IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

West Virginia AFL-CIO, *et al.*,
Plaintiffs,

v.

Civil Action No. 16-C-959-969
Judge Jennifer F. Bailey

Gov. Earl Ray Tomblin *et al.*,
Defendants.

ORDER GRANTING PRELIMINARY INJUNCTION

This action involves constitutional challenges to the provisions of Senate Bill 1, (hereafter "S.B. 1"), of the 2016 Regular Session of the West Virginia Legislature. In their amended complaint, Plaintiffs sought, among other relief, a preliminary injunction. Based upon the pleadings, the memoranda of law, the arguments of counsel, and the evidence adduced at the hearing on August 10, 2016, the Court ruled that the Plaintiffs were entitled to a preliminary injunction and ordered that the provisions of S.B. 1 were enjoined until the conclusion of these proceedings.

In support of such ruling, the Court, in addition to its remarks at the conclusion of the hearing, finds as follows:

FINDINGS OF FACT

1. During the 2016 Regular Session, the West Virginia Legislature enacted 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. [1]

[1] Following enactment of the National Labor Relations Act in 1935, which guaranteed organizing and representational rights to labor organizations, unions typically bargained for contract provisions that required union membership as a condition of employment. Such a condition created a "closed shop." In 1947, Congress enacted the Taft-Hartley Act, which in § 8(a)(3), 29 U.S.C. § 158(a)(3), made closed shops an unfair labor practice. That section also provided, however, that collective bargaining agreements could create "union shops," that is, arrangements

2. S.B.1 amends two sections of W.Va. 21-1A-1 et seq., commonly referred to as the West Virginia Labor Management Relations Act, adopted in 1971 and "patterned" after the provisions of the National Labor Management Relations Act, as follows:[2]

(a) The amendments to these two sections of present law eliminate the requirement of an employee to be a member of a labor management organization 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."[3]

(b) The amendments also eliminate the authority of the labor organization to assess any employee for whom it serves as "the exclusive representative" any "periodic dues" or "initiation fees" (as authorized without changes to S.B. 1) or to require any "dues, fees, assessments or other similar charges, however denominated, of any kind or amount" or any charitable contribution in lieu of such payment.[4]

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

4. The essence of S.B.1 provides that no person may be required as a condition or

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in which union membership could not be a condition for hire but could, after thirty days, be a condition for continued employment. Taft-Hartley then added § 14(b), 29 U.S.C. § 164(b), which essentially authorized the states to enact laws prohibiting union membership as a condition of continued employment. About half of the states – the so-called "right to work" states – have enacted such laws, thus creating "open shops."

[2] See, W. Va. Code § 21-1A-1(c).

[3] See, W. Va. Code § 21-1A-5(a). This code section is not amended by S. B. 1, which requires such representation.

[4] See, S. B. 1, amendment to W. Va. Code §§ 21-1A-4 and 4.

continuation of employment to: become or remain a member of a labor organization; 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.[5]

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.[6]

6. S.B. 1 would apply 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."

7. Further, S.B.1 includes: "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." The term "building and construction industry" is not defined in S.B. 1.[7]

8. 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.

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[5] See, S.B. 1, W. Va. Code § 21-5G-2.
[6] See, S. B. 1, W. Va. Code §21-5G-5.
[7] See, S. B. 1, W. Va. Code §21-5G-7(a).

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, contend that they 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 that, as such, they 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.

9. The Defendant Earl Ray Tomblin, the Governor of the State of West Virginia at the time of the filing of the amended petition, is sued in his official capacity.

10. The Defendant Patrick Morrisey is the Attorney General of the State of West Virginia and 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 also represents the State of West Virginia.

11. At the hearing on the Motion for a preliminary injunction, the Plaintiffs presented the testimony of Ken Hall, the President of Teamsters Local 175, one of the plaintiffs in this action. Mr. Hall is also the General Secretary Treasurer of the Industrial Brotherhood of Teamsters in Washington and is a forty-year member of the union, having worked twenty-nine of those years as an employee of the union.

