

**Testimony of Teague P. Paterson  
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American Federation of State, County and Municipal Employees (AFSCME)  
Before the  
House Committee on Education and Labor  
Subcommittee on Health, Employment, Labor and Pensions  
June 26, 2019  
On  
Standing with Public Servants: Protecting the Right to Organize**

Chairwoman Wilson, members of the committee, I am Teague Paterson, Deputy General Counsel for the American Federation of State, County and Municipal Employees (AFSCME). AFSCME represents more than one million members. I want to thank Chairwoman Wilson and Ranking Member Walberg for convening this hearing and for the opportunity to testify. I also want to thank Congressman Cartwright and Senator Hirono for sponsoring the Public Service Freedom to Negotiate Act, and Chairman Scott and the many other members of this committee for co-sponsoring the bill.

AFSCME members provide the vital services that make America happen. In major cities and in small towns across the United States, our members work in hundreds of occupations dedicated to serving the public. Our members' varied professions include:

- Justice system professionals, including law enforcement officers, 911 dispatchers, corrections officers and the youth services workers that help troubled juveniles, child protections workers who keep our most vulnerable safe, as well as probation and parole officers that monitor and support offenders, and social workers that help support crime victims;
- Education professionals working with students of all ages—from early childhood, to K-12 schools, higher education—including paraprofessionals, librarians, nurses, maintenance workers, nutrition and transportation workers, clerical and administrative professionals, and others;
- Health care system professionals, including nurses, technicians, physician assistants, therapists, doctors, pharmacists, and dieticians; as well as the emergency services/EMT workers, behavioral health workers, and home care workers, all working to ensure access to quality health care for millions of Americans;
- Transportation and public works professionals responsible for our nation's roads, transportation networks, ports and airports; as well as the operators, maintenance workers, engineers and scientists working at public utilities to ensure that our communities have access to safe and affordable drinking water; and
- Many others, including camp counselors and WIC program nutritionists, zookeepers and horticulturists, park rangers and lifeguards, public housing professionals, building and

fire code inspectors, and hundreds of other public service jobs fulfilled by people working every day to make our communities better places to live.

## **Unions Benefit All Workers**

Working people join and form unions to gain a collective voice on the job so they can address their working conditions, gain economic security, and improve the work they do. By standing together in strong unions, members can negotiate higher wages and safer workplaces. Notably, those who gain the most from forming and joining unions are low- and middle-wage workers, making unions a key part of addressing income inequality.<sup>1</sup> Unionized workplaces also play a critical role in reducing gender and racial inequality by raising wages for women, reducing racial wage gaps, and providing the means to address other forms of unfair discrimination on the job.<sup>2</sup> Union members seek and negotiate employer-provided health care, retirement plans, and other benefits such as paid sick and family leave. Union workplaces are also safer workplaces.<sup>3</sup>

Strong unions also benefit non-union workers. In regions and sectors with active unions, wages are higher for all workers—union and non-union alike—because non-union employers must also raise their wages to remain competitive.<sup>4</sup>

Public service workers and public sector unions, like AFSCME, provide extensive benefits to their communities. For public service workers, it is not just a job, it's a calling. Union members working in the public service use their collective voice to advocate for better and more efficient public services. Union members are engaged in the fights to ensure that 911 call centers have the staff they need to answer calls quickly and dispatch help; that hospitals have the resources necessary to protect patients; that the elderly and disabled receive the care they need at home rather than in the emergency room; and that schools hire the counselors, librarians, paraprofessionals and other staff necessary for students to succeed.

With everything that unions offer their members, working people in general, and our communities, it should come as no surprise to the Committee that the majority of working people say that they would vote to form a union, if they could do so without the fear of reprisal or retaliation. However, in many states and communities, public servants are deprived of this basic right. And anti-union corporations, their owners, and the politicians and think tanks that they fund, are working in lockstep to undermine public employees' union rights and the effectiveness of their unions.

