IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
No. 17-0187

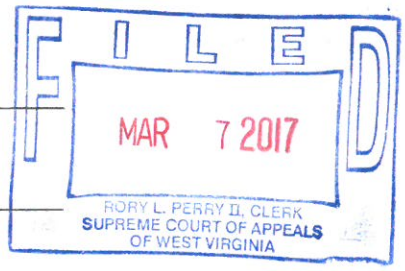
Patrick Morrisey, in his official capacity as
West Virginia Attorney General,
and the State of West Virginia,

Petitioners/Appellants,

v.

West Virginia AFL-CIO, et al.

Respondents/Appellees.



PETITIONERS' BRIEF

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I. The circuit court erred in preliminarily enjoining Senate Bill 1 of the 2016 Legislative Session ("the Act") because Respondents cannot show a likelihood of success, or even a substantial question, on the merits of their claims, Respondents have failed to show any irreparable harm, and both the State and the public will be irreparably harmed by the injunction.

II. The circuit court erred by issuing an injunction that would govern non-parties who received no notice of this proceeding in violation of federal and state due process guarantees.

INTRODUCTION

Petitioners Attorney General Patrick Morrisey and the State of West Virginia (collectively, "the State") respectfully request that this Court vacate the circuit court's order preliminarily enjoining enforcement of Senate Bill 1 of the 2016 Legislation Session ("the Act"), the State's right-to-work law known in part as the Workplace Freedom Act. For the reasons below, Respondents are unlikely to succeed on the merits of their legal challenges and the balance of equities weighs in favor of vacating the injunction.

State right-to-work laws have long been an integral part of this Nation's system of labor relations. For over eighty years, federal law has provided a highly-regulated framework in which unions can operate subject to certain terms and conditions designed to respect the rights of employees and employers in union elections and labor negotiations. Under this framework, unions face choices about how best to organize that come with both costs and benefits. For example, unions may elect to represent only members or they may elect to represent all employees in a bargaining unit, including nonmembers. Unions that take the latter approach obtain the valuable right to act as the exclusive agent of the unit in negotiations with management. But federal law also imposes certain costs and potential costs on exclusive agency

unions: such unions are obliged to treat members and nonmembers fairly, and they face the possibility that a state will exercise its reserved discretion under federal law to enact a right-to-work law, prohibiting agreements that would compel nonmembers to join an exclusive agency union or subsidize the union's activities.

The State Legislature in 2016 exercised its reserved authority under federal labor law to enact a right-to-work law. Senate Bill 1, which ensures that employees cannot be compelled to join a union or pay agency fees to subsidize union activities on pain of losing their employment, furthers West Virginia's substantial interests in vindicating its citizens' rights to free association. Like every other state right-to-work law, West Virginia's law is specifically permitted by 29 U.S.C. § 164(b), which provides that federal law does not "authoriz[e] 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." Of the 28 right-to-work laws in the country, *see supra* n.1, only West Virginia's is currently enjoined.[1]

In this suit, Respondents have not challenged the longstanding federal regime that permits state right-to-work laws. Rather, Respondents claim that the Act impermissibly compels unions to provide services to nonmembers without compensation and thus takes their property and violates their rights to free association and due process in purported violation of the West Virginia Constitution. But Respondent's underlying premise is false: *The Act* does not require

[1] Two of those right-to-work laws have been enated since the passage of the Act. Kentucky's right-to-work law is now in effect. *See* Ky. Rev. State. § 336.130(3)(a); 2017 Kentucky Laws Ch. 1 (HB1) §14. Missouri's right-to-work law will become effective on August 28, 2017. *See* Senate Bill No. 19, 99th Missouri General Assembly, First Regular Session 2017, § 290.590(2), (7)(5) *available at* www.senate.mo.gove/17info/pdf-bill/tat/SB19.pdf; Current Bill Summary, Senate Bill 19, www.senate.mo.gov/17info/BTS_Web/Bill.aspx?SessionType=R&BillID =57095277.

anything from unions. It is *federal law*, which Respondents do not challenge, and *Respondents' own voluntary choice* to take advantage of the benefits of organizing as exclusive agency unions that imposes the duty of fairly representing nonmembers, whether or not fees can be collected from those nonmembers under state law. Because the Act does not impose the burdens that Respondents challenge, their claims must fail for that reason alone.

Even if state law could somehow be deemed responsible for compelling Respondents to provide services to nonmembers, it would still raise no constitutional concerns. Federal and state appellate courts have rejected takings claims in contexts where, as here, an organization has voluntarily entered a highly-regulated industry that imposes certain obligations and potential obligations as the cost of doing business. Also, because the Act restricts at most the right of unions to collect prospective fees under hypothetical future collective bargaining agreements, Respondents can point to no cognizable property interest for their takings claims. And in upholding similar right-to-work laws, the U.S. Supreme Court has held that a union's right to associate does not extend to the right to compel a nonmember employee to support the union's activities.

The circuit court erred in issuing a preliminary injunction. As a threshold matter, the circuit court erroneously applied a relaxed standard to conclude that injunctive relief was appropriate because Respondents had raised serious constitutional questions. In any event, injunctive relief would be inappropriate under any standard: Respondents have neither raised serious constitutional questions nor, under the correct standard, are they likely to succed on their claims. The court likewise erred in balancing the equities in Respondents' favor, when delay in this law's enforcement will impair the State's vital interest in protecting its citizens from compelled association. Finally, the circuit court erred in purporting to issue a statewide

injunction against enforcement of the Act when only one county prosecutor had been served and had an opportunity to appear.

This Court should vacate the preliminary injunction.

STATEMENT OF THE CASE

Respondents have obtained a preliminary injunction of the Act based on various theories that all depend on the same incorrect premises: (1) that West Virginia is somehow coercing unions to offer services to nonmembers and (2) that unions are constitutionally entitled to agency fees as compensation for those services. Both premises are wrong and cannot be squared with federal or state law.

First, a union's decision to represent nonmembers is a voluntary choice that federal labor law has afforded unions since the New Deal era. Under federal law, unions may either represent only members (a "members-only" union) or represent all employees within a particular bargaining unit, including nonmembers (an "exclusive agency" union). *See* 29 U.S.C. § 159(a); W. Va. Code § 21-1A-5(a); *Zoeller v. Sweeney*, 19 N.E.3d 749, 753 (Ind. 2014). These options each come with costs and benefits under federal law that unions must weigh when determining whether and how to organize.

Second, among the known costs of choosing to be an exclusive agency union is that federal law expressly authorizes States like West Virginia to enact laws (like the Act) that restrict the ability of an exclusive agency union to require employees to join the union or subsidize its activities. Federal law specifically states that it shall not "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). This law is consistent with U.S.

Supreme Court precedent holding that "unions have no constitutional entitlement to the fees of nonmember-employees." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, __, 132 S. Ct. 2277, 2291 (2012) (quoting *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 185 (2007)).

These provisions of federal law provide the basic legal framework in which unions have operated for decades, and Respondents do not challenge it. Rather, Respondents ignore inconvenient aspects of federal law and challenge only the Act. But the Act merely does what is expressly contemplated and permitted by federal law: It limits the ability of unions that have chosen to be exclusive agency unions to force nonmembers to pay fees. It does not require any unions to provide services to anyone that the union has not chosen to serve, nor does it deprive unions of any compensation to which they are legally entitled.

