5G-7 (2016) *with* W. Va. Code § 21-5G-7 (2017).

date when the amended § 21-5G-7 took effect. *See Rockland Realty Corp. v. Lilly*, 199 W. Va. 674, 678, 487 S.E.2d 332, 336 (1997) (per curiam) (a challenge to a statute that "is no longer in effect, having been substantively amended by the Legislature" falls "squarely into the category of moot questions"); *cf. Pine Tree Medical Assocs. v. Sec'y of Health & Human Servs.*, 127 F.3d 118, 120–21 (1st Cir. 1997) (holding that challenge predicated on the repealed notice and comment provision of a statute had been rendered moot). "Moot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or of property, are not properly cognizable by a court." Syl. Pt. 1, *State ex rel. Lilly v. Carter*, 63 W. Va. 684, 60 S.E. 873 (1908).

Thus, because of the amendments to the Act, the claim advanced in Count 3 of the Amended Complaint fails as a matter of law and the AG is entitled to Summary Judgment on this claim.

V. JANUS

During the pendency of these proceedings, the United States Supreme Court, the only Court with authority above that of the Supreme Court of Appeals of West Virginia, rendered an opinion on the much awaited case of *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (decided June 27, 2018).

In this landmark case, the Court ruled that public sector labor unions cannot charge agency fees to employees who decline to join a union but who are nonetheless covered by its collective bargaining unit. In ruling that such fees are an unconstitutional burden on the First Amendment rights of such public employees, by "compelling them to subsidize private speech on matters of substantial public concern," the Court reversed its prior 1977 decision in *Abood v.*

Detroit Board of Education, *supra*, which prohibited the use of public sector union fees for political causes such as lobbying, but allowed the use of such fees for the cost of collective bargaining and other services provided to members.

Consequently, the highest Court in this country has determined that an agency fee ban on public sector unions is lawful. However, *Janus* only applies to public sector unions and not to private sector unions. While the First Amendment restricts government action, it cannot restrict private conduct.

Indeed, Justice Alito wrote, as to the Court's authority over private sector unions, "*Abood* failed to appreciate that a very different First Amendment question arises when a State *requires* its employees to pay agency fees. See *Harris, supra,* at ——, 134 S.Ct., at 2632."*Janus* at 2479. Justice Alito also elaborated in footnote 24 of the opinion, explaining the differences as to the Court's view of public versus private sector unions, which Benjamin Sachs, a labor professor at Harvard University opines: "In this footnote in Janus, he's sending a signal that we are not going to the private sector…"[32]

In adopting this same conclusion, on February 1, 2019, a Texas Northern District Judge agreed that *Janus* applied only to public sector and not to private sector unions and workers. "In particular, the ruling in *Janus* applies to public-sector unions and workers, not private-sector unions and workers. *See id.* at 2478 ("[W]e conclude that *public-sector* agency-shop arrangements violate the First Amendment[.]" (emphasis added))." *Carter v. Transp. Workers Union of Am. Local 556*, No. 3:17-CV-2278-S, 2019 WL 416151, at *12 (N.D. Tex. Feb. 1,

[32] "Extending Supreme Court's Janus decision to private-sector unions an uphill battle." July 17, 2018, Washington Examiner.com.

2019).

Accordingly, the ruling in *Janus* supports this Court's determination that under the West Virginia Constitution, the agency fee ban on private sector unions is unlawful.

VI. PLAINTIFFS' MOTION REGARDING VALIDITY OF CONTRACTS

The final matter pending before this Court is the Plaintiffs' Motion for a Declaration of Validity of Collective Bargaining Agreements Entered Into During the Pendency of Preliminary Injunction.

Specifically, the Plaintiffs seek a declaration from this Court that "any and all collective bargaining agreements entered into during the pendency of the preliminary injunction issued by this Court are legal contracts and that any union security clauses contained therein are valid clauses." The Court is uncertain whether any of the parties to the contracts are presently parties (Plaintiffs) in this litigation and, in any event, is certain that not all parties to those contracts are parties in this litigation. Moreover, a "blanket order" ratifying provisions of contracts never seen by the Court and affecting the rights of persons not parties in this case seems particularly dubious.

In this regard, the positions advanced by the AG and *amici* are well taken since the Court simply has no jurisdiction over matters that are not controversies between the parties, which is certainly not the case for this request. Accordingly, this Court **DENIES** Plaintiffs' motion.

VII. SEVERABILITY

The findings of this Court do not require that all of the provisions of S. B. 1 be declared unlawful or that any person or entity be enjoined from enforcing those remaining provisions, not declared unlawful herein.

Indeed, both the West Virginia Labor Management Relations Act (W. Va. Code §§ 21-1A-1, *et seq.*) and The Workplace Freedom Act (W. Va. Code §§ 21-5G-1, *et seq.*) have severability provisions.[33] W. Va. Code § 21-1A-8 provides: "If any provision of this article, or the application of any provision to any person or circumstance, shall be held invalid, the remainder of this article, or the application of any such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby."

W. Va. Code § 21-5G-7(b) similarly provides: "If any provision of this article or the application of any such provision of this article to any person or circumstance is held invalid by a court of competent jurisdiction, the remainder of this article or the application of its provisions to persons or circumstances other than those to which it is held invalid is not affected thereby."

RULING

Accordingly, based on the foregoing findings, this Court **ORDERS** that the following provisions of S. B. 1 are declared violative of the Constitution of the State of West Virginia and shall have no force and effect as the law of this state:

First, W. Va. Code § 21-1A-3, to the extent it would authorize employees "to refrain from paying any dues, fees, assessments or other similar charges however denominated of any kind or amount to a labor organization of to any third party including, but not limited to, a charity in lieu of a payment to a labor organization."

Second, W. Va. Code § 21-5G-2 (subdivisions (2) and (3)), to the extent it prohibits requiring persons to:

"(2) Pay any dues, fees, assessments or other similar charges, however denominated, of

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[33] *See also*, W. Va. Code § 2-2-10(cc).

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."

To the extent that the Plaintiffs seek to have any other provision of S. B. 1 declared unlawful, such relief is hereby **DENIED**.

To accommodate any potential appeal from this Order, this Court, *sua sponte*, **STAYS** the effect of any ruling herein for a period of thirty (30) days from the entry hereof.

The Clerk of the Court is **ORDERED** to send certified copies of this Order to all counsel of record.

ENTERED this 27th day of February, 2019.

Jennifer F. Bailey
Judge Jennifer F. Bailey
Kanawha County Circuit Court