## **Workers Must be Free to Organize**

It is because unions were so successful in carving out a place for working and middle-class Americans in the country's economic, social and political spheres, that unions have become the target of corporate interests and the politicians that are their benefactors. In their view, any

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<sup>1</sup> Josh Bivens and others, "How Today's Unions Help Working People," Economic Policy Institute, August 24, 2017.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

power that working people have obtained has come at their expense. It is to be expected that corporations would want to maximize profits, eliminate as much as possible their tax liability, dominate political discourse, and seize the provision of public services to obtain additional revenue streams and profit opportunities. But a winner-takes-all economy is bad for America. Workers, organized in unions, are one of the only institutions that stand in their way. Public employee unions – which make up half of the union movement – are the targets of these monied interests. And this attack on public employee unions has, by design, taken place largely outside of the public eye and often through proxies and factotums.

The Supreme Court’s 5-4 decision a year ago in *Janus v. AFSCME Council 31* provides a textbook example of how corporate interests rig the system in their favor. Following the Supreme Court’s determination in *Citizens United* that corporations are people, and corporate money is protected speech, the billionaires and their foundations implemented a strategy to monopolize this form of “speech” by seeking to dismantle the one institution that effectively checks their agenda: America’s unions. In their own words, the purpose of the *Janus* case was to “defund” and “defang” unions.<sup>5</sup>

For decades the proposition laid down in the 1977 case *Abood v. Detroit Board of Education* was non-controversial, and accepted by conservative economists, politicians and over 17 Supreme Court justices across the ideological spectrum. Because a union is obligated to represent all employees in a bargaining unit, members and nonmembers alike, it is fair that all bargaining unit members contribute to the cost of the union’s representation, but not its political or ideological expenditures. Attacking *Abood*’s holding, which confirmed these nonmember “fair share fees” were constitutional, became a goal of these groups because they thought – incorrectly as it turns out – unions would be weakened without them.

The *Janus* case began when Bruce Rauner was elected Governor of Illinois and proceeded to attempt to dismantle Illinois’ public employee unions. In addition to pumping money via his family foundation into anti-union groups like the Illinois Policy Institute (along with the Bradley, Koch, DeVos and other dark money funded foundations, who fund this and other State Policy Network affiliates),<sup>6</sup> Governor Rauner refused to negotiate with state employee unions, and issued an executive order declaring fair share fees unconstitutional.<sup>7</sup> When the courts struck down his order, he then sued every single state employee union on the basis that fair share fees were contrary to the First Amendment. But the governor never paid any fair share fees, and so he was dismissed from the case. His family foundation’s allies, the NRTW Foundation and the “Liberty Justice Center”, found three state employees, including Mark Janus, to join Rauner’s lawsuit and save it from being dismissed. Ultimately Janus’ claim was taken up by the Supreme Court, and the five conservative-minded justices of the Supreme Court made short shrift of *stare decisis* and principles of judicial restraint, and overruled *Abood* by equating money with speech

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<sup>5</sup> Ed Pilkington, The Guardian, “Rightwing alliance plots assault to ‘defund and defang’ America’s unions,” August 30, 2017.

<sup>6</sup> Mick Dumke, ProPublica, and Tina Sfondoles, Chicago Sun-Times, “As Conservative Group Grows in Influence, Financial Dealings Enrich Its Leaders,” February 8, 2018 ProPublica Illinois.

<sup>7</sup> Executive Order 2015-13; see also Celine McNicholas, Zane Mokhiber, and Marni von Wilpert, “Janus and Fair Share Fees: The Organizations Financing the Attack on Unions’ Ability to Represent Workers,” February 21, 2018, Economic Policy Institute.

and collective bargaining with political speech. Just weeks after the decision, Mr. Janus accepted his reward when he quit his job in the public service and took a position as a “senior fellow” with the Illinois Policy Institute which, as noted, receives considerable funding from Rauner’s Family Foundation.<sup>8</sup> These same organizations are continuing their attacks in the courts against public employee unions on various theories which, to date, have not been successful.