I. Legal Background

A. Unions exist under a highly reticulated legal regime. Both federal and state law provide that employees have the right to "bargain collectively through representatives of their own choosing." 29 U.S.C. § 157; *see also* W. Va. Code § 21-1A-3. In seeking to represent a group of employees, unions may choose to organize as either an exclusive agency union or a members-only union. That choice bears certain costs and benefits.

With respect to exclusive agency unions, federal law confers a "set of powers and benefits." *Sweeney v. Pence*, 767 F.3d 654, 666 (7th Cir. 2014). An exclusive agency union acts as the sole representative of employees—whether members or non-members—"in respect to rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. § 159(a). And federal law *requires* employers to bargain in good faith with an exclusive agency union. 29 U.S.C. § 158(a)(5), (b)(3).

These federally-created powers "result[] in a tremendous increase in the power of the representative group—the union." *Am. Commc'n Ass'n v. Doud*, 339 U.S. 382, 401 (1950). An exclusive agency union wields power "comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202 (1944). That power extends even to the ability to set the terms and conditions of employment of workers within the bargaining unit who opt not to become union members. *See Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1955).

These benefits, however, also carry costs. Because federal law provides enormous power to unions to act on behalf of the employees they represent, federal law imposes a statutory duty to represent all employees fairly—even nonmembers. *See Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 761 (1961); *see also Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *United Steelworkers of Am., AFL-CIO-CLC v. Rawson*, 495 U.S. 362, 373 (1990). The U.S. Supreme Court has explained that if the law conferred the power of exclusive representation "without any commensurate statutory duty toward its members, constitutional questions arise." *Steele*, 323 U.S. at 198. Accordingly, since the dawn of federal labor law, exclusive agency unions have accepted the duty of fair representation as a statutory responsibility in exchange for the benefits that come with exclusive representation.[2]

Unions are not required to use an exclusive agency model and assume the duty of fair representation. To form an exclusive agency union, a "majority of employees" in a bargaining unit must designate a union as a representative. 29 U.S.C. § 159(a); W. Va. Code § 21-1A-5(a).

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[2] This Court has not yet interpreted a similar provision of state law to determine whether it also includes a duty of fair representation. *See* W. Va. Code § 21-1A-5(a). In any event, to the extent that state law can be interpreted to impose a duty of fair representation, it would be entirely derivative of the imposition of the duty of fair representation under the federal National Labor Relations Act. *See* W. Va. Code § 21-1A-1(c).

But a union's decision to stand for election as an exclusive agent is voluntary. 29 C.F.R. § 102.61. And even after election, a union may cease to act as exclusive representative at any time "by unequivocally and in good faith disclaiming further interest in representing the unit." *Dycus v. NLRB*, 615 F.2d 820, 826 (9th Cir. 1980).

A union can decide instead that it wishes to represent only members and thus forgo both the benefits and costs of exclusive agency. "'Members only' contracts" that allow a union to represent only members "have long been recognized." *Retail Clerks Int'l Ass'n v. Lion Dry Goods*, 369 U.S. 17, 29 (1962). Respondents themselves acknowledge this option and understand that it would require foregoing the substantial benefits conferred by federal law on unions that choose the responsibilities of exclusive agency. App. 185. Respondents suggest that no union would want to make this tradeoff, App. 185–86, but they do not deny that the choice to accept the duty of fair representation in exchange for acting as a bargaining unit's exclusive representative exists under federal law.

B. One additional potential cost of exclusive agency is that federal law reserves to the States the power to prohibit contracts that require employees to be "members[]" of exclusive agency unions on pain of losing their jobs. Federal law allows employers to enter into "an agreement with a labor organization . . . to require as a condition of employment membership therein." 29 U.S.C. § 158(a)(3). But federal law also allows that such agreements may be "prohibited by State . . . law." 29 U.S.C. § 164(b). In other words, although federal law permits private "agency-shop arrangements," "States retain the power . . . to ban . . . such agreements." *Davenport*, 551 U.S. at 190 n.3.

This reserved power allows States not only to prohibit contracts requiring employees to *join* an exclusive agency union, but also those that require employees to *subsizdize* such unions.

Under U.S. Supreme Court precedent, the term "membership" in these provisions includes any requirement to pay agency fees to support a union's activities. The phrase "'[m]embership' as a condition of employment" in 29 U.S.C. § 158(a)(3), which permits agency-shop arrangements, has been "whittled down to its financial core." *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 742 (1963). This "financial core" includes payments "germane to collective bargaining, contract administration, and grievance adjustment." *Commc'n Workers of Am. v. Beck*, 487 U.S. 735, 745 (1988). And the U.S. Supreme Court has recognized that this term "membership" should have the same meaning under 29 U.S.C. § 164(b), which authorizes States to forbid agency-shop arrangements through right-to-work laws like the Act. *See Retail Clerks Int'l Ass'n v. Schermerhorn*, 373 U.S. 746, 751 (1963).

The legislative history of the 1947 Taft-Hartley Act, which clarified the reserved authority of the States to ban compulsory union membership, confirms this broad understanding of "membership" to include all compulsory fees. At the time, a number of States already had right-to-work laws that prohibited all compulsory fees. *Sweeney*, 767 F.3d at 662. "The House report listed each state which had passed a right-to-work law or constitutional provision" that Taft-Hartley was intended to affirm. *Int'l Union of the United Ass'n of Journeyman and Apprentices of the Plumbing and Pipefitting Indus. of the U.S. and Canada, Locals Unions Nos. 141, 229, 681 and 706 v. NLRB*, 675 F.2d 1257, 1260 (D.C. Cir. 1982). Congress was "well aware" that seven of those twelve state laws included explicit bans on compulsory fees, and "the stated purpose of [28 U.S.C. § 164(b)] was to preserve the efficacy of laws like these—statutes that allowed states to place restrictions of their choosing on union security agreements, including restrictions on whether employees could be compelled to pay dues or fees of any kind to a union." *Sweeney*, 767 F.3d at 662, 663.

Thus, "a union's status as exclusive bargaining agent and the right to collect an agency fee from nonmembers are not inextricably linked." *Harris v. Quinn*, 134 S. Ct. 2618, 2622 (2014). Under federal law, States can decide whether to allow employers and unions to negotiate for provisions that would compel nonmember employees to pay agency fees. When unions adopt an exclusive agency model, they do so knowing that certain States may limit their ability to collect fees from nonmembers, notwithstanding that federal law requires as an unwaivable condition of exclusive agency that such unions represent both members and nonmembers fairly.

II. Senate Bill 1 of the 2016 Legislative Session

Consistent with federal law, the West Virginia Legislature passed Senate Bill 1, now codified as West Virginia Code §§ 21-1A-3, 21-1A-4 and 21-5G-1 to -7, on February 5, 2016 ("the Act"). After the Governor vetoed the Act, the Legislature overrode the veto on February 12, 2016. The Act applies only to any agreement entered, modified, renewed, or extended after July 1, 2016. W. Va. Code § 21-5G-7(b).

The Act codifies a number of protections for employees in a new article of the West Virginia Code, entitled the West Virginia Workplace Freedom Act. W. Va. Code Chapter 21, Article 5G. The Workplace Freedom Act provides that a person may not be required to "[b]ecome or remain a member of a labor organization; [p]ay any dues, fee, assessments or other similar charges, however denominated, of any kind or amount to any labor organization; or [p]ay any charity or third party, in lieu of those payments, any amount that is equivalent to a pro rata portion of dues, fees, assessments or other charges required of members of a labor organization." W. Va. Code § 21-5G-2. The Act also bars "[a]ny agreement, understanding or practice . . . between any labor organization and an employer . . . which provides for the exclusion from employment of any person because of membership in, affiliation with, resignation from or

refusal to join or affiliate with any labor organization," and provides both civil and criminal penalties for noncompliance. W. Va. Code §§ 21-5G-3, 4, 5.