12. The following evidence was admitted, without objection, through the witness Ken Hall:

(a) The financial costs to the Teamsters during the time period of 2013 – 2016 for providing to members of the collective bargaining units they represent, including services they are required to provide to both union members and non-members, including costs for legal fees, arbitration fees, lost time wages, and other administrative costs. (See Plaintiffs'

Exhibit 1).

(b) The projected revenue losses and costs to certain Teamster union members if S.B. 1 takes effect. (See Plaintiffs' Exhibit 2).

(c) 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 employees represented by unions who are not union members. (See Plaintiffs' Exhibit 3).

(d) A representative certification of exclusive representation from the National Labor Relations Board setting forth requirements to represent all employees. (See Plaintiffs' Exhibit 5).

(e) An academic report commissioned by the West Virginia Legislature and discussed extensively during the deliberations on S.B.1 that provided: "(T)he 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)".[8] (See Plaintiffs' Exhibit 6).

13. As of the time of the hearing on this motion, collective bargaining that would be affected by the provisions of S. B. 1 was ongoing.

14. As agreed to by the parties, the average collective bargaining agreement is in effect for a term of 3 to 4 years.

CONCLUSIONS OF LAW

1. In *Jefferson County Board of Education v. Jefferson County Education Association*, 183 W. Va. 15, 24, 393 S.E.2d 653, 662 (1990), the West Virginia Supreme Court of Appeals recognized

[8] John Deskins, "The Economic Impact of Right to Work Policy in West Virginia" at page 29 (November 2015).

the necessity of a "balancing of hardship test" to determine whether to issue a preliminary injunction. That test was set forth in Syllabus Point 4 of *State ex rel. Donley v. Baker*, 112 W.Va. 263, 164 S.E. 2d 154 (1932): "The granting or refusal of an injunction, whether mandatory or preventive, calls for the exercise of sound judicial discretion in view of all the circumstances of the particular case; regard being had to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award or denial of the writ." The Court in *Jefferson County,* 183 W. Va. at 24, 393 S.E.2d at 662, and in *Hart v. National Collegiate Athletic Association*, 209 W. Va. 543, 547, 550 S.E.2d 79, 83 (2001), elaborated that this approach requires a court to consider the "flexible interplay" between four factors in determining whether to issue a preliminary injunction: "(1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest." *Accord*, *State ex rel. McGraw v. Imperial Marketing*, 196 W. Va. 346, 352 n.8, 472 S.E.2d 792, 798 n.8 (1996).

2. "[W]here a statute is plain and unambiguous, it is the clear and unmistakable duty of the judiciary to merely apply the language." *State ex rel. Biafore v. Tomblin*, 236 W. Va. 528, 532, 782 S.E.2d 223, 227 (2016). When a statute is clear,

> "the duty of the courts is not to construe but to apply the statute, and in so doing, its words should be given their ordinary acceptance and significance and the meaning commonly attributed to them." [*State v. Epperly,* 135 W. Va. 877, 884, 65 S.E.2d 488, 492 (1951).] Courts are obligated to "presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253–254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). When the language of a statute is unambiguous, "judicial inquiry is complete." *Rubin v. U.S.,* 449 U.S. 424, 430, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981).*State ex rel. Biafore*, 236 W. Va. At 533, 782 S.E.2d at 228.

3. 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).

4. Unions and their members have long received constitutional protection for their exercise of associational rights. *Hague v. C.I.O.*, 307 U.S. 496 (1939); *Thomas v. Collins*, 323 U.S. 516 (1945); *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).

5. The West Virginia Supreme Court of Appeals has held 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).

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

7. State action that compels a person or organization to provide services without compensation effects an unconstitutional taking. *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).

8. 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).

9. The National Labor Relations Act at Sec. 9, 29 U.S.C. § 159, and the West Virginia Labor Relations Act, W.Va. Code § 21-1A-5(a) provide that "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."