*Janus*, and cases like it, are the product of a corporate-backed effort to coordinate attacks on unions and working people to weaken institutional opposition to their agenda. This agenda is financed by the same billionaires who operate, and move millions of dollars, through a shadowy network of think tanks, legal service corporations, PACs, lobbyists and judicial junkets (disguised as educational seminars and retreats for judges). One front of this attack, which was rolled out in the days after the *Janus* decision, are aggressive dissuader campaigns that seek to convince public employees to quit their union, often relying on false promises that by doing so public employees “give themselves a raise” but “lose nothing.” Of course, if that were true these corporate-backed groups would not be spending their time, money and efforts on these direct propaganda campaigns, and our members have not been fooled by these misleading slogans.

Another frontline in this war on working people’s rights has simultaneously played out in state legislative houses and governors’ mansions. While Wisconsin governor Scott Walker’s successful efforts in 2011 to stifle Wisconsin public servants’ and teachers’ voices was fully reported in the national news, America’s unions continue to face similar attacks in many states across the country. Virtually every state has seen these bills introduced, and a complete accounting of these state legislative attacks is well beyond the scope of this testimony. Below are some examples.

On February 17, 2017, after fifty years of protecting the rights of public employees to collectively bargain, the Iowa legislature initiated House File 291, dismantling member protections and limiting the scope of bargaining and union governance.<sup>9</sup> Like Wisconsin Governor Walker’s Act 10, the Iowa law restricts bargaining units to negotiate only over whether public servants may receive a raise equaling inflation, and forces public employees to undergo continual, costly and time-consuming “recertification elections,” in which a non-vote is counted as a “no vote.”<sup>10</sup> Likewise, on June 1, 2018, Missouri Governor Eric Grietens signed HB 1413 into law hours before stepping down from office.<sup>11</sup> That law places broad prohibitions on unions and members both at the bargaining table and at the ballot box, and is specifically designed to hamper unions’ political participation, treating them differently from all other organizations when it comes to political participation and support for political causes. The law also imposes onerous and unfair “recertification elections” in similar manner as the Iowa and Wisconsin laws.

While some states have sought to practically eliminate collective bargaining for all public employees, other states are targeting specific groups. In Georgia, North Carolina, South

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<sup>8</sup> Mitchell Armentrout, Chicago Sun-Times, “Mark Janus Quits State Job for Conservative Think Tank Gig After Landmark Ruling,” July 20, 2018.

<sup>9</sup> H.R. 291, Gen. Assemb., Reg. Sess. (Iowa 2017). *See also* William Petroski & Brianne Pfannenstiel, Des Moines Register, “Iowa House, Senate Approves Sweeping Collective Bargaining Changes,” February 16, 2017.

<sup>10</sup> *Ibid.*

<sup>11</sup> H.B. 1413, 99<sup>th</sup> Gen. Assemb., Reg. Sess. (Mo. 2018).

Carolina, Virginia, and Texas state laws prohibit public teachers from collective bargaining,<sup>12</sup> while teachers in Indiana are limited to collectively bargaining only over wages, salary, and wage-related fringe benefits, which include insurance, retirement benefits, and paid time off.<sup>13</sup>

Other state laws are pushing an anti-union agenda through a piecemeal strategy, such as eliminating processes that facilitate members paying their union dues or imposing onerous, costly and unnecessary recertification requirements. For example, buried in the 205 pages of Florida HB 7055, adopted in 2018, was a requirement that teachers be required to undergo a “recertification” election, in which non-votes are counted as no votes, in the event the number of dues-paying members in the unit fell below fifty percent. It has been established that nonpayment of dues is not evidence of a lack of desire for union representation and the two are not linked, and the law simply imposes additional costs and burdens associated with union representation. Similarly, that same year in Michigan, Senate Bill 1260 was introduced, which like the other bills counts absent votes as “no votes” and imposes a recertification election every other year.<sup>14</sup> Similar bills have been introduced in other states<sup>15</sup>, as ALEC and the SPN network have made these rigged “recertification” requirements a top state legislative priority.