The Act also amended the preexisting Labor-Management Relations Act for the Private Sector to provide similar protections for a right not to pay compulsory union fees. *See* W. Va. Code § 21-1A-3. These amendments also make it an unfair labor practice for a labor organization to interfere with the exercise of this right. W. Va. Code § 21-1A-4(b)(1).[3] A violation of these protections may be enforced through the courts. W. Va. Code § 21-1A-7(b).

These provisions of the Act are consistent with similar provisions in the majority of right-to-work laws across the country.[4]

III. Respondents' Suit and Preliminary Injunction Proceedings

Respondents—several organized labor organizations and a purported member of one such organization—filed a complaint challenging the Act on June 27, 2016, only days before its July 1 effective date. App. 44–60. Respondents sought statewide injunctive relief, but the only prosecuting attorney that Reponsdents served was the Kanawha County Prosecuting Attorney, as a purported representative of the class of prosecuting attorneys. App. 51, 84. Along with their

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[3] Legislation has been introduced to amend the Workplace Freedom Act in two respects. Senate Bill 330, 2017 Regular Session, *available at* http://www.legis.state.wv.us/Bill_Text_HTML/2017_SESSIONS/RS/bills/sb330%20intr.pdf. This Bill would omit a definition of the word "State" from the Act that is not at issue in this litigation and would omit the rule of interpretation related to the construction and building industries on which Respondents have relied to argue that they are exempt from the Act. *Id.* The Bill includes language that provides that the changes made "shall be applied retroactively." *Id.* A note on the Bill clarifies that the purpose of the Bill includes "to repeal provisions relating to the statutory construction of the act." *Id.* Should the Bill become law, it would moot Respondents' argument addressed in Part I.D. of this brief.

[4] *See* Ala. Code § 25-7-34; Ark. Code § 11-3-303; Ga. Code § 34-6-22; Idaho Code § 44-2003; Indiana Code § 22-6-6-8; Iowa Code § 731.4; 23 La. Rev. Stat. § 983; Mich. Comp. Laws § 423.14; Miss. Code § 71-1-47(d); Neb. Rev. Stat. § 48-217; N.C. Gen. Stat. §§ 95-81–95-82; Okla. Const. Art. 23, § 1A(B); S.C. Code § 41-7-30; Tenn. Code § 50-1-203; 3 Tex. Labor Code § 101.111; Va. Code § 40.1-62; Utah Code § 34-34-10; Wis. Stat. 111.04(3)(a); Wyo. Stat. § 27-7-111.

complaint, Respondents filed a motion for a preliminary injunction. App. 61–82. In support of their motion, Respondents claimed that the Act infringes on their liberty and freedom of association and takes property without just compensation in violation of the West Virginia Constitution. *See* App. 69–80. Respondents argued too that the Act should not be applied to construction and building unions. App. 80–81. Respondents amended their complaint before the circuit court held a hearing on their motion for a preliminary injunction. App. 85–97. The substance of Respondents' claims remained the same in their amended complaint. App. 90–96. The Attorney General filed a motion to intervene on behalf of the State of West Virginia and a response opposing the motion for a preliminary injunction. App. 102–132.

The circuit court held a hearing on the preliminary injunction motion on August 10, 2016. Respondents presented a single witness at that hearing. App. 219–68. That witness—Ken Hall, president of Teamsters Local 175 and General Secretary of the International Brotherhood of Teamsters—failed to produce any empirical evidence that the Act would cause Respondents any cognizable harm. Instead, Hall testified that he had instructed the bookkeeper of Teamsters Local 175 to prepare a document that showed that the Act could theoretically result in loss of revenue due to a loss in union membership of up to 20 percent. App. 220–23. But Hall conceded that he merely borrowed that number from a report that the Senate had prepared by a third party in connection with its consideration of the Act, without independently corroborating it. App. 223, 260–62. Hall further testified that "we have some" collective bargaining agreements "that are in the process of being renegotiated or have just been renegotiated," but he did not provide any other evidence of collective bargaining agreements that might be covered by the Act. App. 267. No other evidence about any Respondents was introduced.

After the close of testimony, the circuit court announced that it intended to issue an injunction that would apply on a statewide basis and that would delay the effective date of the law. App. 312. At the circuit court's request, Respondents submitted a proposed order at the request of the circuit court. *See* App. 189–97. The State filed objections to the proposed order. App. 189–97. Among other objections, the State pointed out that the proposed order granted relief "beyond the relief appropriate to a preliminary injunction and beyond the parties before the Court in delaying the effective date of the Act." App. 196.

Since the August 10 hearing, the defendants have filed responsive pleadings and cross-motions for summary judgment have been fully briefed. *See* App. 3, 7. A hearing was held on the motions for summary judgment on December 2, 2016. App. 198. At the conclusion of the hearing, the circuit court did not announce a ruling or a timetable for a decision on the preliminary injunction, but requested that both the State and Respondents prepare proposed findings and conclusions on summary judgment, which have now been submitted. *See* App. 3, 12. No order or opinion on the pending cross-motions for summary judgment has been issued.

After the State informed the circuit court that it intended to file a petition for an extraordinary writ in this Court if no order issued on the preliminary injunction, App. 206, the circuit court issued an order granting a preliminary injunction on February 23, 2017. App. 13–28. One day later the circuit court issued a superseding and final order on the preliminary injunction. App. 29–43.

The circuit court's order concluded that "[b]ecause plaintiffs bear such an imbalance of the hardships," they were entitled to an injunction so long as "[t]he constitutional questions raised by the Plaintiff are substantial, serious and difficult, and are therefore fair gorunds for a more deliberate investigation." App. 41. But the principal hardship that the circuit court relied on

to relax the standard of review was merely "plaintiffs' *assertions* of constitutional violations." App. 40 (emphasis added). The test the circuit court applied—requiring merely that a constitutional question be substantial, serious, or difficult such that they are fair grounds for more deliberate investigation—was derived from Fourth Circuit case law that has since been rejected by the United States Supreme Court. *See Real Truth About Obama, Inc. v. FEC*, 575 F. 3d 342, 346–47 (4th Cir. 2009), *vacated on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010)

Applying its relaxed standard, the circuit proceeded to conduct a brief analysis of the merits that ignored many of the legal arguments raised by the State and relied on unsupported factual contentions. For example, although the State had explained that no property had been taken by the Act, the circuit court relied entirely on costs arising from the federal duty of fair representation when it concluded that Plaintiffs had adequately shown that the Act took property without just compensation. App. 39–40. Similarly, the circuit court distinguished U.S. Supreme Court precedent that established that unions have no associational rights to compel employees to pay fees on pain of losing their jobs, *Lincoln Fed. Labor Union No. 19129, Am. Fed. of Labor*, 335 U.S. 525 (1949), based on the irrelevant and incorrect assertion that the state right-to-work laws challenged in that case permitted agency fees. App. 38 n.10. And the circuit court relied on alleged harms to individual union members even though no evidence related to the sole individual member named as a plaintiff had been introduced. App. 39–40.

SUMMARY OF ARGUMENT

The circuit court's extraordinary decision to enjoin the Act—a law similar to laws in effect in more than half of the other States and designed to protect the associational freedoms of West Virginia employees—has impermissibly prevented implementation of the statute on the

timetable mandated by the Legislature, caused irreparable harm to the State, and sowed confusion among employees, unions, and employers who lack clarity as to how to lawfully negotiate collective bargaining agreements while these proceedings continue. The circuit court also improperly imposed a statewide prohibition on enforcement of the Act without providing all those responsible for its enforcement with notice and an opportunity to be heard.