10. Unions selected by a majority of workers in a bargaining unit to represent them for

collective bargaining and contract administration are required by federal and state law to fairly and equally represent all members of the unit, including workers who are not members of the union. *E.g.*, *Vaca v. Sipes*, 386 U.S. 171 (1967); *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944).

11. Under federal and state labor law, an employer has no duty to bargain with a union that is not elected by a majority of bargaining unit workers and certified by the National Labor Relations Board pursuant to 29 U.S.C. § 159.

12. The suspension of fundamental constitutional rights, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427, U.S. 347, 373 (1976); *The Real Truth About Obama*, 575 F.3d 342, 351 (4th Cir. 2009).

DISCUSSION

The first step in determining whether to issue a preliminary injunction using the balancing of the hardship test is to balance the likelihood of irreparable harm to plaintiffs against the likelihood of harm to defendants. If the balance of hardship "weighs more heavily on the plaintiffs" the likelihood-of-success standard is replaced by one that considers whether the plaintiffs have raised questions going to the merits that are serious, substantial, difficult, and doubtful as to make them fair ground for litigation and thus for more deliberate investigation. *Blackwelder Furniture Company v. Seilig*, 550 F.2d 189, 195 (4th Cir. 1977), *quoting Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740, 743 (2nd Cir. 1953).[9] This Court finds that

[9] According to the Fourth Circuit,

> The two more important factors are those of probable irreparable injury to plaintiff without a decree and of likely harm to the defendant with a decree. If that balance is struck in favor of plaintiff, it is enough that grave or serious questions are presented; and plaintiff need not show a likelihood of success. Always, of course, the public interest should be considered.

each of the factors in this case weigh heavily toward granting the motion for a preliminary injunction.

If S.B.1 had become operable on July 1, 2016, as designated in West Virginia Code § 21-5G-8(b), the plaintiffs would be unable to bargain for agency fees in negotiating new collective bargaining agreements without exposing themselves to the Act's criminal and civil penalties. The Act's implementation would mean that plaintiffs would have to negotiate contracts that are commonly 3 to 4 years in length in which they would have to forego agency fees.

The plaintiffs contend that their fundamental right to associate, which is expressly protected by Article III, § 16 of the West Virginia Constitution and implicitly so by Article III, § 7, *Pushinsky v. West Virginia Board of Law Examiners*, 164 W. Va. 736, 266 S.E.2d 444 (1980), is at issue. Article III, § 16 of the West Virginia Constitution expressly provides that the freedom to consult for the common good shall be held inviolate. The Supreme Court of the United States and the West Virginia Supreme Court of Appeals have 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*, *supra*. The provisions of S.B. 1, according to the Plaintiffs, harm their ability to associate with employees to advance workers' causes.[10]

If, as prescribed by S.B.1, employees can obtain the services of a union to negotiate and

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[10] The Attorney General cites *Lincoln Federal Labor Union v. Northwestern Iron & Metal Company*, 335 U.S. 525 (1949), which upheld right to work laws in Nebraska and North Carolina. The laws at issue in that case, however, were quite different from the West Virginia law challenged here and did not include a ban on contracts that impose agency fees. *Id.* at 528-29, nn. 1-2. The case thus did not address the central issue: whether prohibiting contracts that require agency fees (and no more) is consistent with the freedoms of association and from uncompensated takings. *Lincoln Federal* was also decided well before the associational rights cases relied upon by the plaintiffs were decided and did not address the takings question because the laws in that case did not effect a taking.

administer a contract without having to pay either union dues or the agency fees, they would – naturally and predictably – be seriously discouraged from joining a union. Why, the employee would ask, should I pay for something that the law requires be made available to me for nothing? Such a circumstance the Plaintiffs contend would – naturally and predictably – seriously burden a union's ability to recruit and retain members. Moreover, workers who remain union members pay a penalty for exercising their right of membership because they must pay a premium on their dues to finance the services provided to nonmembers who would pay nothing.

The Plaintiffs produced evidence to support their assertion, including statistics from the United States Bureau of Labor Statistics. (See Plaintiffs' Exhibit 4). The Bureau's statistics show, for example, that in Indiana, a state that has recently enacted a law similar to the Act, union membership declined by 147,000 or 19% from 2011 to 2015.