## **Workers Support Unions**

Despite the coordinated attacks on working people, where workers are afforded an opportunity, they reject these attacks and stand by their unions. In 2011, Ohio Governor John Kasich signed Senate Bill 5,<sup>16</sup> which was similar in its scope of regulation to Governor Walker’s Act 10, organized workers forced a referendum and Ohio voters forcefully rejected it.<sup>17</sup> Last summer voters in Missouri overwhelmingly rejected the state legislature’s passage of a so-called “right to work” law by repealing the law with an over thirty percent margin. The results of experimental “recertification” elections imposed on public workers also prove this point. In Missouri, Wisconsin and Iowa, where these methods have been forced on workers, and despite the unfair processes, procedures and expenses, public workers have nearly universally and consistently voted to keep their unions.

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<sup>12</sup> Milla Sanes, John Schmitt, *Right to Collective Bargaining*, REGULATION OF PUBLIC SECTOR COLLECTIVE BARGAINING IN THE STATES, Mar. 2014 at 4. *See also* Martin Malin, *The Legislative Upheaval in Public-Sector Labor Law: A Search for Common Elements*, ABA Journal OF Labor and Employment Law, January 2012, at 156 (stating that Nevada removed bargaining rights from doctors, lawyers, and some supervisors).

<sup>13</sup> *Ibid.* *See also* H.B. 4468, 100<sup>th</sup> Gen. Aseemb., Reg. Sess. (Ill. 2019) (limiting collective bargaining from terms and conditions of employment to wages only, denied on Jan. 9, 2018).

<sup>14</sup> S.B. 1260, 2018 Leg., Reg. Sess. (Mich. 2018); *see also* Lindsay VanHulle, “Michigan GOP to Public Unions: Recertify Every Two Years or Die,” Bridge, December 5, 2018.

<sup>15</sup> *See, e.g.*, H.B. 1607, 2017 Leg., Reg. Sess. (Wash. 2017), S.B. 5551, 2017 Leg., Reg. Sess. (Wash. 2017).

<sup>16</sup> S.B. 5, 129<sup>th</sup> Gen. Assemb., Reg. Sess. (Ohio. 2011) *see also* S.B. 1260, Reg. Sess. (Mi. 2018) (requiring recertification every two years) *see also* H.B. 871, Gen Assemb., Reg. Sess. (Pa. 2017) (requiring public organizations representing a collective bargaining unit to file quarterly reports documenting annual salary and benefit costs of all officers and employees of the employee organization, salary and benefit increases of officers and employees, and a detailed summary of all expenses incurred throughout the quarter which required the expenditure of membership dues).

<sup>17</sup> <https://www.sos.state.oh.us/elections/election-results-and-data/2011-elections-results/state-issue-2-november-8-2011/#gref>

Public employees have vigorously voiced their needs and demands through other means, namely strikes. In the last two years public employees have made their grievances known by withholding their work and engaging in work stoppages. Public school teachers have struck in Arizona, Oklahoma, West Virginia, North Carolina, Kentucky, Tennessee, and Virginia; university professors at Wright State University and Virginia Commonwealth; and bus drivers have engaged in job actions in Georgia, despite laws in all of these states prohibiting public employee strikes. History proves that where workers have no productive outlet for resolving grievances, they engage in disruptive job actions; this is as true for the private sector as the public sector. The 1940 treatise “One Thousand Strikes of Government Employees,” by David Ziskind, published by the University Columbia Press, meticulously documents public employee strike activity over the preceding hundred years, verifying over 1,100 such actions across American states and cities while also noting that the available documentation accounts for only a portion of the actual public sector strike activity. The many states that have afforded robust collective bargaining rights to public employees did so in the face of work stoppages in the 1960s through 1980s. After channeling their labor relations into a cooperative and productive process, these states saw dramatic reductions of the incidence and length of disruptive economic actions by public employees, and in some cases their elimination.

But the consequences of failing to ensure adequate collective bargaining rights in the public sector involves more than reducing disruption, because where state laws have curtailed or all-but eliminated collective bargaining rights, there have been real human and societal consequences. In Iowa, as I have noted, the enactment of anti-union legislation stripped public sector unions of the right to bargain over working conditions—including essential health and safety measures—as well as the right to file grievances through a collectively bargained contract.