The circuit court granted the injunction by proceeding from the erroneous premise, based on case law that has since been overturned by the U.S. Supreme Court, that plaintiffs in certain cases need only raise "serious" or "difficult" constitutional questions to enjoin a law, rather than show reasonable likelihood of success on the merits. App. 37. Applying this incorrect standard, the circuit court proceeded to credit Respondents' constitutitional challenges to the Act based on little more than a recitation of their cursory allegations.

Under the correct test, Respondents have utterly failed to show that their claims are reasonably likely to succeed. Respondents argue that the State's prohibition of nonmember agency fees somehow unconstitutionally coerces a union to represent nonmembers without just compensation. But the underlying premise that the challenged *state* law is coercing unions to do anything is false. The mandate for exclusive agency unions to fairly represent all employees in a bargaining unit derives from *federal* law, which Respondents do not challenge. Moreover, even federal law does not force Respondents to assume the duty of fair representation. Rather, Respondents voluntarily assume that duty to enjoy the benefits that come with that obligation, including a legally-enforced monopoly on the right to bargain with employers.

There are myriad other problems with Respondents' legal positions. They have not identified a cognizable property interest that has been "taken" for purposes of their takings claims. Because the Act only operates prospectively, Respondents can at most claim a unilateral

expectation in fees from future contracts, which is not a sufficient property interest under this Court's case law.

Nor can Respondents demonstrate any infringement on their right to associational freedom. The Act does not impose any restriction on any employee's right to choose to join or not join a union. To the contrary, it is Respondents who wish to prevent the States from protecting the associational rights of employees who choose not to join a union by compelling them to provide unions with financial support.

The circuit court's analysis of the harms in this matter was also fatally flawed. In particular, the circuit court assumed that Respondents' constitutional claims were meritorious when it concluded that they had been irreparably harmed by a violation of constitutional rights because they had made "assertions of constitutional violations." App. 40. The circuit court then circularly relied on its conclusion about irreparable harm to conclude that it did not need to perform more than a cursory review of the merits of Respondents' constitutional claims. App. 41. For all of these reasons, and those set forth below, this Court should vacate the preliminary injunction and remand to the circuit court with instructions to conduct further proceedings consistent with this Court's decision.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State requests oral argument pursuant to West Virginia Rule of Appellate Procedure 20 because this appeal raises matters of first impression and issues of fundamental public importance in this State.

STANDARD OF REVIEW

This Court applies "a three-pronged deferential standard of review" when it reviews "the exceptions to the findings of fact and conclusions of law supporting the granting of a temporary

or preliminary injunction." Syl. Pt. 1, in part, *State ex rel. McGraw v. Imperial Marketing*, 196 W. Va. 346, 472 S.E.2d 792 (1996). This Court reviews "the final order granting the temporary injunction and the ultimate disposition under an abuse of discretion standard," "the circuit court's underlying factual findings under a clearly erreoneous standard," and "questions of law de novo." *Id.*

ARGUMENT

I. Respondents failed to meet any of the requirements for a preliminary injunction

The burden of proof to justify an injunction rests on the party seeking the injunction. *See Camden-Clark Memorial Hosp. Corp. v. Turner*, 212 W.Va. 752, 760, 575 S.E.2d 362, 370 (2002). A circuit court must consider four factors when it decides whether to issue an injunction holistically: "(1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest." *Jefferson Cnty Bd. of Educ. v. Jefferson Cnty Educ. Ass'n*, 183 W.Va. 15, 24, 393 S.E.2d 653, 662 (1990). Respondents have failed to satisfy any of these requirements for the issuance of an injunction.

A. Respondents failed to show a likelihood of success on the merits

The burden faced by a party seeking to show that it is likely to prevail in a constitutional challenge to legislation is particularly high. "[T]here is a presumption of constitutionality with regard to legislation," Syl. Pt. 6, in part, *Gibson v. W. Va. Dept. of Hwys.*, 185 W.Va. 214, 406 S.E.2d 440 (1991), and "any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question." Syl. Pt. 1, in part, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965).

This Court's decisions required the circuit court to "consider . . . [Respondents'] likelihood of success on the merits" in light of this presumption of constitutionality. *See Hart v.*

Nat'l Coll. Ath. Ass'n, 209 W.Va. 543, 548, 550 S.E.2d 79, 84 (2001) (*per curiam*) (quoting *Jefferson Cnty Bd. of Educ.*, 183 W.Va. at 24, 393 S.E.2d at 662). But the circuit court relied on a now-defunct federal standard under which a court could issue a temporary injunction when there was a "decided imbalance" between a plaintiff's irreparable harm and a defendant's harm. *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co., Inc.*, 550 F.2d 189, 195 (4th Cir. 1977) (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953)). That outdated standard also looked to whether the plaintiff "raised question going to the merits so serious, substantial, or difficult, as to make them fair ground for litigation." *Id.* In support of this standard, the court cited a nearly-40-year-old decision that the Fourth Circuit has since expressly overruled because that decision "now stands in fatal tension with the Supreme Court's 2008 decision in *Winter* [*v. NRDC*, 555 U.S. 7 (2008)]," which requires that a "plaintiff clearly demonstrate that it will *likely* succeed on the merits." *Real Truth About Obama, Inc. v. FEC*, 575 F. 3d at 346–47. The circuit court failed to correctly consider whether Respondents' were likely to succeed on the merits here.

But under any standard, Respondents failed to make an adequate showing on the merits of their claims.

1. The Act does not take property without just compensation

The circuit court erred in concluding that Respondents had raised at least a serious constitutional question, let alone shown a likelihood of success, that the Act takes property without just compensation. App. 39–41. Neither the circuit court nor Respondents have identified any cognizable property interest that has been taken by the Act. Respondents cannot show a serious constitutional question, let alone a likelihood of success, on their takings claim.

a. Respondents cannot claim a property interest in the only matter actually regulated by State law—that is, Respondents' expectation in fees that nonmembers might be forced to pay in any collective bargaining agreements entered after the effective date of the statute (July 1, 2016).

This Court has not articulated a clear test for what qualifies as "property" for purposes of a takings claim, but the meaning of "property" for purposes of due process challenges is well-established. That test provides that "[a] 'property interest' includes" both "traditional notions of real and personal property" and "those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings." *See* Syl. Pt. 3, *Waite v. Civil Serv. Comm'n* 161 W.Va. 154, 241 S.E.2d 164 (1977). Under this standard, "[a] property interest . . . must derive from private contract or state law, and must be more than [a] unilateral expectation . . . ." Syl. Pt. 3, *Orteza v. Monongalia Cnty. Gen. Hosp.*, 173 W. Va. 461, 318 S.E.2d 40 (1984). Respondents cannot point to a legitimate claim of entitlement under either an existing contract or federal or state law.

With respect to contractual rights, Respondents have only a "unilateral expectation." The Act applies only to collective bargaining agreements entered or modified after July 1, 2016. W. Va. Code § 21-5G-7(b). Respondents' ability to collect agency fees under contracts in effect as of that date has not been infringed. With respect to contracts entered into *after* that date, Respondents could only speculate that they would be able to successfully negotiate new agreements with employers that provide for the collection of fees from nonmembers in the absence of the Act, but any such agreement would require the agreement of a third-party, the employer. While Respondents doubtless *intend* to enter future contracts with such provisions, that is mere unilateral expectation, and thus insufficient to state a property interest.

