

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 19-0298

PATRICK MORRISSEY, in his official capacity
As West Virginia Attorney General, and the
STATE OF WEST VIRGINIA,

Petitioners,

v.

WEST VIRGINIA AFL-CIO, et al.
Respondents.

PROPOSED BRIEF *AMICUS CURIAE* THE AMERICAN CIVIL LIBERTIES UNION
OF WEST VIRGINIA FOUNDATION IN SUPPORT OF RESPONDENTS

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I. STATEMENT OF INTEREST OF *AMICUS CURIAE*¹

The American Civil Liberties Union of West Virginia Foundation (ACLU-WV) is a non-partisan, non-profit membership organization whose mission is to ensure the Bill of Rights and rights guaranteed by the West Virginia Constitution are preserved for each new generation. The ACLU-WV accomplishes these goals through legislative advocacy, litigation, grassroots organizing, and public education. The ACLU-WV has a long history of legal and policy advocacy for the fundamental associational rights of individuals and organizations.

Because this case requires the Court to consider associational interests, a proper resolution is of significant importance and concern to ACLU-WV and its membership.

¹ No counsel for either party authored this brief or made a monetary contribution specifically intended to fund the preparation of submission of this brief.

II. INTRODUCTION AND BACKGROUND

In 2016, the West Virginia Legislature enacted S.B. 1, titled “The Workplace Freedom Act” (“Workplace Freedom Act”). The legislation operated in two ways to create what is commonly referred to as a “right-to-work” law: (1) it added new statutory provisions to the West Virginia Code, and (2) it repealed certain sections of the West Virginia Labor-Management Relations Act for the Private Sector that could be read in conflict to the Workplace Freedom Act.

The newly created Section 21-5G-2 of the West Virginia Code provides:

§ 21-5G-2. Individual’s right to refrain from affiliating with a labor organization.

A person may not be required, as a condition or continuation of employment, to:

- (1) Become or remain a member of a labor organization;
- (2) Pay any dues, fees, assessments or other similar charges, however denominated, of any kind or amount to any labor organization; or
- (3) Pay any charity or third party, in lieu of those payments, any amount that is equivalent to or a pro rata portion of dues, fees, assessments or other charges required of members of a labor organization.

The effect of the enactment and implementation of Section 21-5G-2 is twofold: Under the statute, West Virginia state law prevents unions in the private sector from requiring membership as a condition or continuation of employment; and (2) it deprives private sector unions of their right to collect “agency fees.”²

Plaintiffs/Respondents West Virginia AFL-CIO, et al. filed a petition in Kanawha County Circuit Court requesting the court issue a declaration that the Workplace Freedom Act violated

² “Agency fees” are the portion of union dues allocated to costs incurred in relation to the collective bargaining process and the administration of contracts. Agency fees are separate from monies used for political or ideological purposes.

several provisions of the West Virginia Constitution. Plaintiffs/Respondents also sought injunctive relief against the enforcement of the Act. The court issued a preliminary injunction, which Defendant/Petitioners Governor James C. Justice, et al. appealed to this Court.

This Court reversed and remanded the matter, instructing the circuit court to conduct a final hearing on the merits. The circuit court issued a ruling holding that the Workplace Freedom Act's ban on the collection of agency fees (1) violates the associational rights of unions and their members as protected by Article III, Sections 7 and 16 of the West Virginia Constitution; (2) violates the rights of unions and members to protection for the taking of property without just compensation pursuant to Article III, Section 9 of the West Virginia Constitution, and (3) places an arbitrary restraint on liberty in violation of Article III, Sections 3 and 10 of the West Virginia Constitution.

Defendants/Petitioners appealed the matter to this Court.

Defendants/Petitioners object to the circuit court's ruling that the Workplace Freedom Act violates Plaintiffs/Respondents' constitutional rights. In doing so, Defendants/Petitioners rely in part on the Supreme Court's recent decision in *Janus v. American Federation of State, County and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018). Such reliance is misplaced. Amicus in this brief seeks to draw attention to the breadth of Plaintiffs/Respondents' constitutional association rights under the West Virginia Constitution, to note the critical need to assess any infringement of those rights against the backdrop of the West Virginia Constitution's expansive promise to protect inherent fundamental rights, and to emphasize that any application of *Janus* in the context of agency fees should be properly limited to the public sector.

III. ARGUMENT

A. The West Virginia Constitution's Broad Protections Stringently Limit the State's Power to Infringe on Plaintiffs/Respondents' Fundamental Individual Rights

Section I of Article III of the West Virginia State Constitution provides that all people:

. . . by nature, equally free and independent, have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely: the enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety.

Section I is rooted in the “natural law and inherent rights” philosophy of John Locke.³ In interpreting Section I, this Court has included among those inherent rights the rights to speech, press, association, assembly, and petition. *See Woodruff v. Bd. of Trs.*, 173 W. Va. 604, 611 (1984).