The disastrous consequences of this type of legislation are exemplified by the story of Tina Suckow, an AFSCME nurse and a grandmother who served patients at the Independence Mental Health Institute. Tina knew that working at a mental health facility could be dangerous, but she took the job because she believed in caring for those in need. In October 2018, Tina responded to a page from her colleagues to help with an aggressive patient. After staff was unable to deescalate the situation, supervisors made the decision to use new safety equipment to physically restrain the patient. Unfortunately, staff had not been trained on how to properly use the new equipment. The patient grabbed Tina and began to beat her. By the time her colleagues were able to restrain him, Tina had suffered severe injuries, including a neurological ailment she still suffers from today. Yet instead of receiving support from her employer, the state of Iowa turned its back on her. Management at the institute neglected to report the attack to law enforcement or investigate the situation. After her medical leave expired, they refused to allow her co-workers to donate vacation leave or even grant Tina’s request to take unpaid leave to recover. Just two weeks after undergoing surgery to treat her injuries, Tina was fired.

Examples like this illustrate why the people that dedicate their careers to public service need strong unions. If her union had not been stripped of the right to negotiate training and safety measures, staff would have had the ability to negotiate training regarding the use of new equipment before it was implemented, and this attack may have been prevented. If her union had not been stripped of the right to negotiate the use of leave, her colleagues could have supported her while she recovered. And if her union had not been stripped of her contract protections and the right to file grievances through her collective bargaining contract, she could have appealed

her unjust firing. AFSCME members like Tina don't enter public service to get rich. They do it because they want to help others and make their communities better places to live. Dedicated public servants like Tina deserve the freedom to join a strong union that is empowered to protect them on the job.

Sadly, we know that there are countless other stories like Tina's, where legislation designed to weaken unions is endangering the people working to serve their communities. In Wisconsin, Act 10 prohibited public service unions from negotiating for fair wages, adequate benefits, and safe working conditions. Without a voice on the job, many experienced officers chose to retire rather than work in dangerous facilities where their views on maintaining safety would not be considered. Vacancies ballooned as the state refused to pay competitive wages for new officers. With prisons understaffed and officers overworked, assaults on staff became a crisis in facilities statewide.<sup>18</sup>

Consider also the divergent paths by the neighboring states of Wisconsin and Minnesota. While Governor Walker was pursuing a campaign against public employees and their union under Act 10, Minnesota took a different approach, strengthening labor standards and employee voice.<sup>19</sup> Since 2010, Minnesota has outperformed Wisconsin by nearly every available measure. Job growth, wages, and household incomes have all grown faster in Minnesota. Minnesota is also attracting new residents, while more people are moving out of Wisconsin than into it. Indeed, the detrimental impact of Act 10 on teacher recruitment, retention, and professionalization, and resultant degrading of educational outcomes of Wisconsin students, is now well documented.<sup>20</sup>

We are now at an inflection point. In recent decades the benefits of economic growth have accrued almost exclusively to the wealthiest. Anti-union politicians continue to undermine the rights of working people. Corporate profits and tax breaks for the wealthy are consistently prioritized over fair wages and decent public services. Working people, again, want to be heard. That is why surveys show that unions are more popular than ever before.<sup>21</sup> Where public employees have a meaningful right to bargain, they are choosing to express that right by joining unions. AFSCME's recent gains illustrate this fact. Since 2016, workers have sought AFSCME representation and together we have won the right to represent more than 245 new collective bargaining groups. In 2018, AFSCME added more than 9,000 dues paying members and more than 18,000 dues paying retirees—even as billionaires and corporations spent vast sums on campaigns attacking our union and attempting to persuade our members to quit.

## **PSFNA Levels the Playing Field**

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<sup>18</sup> Molly Beck and Patrick Marley, Milwaukee Journal Sentinel, "GOP leaders say wage increases not on table despite Wisconsin prison overtime costs, staffing shortage," July 12, 2018; Mark Leland, FOX 11 "Investigates growing prison staffing shortage," July 20, 2015.

<sup>19</sup> David Cooper, "As Wisconsin's and Minnesota's Lawmakers took Divergent Paths, so did Their Economies," Economic Policy Institute, May 8, 2018.