Nor do Respondents have a "legitimate claim of entitlement" under federal or state law. Both federal and state law contemplate that States can prohibit unions from charging fees to nonmembers. As the U.S. Supreme Court has held, "[u]nions have no constitutional entitlement to the fees of nonmember-employees." *Davenport*, 551 U.S. at 185. Consistent with that constitutional holding, federal law provides that a State may choose whether to permit agreements that charge fees to nonmembers. 29 U.S.C. § 164(b); *see also Sweeney*, 767 F.3d at 661 (for purposes of federal law, membership "should . . . extend to . . . fees"). Through the Act, the State has chosen to exercise that reserved authority. In short, Respondents cannot show that their property has been taken under Article I, section 9 of the West Virginia Constitution.

b. Having failed to identify any property interest that is taken by the Act itself, the circuit court and Respondents relied instead on costs imposed by federal law to show that their property has purportedly been taken. The circuit court conceded as much when it explained that "[Respondents] contend that the Act's prohibition on agency fees *combined with the federal and state laws imposition on unions of the duty of fair representation—the duty to fairly represent* all *members of the bargaining unit, regardless of union membership*—will effect an uncompensated taking of the union's property and the union members' dues." App. 39 (emphasis added); *see also* App. 77–79 (arguing that the State has "command[ed] the[ir] time and services" for the benefit of "free riders"). The circuit court then cited to expenditures required by federal law in support of the argument that Respondents had raised a serious issue that the Act takes their property. It reasoned that "providing services in negotiating, enforcing, and administering contracts costs money" and that "requiring unions to provide services to 'free riders' while simultaneously prohibiting unions from charging for those services necessarily takes union funds

and directs them to be expended on behalf of third parties." App. 39. This attempt to hold the State accountable for duties imposed by federal law is legally flawed, for several reasons.

First, the circuit court erred in concluding that the Act requires unions to provide services to nonmembers. That duty is imposed not by state law, but rather by the federal duty of fair representation. As noted above (*supra* n.2), this court has ever held that state law imposes a duty of fair representation, and any duty that exists is entirely derivative of the duty imposed by federal law. But even if state law imposed a duty of fair representation, Respondents do not challenge that duty, nor would removing that duty under state law alleviate Respondents from complying with the same duty under federal law.

"Because it is *federal* law that provides a duty of fair representation," the Act "does not 'take' property from" Respondents. *Zoeller*, 19 N.E.3d at 753 (quoting *Sweeney*, 767 F.3d at 666).). If Respondents believe that their property has been taken under the federal duty, they may seek compensation from the federal government or—in the absence of compensation—invalidation of the federal duty. But Respondents have not challenged the federal duty of fair representation for good reason—they want to operate as exclusive agency unions and enjoy the benefits that status provides.

Neither the circuit court nor Respondents provided any support for their conclusion that the proper remedy for an alleged taking worked by the federal duty of fair representation is to invalidate a state law that prevents employees from being forced to support a union. Far from establishing that Respondents are entitled to have the Act invalidated, the decisions relied on by the circuit court and Respondents illustrate that the proper remedy for a taking is compensation from the government that has worked the taking. Instead, Plaintiffs cite cases that are wholly inapposite. When the State required lawyers to provide excessive legal services without

compensation, the remedy was not to permit them to extract fees from a third party or challenge another law that might limit their revenue. Instead, the same government that required the lawyers to provide services was required to compensate the lawyers for those services or to ensure that the State did not require lawyers to expend services that constituted a taking. *See Jewell v. Maynard*, 181 W. Va. 571, 582 (1989); *State ex rel. Partain v. Oakley*, 159 W. Va. 805, 822, 227 S.E.2d 314, 323 (1976). The circuit court erred by invalidating a state law that did not take the property that Respondents alleged had been taken instead of following this well-established approach to takings claims.

Second, Respondents have not been compelled to provide services to nonmembers because they have voluntarily accepted that burden in exchange for the benefits that come with acting as an exclusive agency union. Under federal law, Respondents are free to decide whether to employ an exclusive agency or members-only union model. *See Zoeller*, 19 N.E.3d at 753. Respondents have a duty to fairly represent nonmembers only if they choose to operate as exclusive agency unions and to enjoy the significant benefits that come with the right to exclusive representation of the bargaining unit, as well as the costs. *Int'l Ass'n of Machinists*, 367 U.S. at 760–61. The State has not required Respondents to expend any resources at all, nor does it require Respondents to operate as exclusive agency unions. It has merely provided employees with the right to decline union membership and refuse to pay to support the union's activities—a known possible cost to exclusive agency unions that federal law has expressly permitted since at least 1947.

This Court has previously explained that a party may not choose to participate in a regulatory program and then complain that the requirements of that program have taken property from them. In *State ex rel. Lambert v. County Commission of Boone County*, 192 W. Va. 448,

459, 452 S.E.2d 906, 917 (1994), employers who had chosen to participate in the Public Employees Retirement System complained that a statute that forced them to make payments to the Public Employees Insurance Agency to cover participating retired employees took their property without just compsenation. But this Court concluded that "fundamentally" the payments "cannot be considered as imposing a taking since it is the employer's decision to participate in PERS which activates the imposition of a fee on the employer for health benefits for retired employees." *State ex rel. Lambert*, 192 W. Va. at 459, 452 S.E.2d at 917. For the same reason, Respondents cannot choose to form as exclusive agency unions under federal law and then complain that resources expended to fulfill their obligation to fairly represent nonmembers under that regime have been taken from them.[5]

Third, even if the circuit court were correct that the resources required to comply with federal law has been taken under the Act, it erred by relying on this Court's decisions for a proposition explicitly rejected in one of those decisions. The circuit court cites *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), for the proposition that "[s]tate action that compels a person or organization to provide services without compensation effects an unconstitutional taking." App. 36. But *Jewell* explicitly rejected such a categorical rule. In that case, this Court rejected the argument that the appointment of attorneys to represent indigent clients "even for no pay at all, is an unconstitutional taking," absent a further showing that the amount of labor crosses a threshold

[5] While plaintiffs have not pleaded a federal regulatory takings claim, those cases similarly establish the principle that no constitutional issue is presented when a party enters a highly regulated industry that carries certain obligations as the cost of doing business. *See, e.g., Concrete Pipe and Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645–46 (1993) (concluding that pension plans, which have "long been subject to federal regulation," do not suffer a taking when a legislative ceiling on liability is lifted, "there being no reasonable basis to expect that the legislative ceiling would never be lifted"); *Rucklehaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984).

that would undermine the ability of the business to continue in operation. *Jewell*, 181 W. Va. at 581, 383 S.E.2d at 546. Respondents have not attempted to make any such showing in this case.

Fourth, and finally, even if Respondents did have a legitimate property interest in future agency fees *and* that interest were somehow deemed to have been taken by the State, Respondents have already received just compensation. A union that chooses to serve as an exclusive agent receives substantial benefits under federal law. For example, an exclusive agency union receives the power to act as the sole negotiator for the bargaining unit and exclude dissenting employees. 29 U.S.C. § 159(a). And employers are required to negotiate in good faith with an exclusive agency union. 29 U.S.C. § 158(a)(5). These benefits "fully and adequately compensate[]" Respondents for any expenditures required to meet the duty of fair representation. *Sweeney*, 767 F.3d at 666; *see Zoeller*, 19 N.E.3d at 753.[6]

2. The Act does not violate associational rights

The circuit court also erred when it concluded that Respondents raised a serious constitutional question, let alone shown a likelihood of success, on their claim that the Act infringes their right to associate. Respondents have not claimed that the Act prevents any person from making a voluntary choice whether to associate with a union. Rather, Respondents argue that their right to organize will be infringed if they cannot compel nonconsenting employees to pay fees on pain of losing their jobs. The circuit court concluded that Respondents' right to associate may be infringed because employees might be more likely to choose not to join a union when they are not forced to pay fees to keep their job. App. 38–39. This argument again misconstrues the operation of the Act and has no basis in law.