Secondly, the Plaintiffs 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 collective bargaining unit, regardless of union membership – will effect an uncompensated taking of the union's property and of the union members' dues. Indeed, providing services in negotiating, enforcing, and administering contracts costs money. 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. The Plaintiffs argue that this is a taking, citing *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003); *Sweeney v. Pence*, 767 F.3d 654, 673-77 (7th Cir. 2014) (Wood, C.J., dissenting); *International Association of Machinists District 10 v. State of Wisconsin,* Dane Co. Cir. Ct., Civ. Act No. 2015CV628 (Wis. 2016); *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), and that, as

such, it violates Article III, § 9 of the West Virginia Constitution. The Plaintiffs argue that forcing union members to pay dues to support the provision of services to "free riders" confiscates that portion of their dues to benefit others.[11]

In addition, the Plaintiffs argue that requiring unions to expend their labors against their will without the ability to charge for those labors arbitrarily deprives them of the liberty interests that they enjoy in those labors and consequently violates their rights to due process of law as guaranteed by Article III, § 10 of the Constitution. *Thorne v. Roush*, 164 W. Va. 165, 261 S.E.2d 72 (1979); *Ex parte Hudgins*, 86 W. Va. 526, 103 S.E. 327 (1920). The Plaintiffs produced evidence that demonstrated the harm the Act would cause in terms of actual costs. (See Plaintiffs' Exhibits 1 and 2). The Plaintiffs demonstrated that a loss of members by the Teamsters of 10, 15 or 20 percent would require union members to pay hundreds of thousands of dollars to provide representation to individuals who decide not to pay dues or agencies' fees.

The harm to the Plaintiffs in this matter is compounded by the fact that the Act includes criminal penalties and civil relief and damages. S.B.1 §21-5G-4 creates a misdemeanor offense for violating the law with criminal fines up to $5,000.00, and § 21-5G-5 establishes civil relief for "any violation or threatened violation of this article" with relief including compensatory damages, costs and attorney fees, and punitive damages. In other words, one is subject to both criminal prosecution and civil liability for a violation or an undefined "threatened violation" of the new

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[11] Defendants dismiss any reliance the plaintiff may place on the Wisconsin trial court's adoption of a similar theory advanced by plaintiffs in this action, where the appellate court issued a stay on the trial court's ruling granting summary judgment to the plaintiff unions, citing Machinists Local Lodge 1061 v. Walker (L.C. #2015 C.V. 628, Dist. III, Wis. Ct. App., May 24, 2016. Only the substance of the cases is similar. Procedurally, the issue of a preliminary injunction was not addressed by the trial court. The Wisconsin law was enacted March 9, 2015. The trial court awarded summary judgment in favor of plaintiff unions on April 8, 2016, long after the law was in effect.

law.

It has long been the law that the suspension of fundamental constitutional rights, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427, U.S. 347, 373 (1976); *The Real Truth About Obama*, 575 F.3d 342, 351 (4th Cir. 2009). And certainly, criminal prosecution and civil judgments constitute irreparable harm.

In contrast to these protected interests, the threat of harm to the State if the motion is granted is, at most, *de minimis*. While the State has legitimate and important interests in protecting workers from being forced to join an organization they do not want to join, or to support an organization's political or ideological messages with which they disagree, those interests are fully vindicated by existing statutory and case law, *e.g.*, 29 U.S.C. § 164(a); W. Va. Code § 21-1A-4(3); *Beck v. Communications Workers of America*, 487 U.S. 735 (1989); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), and will not be in the least affected if an injunction would issue against the enforcement of S.B.1. The purported economic benefits of the legislation will not be seriously impaired while this case is litigated. The remaining state interests that can be claimed that S.B.1 will vindicate is to enable nonmembers of unions to get union services free and to discourage union membership. Those purposes do not qualify as legitimate interests, let alone interests important enough to counterbalance the deprivation of plaintiffs' fundamental rights.