<sup>20</sup> David Madland and Alex Rowell, "Attacks on Public-Sector Unions Harm States: How Act 10 Has Affected Education in Wisconsin," Economic Policy Institute, November 15, 2017.

<sup>21</sup> Lydia Saad, Gallup Research, "Labor Union Approval Steady at 15-Year High," August 30, 2018; Drew DeSilver, Pew Research Center, "Most Americans view unions favorably, though few workers belong to one," August 30, 2018.

Public sector workers dedicate their careers to serving their communities, and they deserve the same fundamental labor protections as private sector workers. The Public Service Freedom to Negotiate Act corrects the injustice of our current system which affords no guarantees that public service workers may advocate for themselves and their communities.

The PSFNA provides a simple solution. It adopts a minimum level of tried-and-true labor relations principles that have proven effective, and applies them to states that do not accord these minimum guarantees to their state and local employees. Where states have neglected to ensure public-sector workers can express their right to form or join a union, the legislation ensures these rights will be respected, in the following ways:

- The PSFNA ensures that the decision about whether to form a union is the result of free choice involving a democratic majority-choice process.
- If a defined group of employees join or form a union, the PSFNA obligates employers to collectively bargain over wages, hours, and terms and conditions of employment with their public employees.
- The Act provides for dispute resolution mechanisms, such as mediation, fact-finding or arbitration, to ensure that disputes are resolved cooperatively and objectively, and do not escalate into actions harmful to the community and economy;
- To ensure union representation is the result of employee free choice, PSFNA guarantees public service workers the right to associate with or not to associate with a union, and protections from retaliation or discrimination in the exercise of that individual decision.
- PSFNA ensures the right of union members to utilize voluntary payroll procedures for union dues and prohibits the drain on resources and poll taxes associated with imposing frequent, rigged “recertification” requirements on employees’ expression of their right to be represented by a union.
- Importantly, the Act ensures that its guarantees and protections are meaningful by providing a private right-of-action by workers to file suit for the limited purpose of enforcing their labor rights in the courts.

### **Commerce Clause Grants Congress Authority to Regulate**

The PSFNA is crafted to ensure it is a proper exercise of authority conferred by the Commerce Clause, and as explained further below, does not improperly intrude on state sovereignty. It has long been recognized that the Commerce Clause grants Congress the authority to regulate the conditions of public sector employment. The Federal Labor Standards Act (FLSA), enacted under the Commerce Clause, sets a national floor for minimum wage and overtime laws, including those affecting public sector workers.<sup>22</sup> Title VII of the Civil Rights Act regulates the hiring, firing, and workplace conduct of state employees.<sup>23</sup> The Americans with Disabilities Act regulates discrimination against disabled persons and requires positive steps by employers,

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<sup>22</sup> See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 553 (1985) (“Congress’ action in affording SAMTA employees the protections of the wage and hour provisions of the FLSA contravened no affirmative limit on Congress’ power under the Commerce Clause.”).

<sup>23</sup> Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e(f) (specifically including “employees subject to the civil service laws of a State government, governmental agency or political subdivision”).



including state and local governments, to engage in interactive processes to provide necessary accommodations.<sup>24</sup> Indeed, the Supreme Court has stated that federal power under the Commerce Clause applies to activities without regard to whether the activity affecting commerce involves a public or private entity.<sup>25</sup>

Private sector labor relations have been regulated under the NLRA—without Constitutional objection—for more than eighty years. Because public sector employer-employee relations affect commerce in many of the same ways as private sector employers who are regulated by the NLRA, there is no reason Congress may not enact equivalent reforms, with equivalent Constitutional safeguards, to regulate public employee-employer labor relations.