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[6] Respondents can point to only one court that has ever adopted a takings theory similar to theirs—a trial court in Wisconsin. *Int'l Ass'n of Machinists Dist. 10 v. State*, No. 2015-cv-628, at *5 (Dane Cnty., Wis. 2016). But an appellate court has since issued a stay of the trial court's order pending appeal. *Machinists Local Lodge 1061 v. Walker* (L.C. #2015 C.V. 628, Dist. III, Wis. Ct. App., May 24, 2016). That appeal has not yet been argued or decided on the merits.

First, to the extent Respondents claim that they are less effective because they must represent nonmembers, that claim suffers from the same fundamentally erroneous premise that underlies Respondents' entire case. As shown above, Respondents are not compelled by the Act to represent nonmembers. Rather, Respondents are entirely free to associate as a members-only union and forego the benefits that flow from exclusive representation. And, even if this were not true, any duty to associate with nonmembers by fairly representing them derives from federal law, which Respondents do not challenge.

Second, Respondents' assertion that the Act violates their associational rights by eliminating an employee's "incentive to join a union or remain a member," App. 75, runs counter to two lines of U.S. Supreme Court precedent.

To begin, the Supreme Court has rejected the notion that the First Amendment entitles unions to compel nonmembers to participate in union activities, which would include funding such activities through agency fees. In *Lincoln Federal*, unions challenged right-to-work laws passed in North Carolina and Nebraska on the ground that they interfered with the rights to speak, assemble, and petition. The Supreme Court "deem[ed] it unnecessary to elaborate the numerous reasons" this argument failed, but explained that these rights "cannot be construed as a constitutional guarantee that none shall get and hold jobs except those who will join in the assembly or will agree to abide by the assembly's plans." *Lincoln Fed.*, 335 U.S. at 531. The Court further explained that "[t]here cannot be wrung from a constitutional right of workers to assemble to discuss improvement of their own working standards, a further constitutional right to drive from remunerative employment all other persons who will not . . . participate in union assemblies." *Id.* And the Court rejected the unions' claims despite their assertions that the contracts banned in that case were "a useful incentive to the growth of union membership." 335

U.S. at 532. That rejected argument is the same one Respondents advance here, and the circuit court erred in adopting it as a basis for enjoining the Act.

The circuit court's attempt to distinguish *Lincoln Federal* because "the law at issue in that case did not include a ban on contracts that impose agency fees" is both incorrect and irrelevant. App. 38 n.10. The North Carolina law at issue in the case included an explicit ban on agency fees, N.C. Gen. Stat. § 95-82, although it was not a focus of the litigation. But more important, the principle announced in *Lincoln Federal* controls in this case even though the Court did not explictly mention the ban on agency fees. *Lincoln Federal* establishes that the associational rights of union members do not require compelled "participat[ion] in union assemblies" as a condition of employment. 335 U.S. at 531. And the U.S. Supreme Court has acknowledged that payment of agency fees is a form of participation in and association with a union. *See Knox*, 132 S. Ct. at 2289 ("[C]ompulsory fees" collected by a public employee union "constitute a form of compelled speech and association that imposes a significant impingement on First Amendment rights.") (quotation marks and citation omitted). In fact, a recent Supreme Court decision cited *Lincoln Federal* for the proposition that "unions have no constitutional entitlement to the *fees* of nonmember-employees." *Davenport*, 551 U.S. at 185 (emphasis added). Adopting this reasoning, the Seventh Circuit concluded that a challenge to Indiana's ban on agency fees based in part on the right to associate was foreclosed by *Lincoln Federal*. *See Sweeney*, 767 F.3d at 670. This Court should conclude likewise here.

The circuit court also dismissed *Lincoln Federal* because it was decided "well before the associational rights cases relied upon by plaintiffs were decided." App. 38 n.10. This appears to be a reference to a number of decisions addressing the right of an individual to anonymously join a voluntary organization relied on by Respondents. But Respondents missed two key

components of those decisions. They turned on "the vital relationship between freedom to associate and privacy in one's associations," *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958); *see also Gibson v. Florida Legis. Investigation Comm.*, 372 U.S. 539, 544 (1963) (concluding that the First and Fourteenth Amendments "encompass[] protection of privacy of association"), and they concerned the privacy of the individual members rather than the associations, *see NAACP*, 357 U.S. at 458 (rejecting attempt by the NAACP to assert a right on its own behalf and explaining that "petitioner argues more appropriately the rights of its members . . ."). Respondents here do not seek to vindicate the right of their members to associate privately. In any event, this attempt to distinguish *Lincoln Federal* also fails to account for the fact that the Supreme Court has recently cited *Lincoln Federal* for the propostion that "unions have no constitutional entitlement to the fees of nonmember-employees." *Davenport*, 551 U.S. at 185.

The circuit court also failed to address a second line of U.S. Supreme Court precedent that forecloses Respondents' claim that any policy that might make it more difficult for them to recruit members violates the First Amendment. The U.S. Supreme Court has held "that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 549–50 (1983). "[T]he Constitution 'does not confer an entitlement to such funds as may be necessary to realize all the advantages'" of First Amendment rights. *Id.* (quoting *Harris v. McRae*, 448 U.S. 297, 318 (1983)). For this reason, the Supreme Court and a number of other courts, including the Fourth Circuit, have upheld against First Amendment challenges government policies that purportedly "tend[] to impair or undermine . . . the effectiveness of the union." *Smith v. Ark. State Hwy.*

Emp., Local 1315, 441 U.S. 463, 465–66 (1979).[7] Respondents' claims should be rejected for the same reason. Unions have no right to use the power conferred on an exclusive agency union by the federal government to force third parties to pay funds to subsidize union activities.

Third, far from infringing on associational freedoms, the Act *protects* the associational rights of employees. Freedom of association includes the right "to . . . not associate." *Adkins v. Miller*, 187 W. Va. 774, 777, 421 S.E.2d 682, 685 (1992) (quoting *Rutan v. Repub. Party of Ill.*, 497 U.S. 62, 76 (1990)). This right not to associate includes "the bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris*, 134 S. Ct. at 2644. The Act furthers that important goal by ensuring that a union cannot use the authority that the government confers on it as exclusive agent to compel employees to financially support the union or else lose their jobs. 29 U.S.C. § 159(a); W. Va. Code 21-1A-3. At the same time, the Act does not restrict the ability of workers to join a union if they so choose. Any employee wishing to "join or assist" a labor organization may do so. W. Va. Code § 21-1A-3.

The circuit court dismissed the interest that the State has in protecting employees from being compelled to associate with a union through the payment of agency fees. Instead, it acknowledged only that "the State has legitimate and important interests in protecting workers from being forced to join an organization that they do not want to join, or to support an organization's political or ideological messages with which they disagree." App. 41. But in narrowing its articulation of the State's interest, the circuit court employed a double standard. Because "[f]reedom of association . . . plainly presupposes a freedom not to associate," *Boy*

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[7] *See also South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1257 (4th Cir. 1989) ("Loss of payroll deductions . . . may tend to impair the effectiveness of [unions], but . . . such 'impairment . . . is not one that the First Amendment proscribes."); *Ark. State Hwy. Emp., Local 1315 v. Kell*, 628 F.2d 1099, 1102 (8th Cir. 1980) (same).