There is no parallel to Section I in the United States Constitution. Thus, this Court has interpreted that the West Virginia Constitution goes beyond the United States Constitution to provide greater protection of fundamental constitutional rights. *See Woodruff v. Bd. of Trs.*, 173 W. Va. 604, 611 (1984) (“[W]ith respect to the waiver of fundamental constitutional rights, our state constitution is more stringent in its limitation on waiver than is the federal constitution.”; *see also Pushinsky v. W. Va. Bd. of Law Exam'rs*, 164 W. Va. 736, 745 (1980) (“[W]e think that the West Virginia Constitution offers limitations on the power of the state to inquire into lawful associations and speech more stringent than those imposed on the states by the Constitution of the United States . . .”).

³ *See* Bastress, Jr., Robert M., *The West Virginia State Constitution: A Reference Guide* 54 (2d Ed. 2016) (noting that, in accordance with Locke’s philosophy, “the first section of the Bill of Rights recognizes that there are ‘inherent rights’ that no compact or government may deny.”).

Thus, even if the United States Constitution’s protection of associational rights could be properly interpreted to permit a bar of prohibition on the collection of agency fees in the private sector, those protections should not be read as equal to those provided by the West Virginia Constitution. Rather, the U.S. Constitution’s broad protection of fundamental rights is the floor, not the ceiling, in any examination of the constitutionality of legislation affecting individual rights in West Virginia. The constitutionality of Section 21-5G-2 of the West Virginia Code must be considered against the backdrop of West Virginia’s expansive promise to protect “inherent rights” that no compact or government may deny.

B. The West Virginia Constitution and The United States Constitution Afford Broad Protection of Associational Rights; Divestment of Protections Received via Collective Bargaining Unconstitutionally Infringe on Those Rights

Section 16 of Article III of the West Virginia Constitution holds inviolate “the right of the people to assemble in a peaceable manner, *to consult for the common good*, to instruct their representatives, or to apply for the redress of grievances.” (Emphasis added.)

This Court has interpreted Sections 16 and Section 7 to protect the freedom of association. *See, e.g., State ex rel. Billings v. City of Point Pleasant*, 194 W. Va. 301, 305 (1995); *Woodruff*, 173 W.Va. 604. Further, the Supreme Court has interpreted the United States Constitution to provide constitutional protection to unions for associational rights. *See e.g., Hague v. C.I.O.*, 307 U.S. 496 (1939); *Thomas v. Collins*, 323 U.S. 516 (1945).

Collective bargaining provides critical protection for workers to exercise the rights of speech, association, and petition, and efforts to divest workers of protections afforded to them via collective bargaining unnecessarily infringe on their rights.

Although unions may not require workers to provide fees that support a union’s ideological or political messaging, a prohibition on agency fees—fees that are associated not

with promoting an ideology but with services related to the collective bargaining process— unconstitutionally burdens Plaintiffs/Respondents’ associational rights under the U.S. and West Virginia Constitutions. A prohibition on agency fees operates to cripple a union’s ability to attract or retain members—their right to consult for the common good—because non-paying workers would benefit from protections provided by the collective bargaining process, while union members would see increased dues in order to pay for those services.

Moreover, under Section 8(b)(1)(A) of the National Labor Relations Act,⁴ unions are required to fairly represent and expend resources to support non-members. The non-members obtain the benefits of union representation without funding even the most basic functions of union representation, such as bargaining a contract or enforcing its provisions. As a result, under Section 21-5G-2 of the West Virginia Code, West Virginia unions and their members would be forced to associate with and advocate for non-member free riders.

The associational rights of unions and their members must be balanced with the associational rights of non-members. Under the current federal scheme that requires unions to fairly represent non-members, the only rational balancing under Article III, Section 16 of the West Virginia Constitution would recognize that non-members must share in the burden of funding the union representational activities from which they derive a benefit. As such, Article III, Section 16 must require that where unions are forced to associate with non-members by representing them in negotiating and policing collective bargaining agreements, the non-members can be forced to pay a pro-rata share of the cost of that core representational activity.

C. The Rationale Underscoring Janus Should Be Properly Limited to the Public Sector

⁴ 29 U.S. Code § 158.

During the pendency of these proceedings, the Supreme Court in *Janus v. American Federation of State, County and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018) issued a ruling holding that public sector labor unions are prohibited from charging agency fees to workers that have declined to join a union.

Although Petitioners/Defendants argue that the *Janus* rationale has “broader implications” beyond its limitations to public sector unions, their assertion that *Janus* should be extended to private sector unions is misplaced.” *Id.* at 2481 In *Janus*, Justice Alito noted in a footnote that a First Amendment question would not have arisen in the context of private sector agency fees in previous Supreme Court cases absent action on the government in enacting legislation. *See Janus* at 2479 n. 24. Further, even in the event that a First Amendment issue would arise in a private sector arrangement, the reasoning in the *Janus* decision relied in part on the Court’s assertion that public-sector collective-bargaining is “inherently political”—reasoning that would not extend to the private sector. Justice Alito, citing *Harris v. Quinn*, 573 U.S. 616 (2014) noted that “the individual interests at stake still differ,” and “in the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector.” *Id.* at 2480.

IV. CONCLUSION

For the reasons set forth above, ACLU-WV respectfully moves this Court grant leave to file this brief with the court and to affirm the decision of the Kanawha County Circuit Court in this matter. The ACLU-WV appreciates this Court’s consideration of these issues and the opportunity to share its views and concerns with the court.

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