Because the plaintiffs bear such an imbalance of the hardships in this case, the inquiry on the merits need only be to determine whether the "plaintiff[s] ha[ve] raised questions going to the merits so serious, substantial, difficult, and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation." *Blackwelder*, 550 F.2d at 195, *quoting Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740, 743 (2nd Cir. 1953). The constitutional questions raised by the Plaintiff are substantial, serious and difficult, and are therefore fair grounds for a

more deliberate investigation.

Having reviewed the controlling doctrine, the plaintiffs have demonstrated a substantial likelihood of success on the merits with regard to these fundamental constitutional issues.

The Plaintiffs have also raised the serious question as to whether the Act applies to the building and construction industry in West Virginia.

S.B.1 § 21-5G-7(a) provides:

> 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.

As noted previously, the West Virginia Supreme Court of Appeals has held that, "[W]here a statute is plain and unambiguous, it is the clear and unmistakable duty of the judiciary to merely apply the language." *State ex rel. Biafore v. Tomblin*, 236 W. Va. 528, 532, 782 S.E.2d 223, 227 (2016). Reading this "plain language", and attempting to understand how the provision of the new law would apply to the building and construction industry is impossible to do with any reasonably plausible interpretation. For one, the term "building and construction industry" is not included in the definitions section, is not further mentioned in the entire legislation and is not otherwise defined in the West Virginia Code.[12]

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[12] Wikipedia lists and defines the following trades in construction: Boilermaker, carpenter, carpenter subsidiary trades including cabinet makers, millworker, cladder, framer, joiner, roofer, drywall installer/dater, flooring installer, pile driver, millwright, diver, and diver tender; carpet layer; dredger, dredger may include lead dredgeman, operator, leverman, licensed tug operator, derrick operator, spider/spill barge operator, engineer, electrician, chief welder, chief mate, fill placer, operator II, maintenance engineer, licensed boat operator, certified welder, mate, drag barge operator, steward, assistant fill placer, welder, boat operator, shoreman, deckhand, rodman, scowman, cook, messman, porter/janitor, and oiler; electrician; lineman, including digger machine operator, groundsman; elevator mechanic; fencer; glazier; heavy equipment operator, including at least 27 special function titles; HVAC; insulation installer; ironworker; laborer; mason and stone mason, marble setter and polisher, tile setter and polisher, terrazzo worker and finisher, hod carrier; housepainter and decorator, plasterer; plumber; pipefitter; sheet metal worker; fire sprinkler installer; safety manager, safety officer; site manager; steel fixer; truck driver or teamster; waterproofer; and welder.

The ambiguity of this sentence is such that an entire industry, not identified by any definition or reference, has no certainty of understanding whether the so-called RTW legislation 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 finds that the Plaintiffs have more than a substantial likelihood of success on the merits regarding this issue. Indeed, the public has more than a compelling interest in deciding 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 are enacted with such ambiguity and uncertainty.

The public interest is also advanced by the protection of fundamental constitutional rights such as the associational rights of unions and their members and their rights to maintain their property against attempts of uncompensated takings. Meanwhile, the workplace rights of nonmembers of unions are well protected under current statutory and constitutional law.

RULING

For the reasons set forth above, this Court has granted the *Plaintiffs' Motion for a Preliminary Injunction* and ORDERS that the provisions of Senate Bill 1 of the Regular Session of the 2016 Legislature shall not go into effect until the conclusion of these proceedings. In that the Parties have informed the Court that there is no opposition to the *Plaintiffs' Motion for Waiver of Injunction Bond*, the Court further ORDERS that the injunction bond is waived.

While the Court has granted the Plaintiffs' Motion in this matter, the Court has informed

the Parties of its intention for these proceedings to be concluded within a reasonable time hereafter.

The clerk is hereby directed to mail a copy of this ORDER GRANTING PRELIMINARY INJUNCTION upon its entry to all counsel of record.

ENTERED this 23rd day of February, 2017.

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