In *NLRB v. Jones & Laughlin Steel Corp.*,<sup>26</sup> the Supreme Court upheld the constitutionality of the NLRA because it included “jurisdictional language” that limited the authority of the NLRB to employers with operations that affected commerce.<sup>27</sup> Rather than attempting to define in advance which employers fit this definition, the NLRA tasked the Board with determining on a case-by-case basis whether it had a constitutional basis for jurisdiction.<sup>28</sup> Likewise, PSFNA is built on the same sensitivity—defining a “public employee” as working for an employer engaged in commerce.<sup>29</sup>

In some cases, jurisdiction is clear; consider, for example, a ranger in a state park that attracts out-of-state tourists. In others, it may be helpful to look to the body of jurisdictional precedent built over the past seventy-five years by the NLRB.<sup>30</sup> For example, if the NLRB’s jurisdiction includes labor relations at a private university,<sup>31</sup> public universities similarly engage in commercial activities, and attract students, faculty, staff and researchers in ways that affect interstate commerce. Likewise, while private corrections facilities undoubtedly affect commerce (and therefore are subject to the NLRA), the many more publicly-operated correctional institutions affect commerce more substantially as a result of their greater scale and, therefore, ensuring positive labor relations is an equal if not more pressing goal of Congress in that sector. The same concerns hold true for private and public hospitals,<sup>32</sup> schools, waste management,

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<sup>24</sup> Americans with Disabilities Act, 42 U.S.C. § 12101(b)(4) (2012) (invoking “the sweep of congressional authority . . . to regulate commerce”); *see also Walker v. Snyder*, 213 F.3d 344, 346 (7th Cir. 2000) (“[T]he commerce clause gives Congress ample authority to enact the ADA.”), *cert. denied*, 531 U.S. 1190 (2001).

<sup>25</sup> *See Garcia*, 469 U.S. at 530 (reaffirming *Maryland v. Wirtz*, 392 U.S. 183, 197 (1968) (“If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation.”)).

<sup>26</sup> 301 U.S. 1, 31 (1937)

<sup>27</sup> *See National Labor Relations Act*, 29 U.S.C. § 160(a) (2012) (“The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce.”); *Jones & Laughlin*, 301 U.S. at 31.

<sup>28</sup> *Jones & Laughlin*, 301 U.S. at 31.

<sup>29</sup> Public Sector Freedom to Negotiate Act, § 2(11)(a) (defining a public employee as an “individual employed by a public employer, who in any work week is engaged in commerce of in the productions of goods for commerce”).

<sup>30</sup> *See Jurisdictional Standards*, NLRB, <https://www.nlr.gov/rights-we-protect/law/jurisdictional-standards>. Over the years, these determinations have built into a body of precedent, covering “the great majority of non-government employers with a workplace in the United States.” *Id.* For example, the Board has jurisdiction over retailers if they have an annual volume of business of \$500,000 or more, private hospitals with an annual volume of \$250,000 or more, and “essential links in the transportation of goods or passengers” at \$50,000 or more. *Id.*

<sup>31</sup> *See Cornell University*, 183 NLRB 329 (1970).

<sup>32</sup> *See Butte Medical Properties*, 168 NLRB 266 (1967).

airports, water treatment plants, motor vehicle, road safety, and transit systems. Federal and state contractors are also covered by the NLRA on the basis of their receipt of public funds, and for Commerce Clause purposes there is no difference between publicly-funded or publicly-operated enterprises. Also, consider the recent 35-day federal government shutdown and its immediate and dire effects on commerce, which are still being felt. In this way, the PSFNA addresses a central Federal concern, but does so in a way that is indulgent of state and local labor relations. Rather than supplant state and local laws, as does the NLRA, it establishes minimum standards that have been proven to promote labor peace and reduce the likelihood of labor relations disputes that disrupt economic life.

Therefore, the PSFNA includes several provisions to maintain local control beyond the requirements of the Commerce Clause. The bill guarantees any state that fails to meet its standards an opportunity to design and implement its own solutions,<sup>33</sup> contains explicit instruction for the FLRA to consider “to the maximum extent practicable” the opinions of affected employers and workers,<sup>34</sup> and exempts the smallest municipalities from jurisdiction altogether.<sup>35</sup> Its enforcement scheme ensures it will impact only those states and employers that fail to meet its articulated minimum standards,<sup>36</sup> leaving others to manage their labor relations as they see fit. While these added protections are not necessary to ensure the constitutionality of the PSFNA, they demonstrate a commitment to federalism that further bolsters its compatibility with both the letter and the spirit of the Commerce Clause.