Scouts of Am. v. Dale, 530 U.S. 640, 648 (quotation marks and citation omitted), it cannot be the case that Respondents have an associational interest in collecting agency fees, but employees have no associational interest whatsover in not paying fees.

Instead, the circuit court had two options. First, it could have concluded that associational rights do not extend to the negotiation and administration of a collective bargaining agreement. In that case, the employees protected by the Act would have no right not to associate with a union by declining to pay agency fees, but neither would Respondents have a constitutionally protected associational interest in collecting those fees. Second, the circuit court could have reached the more plausible conclusion that employees enjoy the associational freedom either to associate or not to associate through the payment of fees for collective bargaining. These rights do not conflict because "[t]here cannot be wrung from a constitutional right of workers to assemble to discuss improvement of their own working standards, a further constitutional right to drive from remunerative employment all other persons who will not . . . participate in union assemblies" through financial support. *See Lincoln Fed. Labor Union No. 19129, A.F. of L. v. Nw. Iron & Metal Co.*, 335 U.S. 525, 531 (1949). In either case, the Act would pass constitutional muster.

3. The Act does not infringe on a constitutionally protected liberty interest

Contrary to the circuit court's conclusion, Respondents also have not raised a substantial constitutional question, let alone a reasonable likelihood of success, on their claim that the Act violates a liberty interest protected by the due process clause of the West Virginia Constitution. *See* App. 40. Respondents argue that because the Act purportedly requires them to expend labor for nonmembers, it infringes on a liberty interest guaranteed by the Constitution. App. 80. But again, the Act does no such thing: The duty of fair representation arises under federal law, and only if a union makes a voluntary choice to organize as an exclusive agent.

Even if the Act did somehow compel Respondents to provide services to nonmembers, it would easily pass constitutional muster under this Court's precedents. "[T]he intrusive approach exemplified by *Lochner*," and used in prior eras in this State, "has subsequently been abandoned," and "courts rarely overturn legislation regarding economic matters on the ground that substantive due process has somehow been violated." *Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co.*, 174 W. Va. 538, 542, 328 S.E.2d 144, 149 (1984). Rather, "[i]n matters of economic legislation, the legislature must be accorded considerable deference under a due process standard." Syl. Pt. 3, *Gibson*, 185 W.Va. 214, 406 S.E.2d 440. To overcome this deference, "the burden is on [the] one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Wampler Foods, Inc. v. Workers' Comp. Div.*, 216 W.Va. 129, 145, 602 S.E.2d 805, 821 (2004).

But neither the circuit court nor Respondents attempt to explain how the Act is either arbitrary or irrational. App. 40, 80. Nor could they, as the State indisputably has the power to pass laws like the Act "to promote the general welfare of its citizens." *See, e.g.*, Syl. Pt. 2, *Nulter v. State Rd. Comm'n of W. Va.*, 119 W. Va. 312, 193 S.E. 549 (1937). While Respondents may wish that they had the legal right to charge agency fees to nonmembers, the imposition of reasonable regulations on commercial activity is well within the State's police power. *See* Syl. Pt. 1, *State ex rel. Ellis v. Kelly*, 145 W. Va. 70, 112 S.E.2d 641 (1960).

The Act is rationally related to a legitimate government interest because it recognizes the associational freedom of employees to choose whether to participate in or decline to participate in all union activities, including the payment of fees. W. Va. Code § 21-1A-3. The State has a legitimate interest in protecting associational liberties and the rights of employees to secure employment free from compelled subsidization of activities with which they disagree. This

legislative judgment is not unique: 27 other states have similar protections for nonmember employees. *See* The National Right to Work Legal Defense Foundation, http://www.nrtw.org/rtws.htm. As noted, federal law also recognizes the legitimacy of the interests served by such legislation by authorizing States to enact it. 29 U.S.C. § 164(b).

Moreover, the Legislature could have reasonably concluded that relations between employers, employees, and unions would be better if a dissenting employee could not be compelled to pay fees or lose his job. And the Act rationally promotes those goals by barring agreements that would compel dissenting employees to pay fees or lose their jobs. *See* W. Va. Code § 21-5G-3.

The Legislature could also have concluded that the Act was reasonably related to economic growth and development. In fact, the Legislature commissioned a report that concluded that right-to-work laws contributed to higher long-run rates of employment growth and gross domestic production growth. App. 337. The Seventh Circuit recently concluded that this purpose was sufficient for a right-to-work law to pass rational basis review. *Sweeney*, 767 F.3d at 670–71. [8]

The U.S. Supreme Court rejected a similar due process claim brought by trade unions under federal law. *Lincoln Federal*, 335 U.S. at 533–36. Respondents do not explain why West Virginia's Constitution should be interpreted any differently.

4. The Act indisputably applies to construction trade unions

Finally, the circuit court erred in issuing an injunction based on the effect it gave to a rule of construction included in the Act. App. 41–43. As noted above (*supra* n._), the State

[8] For the purpose of rational basis review, whether the Legislature actually relied on a particular rationale when enacting the law is irrelevant. Respondents must negate "every conceivable basis" that might support the Act, and "it is entirely irrelevant for constitutional purposes whether the legislature was actually motivated by the conceived reason" for a law. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 307 (1993).

Legislature is considering a bill to repeal this provision which, if it passes, would moot the issue presented herein. But in any event, the circuit court badly misinterpreted the meaning and purpose of this provision.

Section 21-5G-7(a) of the Act provides that, "[e]xcept 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." W. Va. Code. § 21-5G-7(a). The most natural reading of this provision is as a rule of construction, directing courts not to read the Act as amending the rules governing collective bargaining in the building and construction industries *except* to the extent required by the Act. That is, unions in the construction and building industries may no longer charge nonmembers agency fees—an action "expressly prohibited" by the Act—but the remainder of the law governing those industries remains unchanged. This reading finds support in the placement of Section 21-5G-7(a) in part of the Act that provides guidance as to the construction and scope of the statute and not in another part that explicitly lists exceptions to the Act's application. *Compare* W. Va. Code § 21-5G-6, *with* W. Va. Code § 21-5G-7. This understanding is consistent with the interpretation of a similar provision by the Seventh Circuit. *Sweeney*, 767 F.3d at 667–68.

But Respondents read this provision to completely exempt the building and construction industries from the Act. This reading would render meaningless the caveat that the Act still applies to the extent that its provisions "expressly prohibit[]" certain conduct. W. Va. Code § 21-5G- 7(a). Respondents' reading thus ignores the "well known rule of statutory construction that the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning." *State ex rel. Johnson v. Robinson*, 162 W. Va. 579, 582, 251 S.E.2d 505, 508 (1979).

So as to give meaning to each of the Act's provisions, it must be interpreted as forbidding contracts compelling nonmembers to pay agency fees, but otherwise leaving intact the law concerning the building and construction industries.

The circuit court did not provide sufficient reason for granting a statewide injunction on this argument for all industries and all unions. The circuit court did not conclude that Respondents are reasonably likely to prevail on their misreading of this section. Instead, it granted an injunction because it concluded that this provision was ambiguous and could cause confusion as to whether the building and construction industry is covered by the Act. App. 42. But in addition to being incorrect, this conclusion provides no reason to enjoin any enforcement of the Act. "The first matter to consider when assessing whether injunctive relief is warranted in a particular case is the nature of the underlying controversy." *Hart*, 209 W. Va. at 549, 550 S.E.2d at 85. Even if Respondents were correct that the statute does not apply to certain industries, that conclusion would not justify enjoining defendants statewide "from enforcing and giving effect" to the Act, as Respondents request. App. 62. Rather, courts would need to evaluate contracts on a case-by-case basis to decide whether any particular contract fell within the purported exclusion.

B. Respondents would not be irreparably harmed by denial of the injunction

To obtain a preliminary injunction, Respondents were also required to "demonstrate the presence of irreparable harm," *Jefferson Cnty. Bd. of Educ.*, 183 W. Va. at 24, 393 S.E.2d at 662. But Respondents have failed to make that required showing for at least two reasons.

First, the circuit court erred by assuming the merits of Respondents' legal claims to conclude that they had been irreparably harmed. App. 40. The primary harm that the circuit court relied on was "plaintiffs' assertions of constitutional violations." App. 40. Taking those assertions as true, the circuit court then explained that "the suspension of fundamental

constitutional rights, 'for even minimal periods, unquestionably constitutes irreparable injury.'" App. 40 (quoting *Elrod v. Burns*, 427 U.S. 347, 273 (1976)). The circuit court then relied on its assumption that Respondents' rights had been violated to conclude that it needed to examine their constitutional claims only to determine whether they had raised substantial questions that were fair grounds for more deliberate investigation in order to grant an injunction.

Second, Respondents failed to present any cognizable evidence of harm to the circuit court. They offered only one witness who testified about a single Plaintiff. App. 219–67. And even that witness provided only a conclusory allegation that he was aware of contracts that might be affected by the law and that "we have some that are in the process of being renegotiated or have just been renegotiated." App. 267. Respondents cannot demonstrate harm without being able to identify specific contracts that might be affected. And even then, Respondents introduced no evidence that they would actually suffer any detriment in those contracts on account of the law—for example, evidence that they would have been able to negotiate an agency-fee provision but for the existence of the Act or that they would not be able to make up any shortfall by other means. Among other possibilities, unions could negotiate provisions in which the employer would pay the cost of any grievance proceedings involving a nonmember employee. And, of course, Respondents remain free to persuade employees to join the union in the first place and pay agency fees in exchange for the benefits of union membership.

Third, any harm to Respondents would not be irreparable. For financial harms to be irreparable, they must be "not susceptible of remediable damages," or "incapable of measurement by any ordinarily accurate standard." *Wiles v. Wiles*, 134 W. Va. 81, 90, 58 S.E.2d 601, 606 (1950). Respondents have offered no evidence of irremediable harm here. For example, neither Respondents nor the circuit court addressed whether Respondents could negotiate for a

"snap-back" provision to permit the collection of fees from nonmembers in the event of a change in the law. Such a provision would eliminate the alleged harm from negotiating contracts that exclude fees. For these reasons, Respondents have failed to make the requisite showing of irreparable harm.

C. The State suffered irreparable injury and the public interest weighs against granting an injunction

The other equitable factors that courts typically consider when deciding whether to award injunctive relief likewise weigh decisively against issuing an injunction here.

The State has suffered injury by imposition of the injunction because it has an indisputed interest in the enforcement of its own laws. *See, e.g., Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013); *Aid for Women v. Foulston*, 441 F.3d 1101, 1119 (10th Cir. 2006). Indeed, "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S.Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)).

Similarly, the public interest generally weighs in favors of enforcing duly enacted state laws. *See Kipps v. Ewell*, 538 F.2d 564, 566 (4th Cir. 1976). Consistent law enforcement allows predictability of legal rights, and it "is in the interest of sound public policy to preserve the predictability of the law." *Beard v. Worrell*, 158 W. Va. 248, 263, 212 S.E.2d 598, 606 (1974). An injunction harms the public interest by blocking enforcement of valid state law and creating uncertainty as to its validity. It also harms the State's ability to protect the associational rights of employees to decide whether to join a union and whether to fund its activities. The circuit court ignored these important public interests when it granted Respondents' request for an injunction.

II. The Circuit Court issued an injunction that would violate the well-established due process rights of non-parties

The circuit court also erred by issuing an injunction that purports to enjoin non-parties who have never received notice in violation of both federal and state due process guarantees. This Court has explained that "[t]he most basic of the procedural safeguards guaranteed by the due process provisions of our state and federal constitutions are notice and the opportunity to be heard, which are essential to the jurisdiction of the court in any pending proceeding." *State ex rel. United Mine Workers of Am., Local Union 1938 v. Waters*, 200 W. Va. 289, 297, 489 S.E.2d 266, 274 (1997) (quoting *P.G. & H. Coal Co., Inc. v. Int'l Union, United Mine Workers of Am.*, 182 W.Va. 569, 579, 390 S.E.2d 551, 561 (1988) (McHugh, J. concurring)).

The circuit court failed to observe these "most basic procedural safeguards" when it issued an injunction that ordered that "the provisions of [the Act] shall not go into effect until the conclusion of these proceedings," without any limitation on geographic scope or the parties affected. App. 43. The circuit court explained that an injunction against all criminal enforcement of the Act "would be against all prosecuting attorneys," even though only the Kanawha County Prosecuting Attorney had been served and received notice. App. 272. Instead of concluding that no such injunction could be imposed because of the failure of Respondents to provide notice to all prosecuting attorneys who are responsible for criminal enforcement in their respective counties, the court expanded the scope of the injunctionby purporting to prevent the Act from going into effect statewide. App. 43.

This Court's precedents demonstrate that where, as here, an injunction has issued that reached beyond the parties who received notice and a hearing, this Court should vacate the injunction. This Court has granted a writ of prohibition to bar the enforcement of an injunction when an enjoined party had not received notice on multiple occasions. In *Ashland Oil, Inc. v.*

Kaufman, 181 W. Va. 728, 348 S.E.2d 173 (1989), for example, this Court prohibited the enforcement of an injunction entered against a defendant who had not received notice. This Court held that to satisfy due process an injunction could be granted without notice to the enjoined party only if the party seeking the injunction made a specific showing supporting the issuance of an injunction without notice. Syl. Pt. 3, *Ashland Oil*, 181 W. Va. 728, 384 S.E.2d 173. This Court has since held that an injunction that failed to comply with the *Ashland Oil* requirements "may not be enforced and should be vacated." *State ex rel. United Mine Workers of Am. Local Union 1938*, 200 W. Va. at 297, 489 S.E.2d at 274. The same result should apply here.

CONCLUSION

For the foregoing reasons, the Attorney General and State of West Virginia respectfully request that this Court vacate the preliminary injunction imposed by the circuit court, and remand with instructions to conduct further proceedings consistent with this Court's opinion.

Respectfully submitted,

STATE OF WEST VIRGINIA

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
NO. 17-0187

Patrick Morrisey, in his official capacity as West Virginia Attorney General, and the State of West Virginia,

Petitioners

v.

West Virginia AFL-CIO, et al.,

Respondents.

CERTIFICATE OF SERVICE

I, Elbert Lin, Solicitor General and counsel for Petitioners, verify that on March 7, 2017, I served a copy of *Petitioners' Brief* and *Petitioners' Appendix* upon counsel for respondents as indicated below by U.S. Mail to the addresses below and sent copies to the additional counsel listed below by U.S. Mail:

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