### **PSFNA Respects the Principles of State Sovereignty**

Although Congress is empowered by the Tenth Amendment to pre-empt state laws under the Commerce Clause,<sup>37</sup> it may not “commandeer the legislative processes of [s]tates by directly compelling them to enact and enforce a federal regulatory program.”<sup>38</sup> In *Hodel*, it was not commandeering when Congress invoked the Commerce Clause to create federal coal mining standards, gave states a limited opportunity to propose their own programs to implement those standards, and then enforced federal regulations against those that failed to do so.<sup>39</sup> The PSFNA, like the Surface Mining Act in *Hodel*, grants states the option to implement their own solutions in order to avoid preemption, but stops short of actually compelling them to do so.<sup>40</sup> Thus, like in *Hodel*, Congress has not commandeered any legislative process and there is no violation of the Tenth Amendment.

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<sup>33</sup> § 4(d)(1)(A)-(C) (ensuring state legislatures have at least one full legislative session after enactment, or any subsequent determination of the FLRA, to address shortcomings and apply for a new determination).

<sup>34</sup> § 3(a)(2) (instructing the FLRA to consider the opinions of local stakeholders generally, and grant the maximum weight practicable to any agreement between stakeholders that state laws are sufficient).

<sup>35</sup> § 8(a)(3)(A) (exempting from the requirements of the PSFNA any political subdivision with a population of under 5000 people, or which employs fewer than 25 public employees).

<sup>36</sup> § 3(a)(3) (limiting the criteria the FLRA may consider to those specifically listed).

<sup>37</sup> See *New York v. United States*, 505 U.S. 144, 157-58 (1992).

<sup>38</sup> See *Hodel v. Va. Surface Mining & Reclamation Ass’n., Inc.*, 452 U.S. 264, 288 (1981); see also *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York*, 505 U.S. at 188.

<sup>39</sup> See *Hodel*, 452 U.S. at 272, 288 (“[T]he States are not compelled to enforce the steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever.”).

<sup>40</sup> See § 3(d)(1).

The Eleventh Amendment ensures states are not hauled into court by citizens of other states and forced to pay damages.<sup>41</sup> Under the seminal case *Ex Parte Young*,<sup>42</sup> the Supreme Court held that suits to require state personnel and administrators to comply with Federal law are permitted under the Eleventh Amendment.<sup>43</sup> This is because without the ability to compel compliance with federal law, the Supremacy Clause is meaningless. While the PSFNA establishes a right of action in federal courts by aggrieved employees, it authorizes only the type of claims for relief against States that have long been permitted under the Eleventh Amendment. It does not allow a plaintiff to directly sue a state or to seek damages, but only to initiate action against a “named State administrator” in order to “enjoin such administrator to enforce compliance,”<sup>44</sup> The PSFNA’s right-of-action enforcement mechanism falls well within the *Ex Parte Young* doctrine and therefore does not violate any Eleventh Amendment principles.

### **PSFNA is Necessary to Support the Freedom of American Workers**

This necessary legislation will help level the playing field and ensure that dedicated public employees have the ability to negotiate for fair wages, hours and working conditions; better treatment of all working Americans; and improved public services for our communities. Thank you, Chairwoman Wilson, for the opportunity to testify. I am happy to answer any questions.

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<sup>41</sup> See *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 72 (1996) (clarifying further that this rule is unaffected by whether the regulation itself is within the scope of congressional authority, or if the suit is for injunctive relief or damages).

<sup>42</sup> See *Ex parte Young*, 209 U.S. 123 (1908) (establishing the “named administrator” exception).

<sup>43</sup> See *Verizon Md., Inc. v. Pub. Service Comm’n of Md.*, 535 U.S. 635, 645 (2002) (Scalia, J.) (establishing that the constitutionality of a right of action against an administrator may be determined via “straightforward inquiry” as to whether it seeks only a prospective injunction).

<sup>44</sup> Public Sector Freedom to Negotiate Act, H.R. [TBD], 116th Cong. § 4(c)(2)(A) (2019).