Testimony of William Messenger
House Subcommittee on Health, Employment, Labor and Pensions
June 26, 2019

Chairwoman Wilson, Ranking Member Walberg, Members of the House Subcommittee on Health, Employment, Labor and Pensions:

Thank you for the opportunity to appear before you today. For nearly two decades I have been practicing labor and constitutional law at the National Right to Work Legal Defense Foundation, advocating for individual employees in both the private and public sectors.

In February 2018, I presented oral arguments on behalf of Mark Janus before the United States Supreme Court in the case of *Janus v. AFSCME*.

Central to this case was the question of the payment of compulsory union fees in the public sector. Because the advocacy that a government union engages in is inherently political, that advocacy is subject to heightened First Amendment protection. As a result, the Court rightly held in its ruling in favor of Mark Janus that it violates workers' First Amendment rights to compel them to subsidize a union's speech without their affirmative consent.

In response to *Janus*, several state governments, at the behest of union officials, have implemented various schemes to attempt to circumvent the decision. These schemes include forcing workers to attend mandatory union recruitment meetings, requiring the disclosure of personal information to union officials, and prohibiting workers from stopping the deduction of union dues from their wages except during short escape periods.

The National Right to Work Legal Defense Foundation has already challenged many such schemes in courts around the country, and will continue to do so for as long as it is necessary.

While public sector workers now enjoy the freedom to choose whether to support a union, many private sector workers do not. Specifically, those private-sector workers who are not fortunate enough to work in the nation's 27 Right to Work states can still be subjected to forced dues requirements, even though their public sector brethren cannot.

This inequity can be rectified by passing a National Right to Work Act, which will guarantee private sector workers the freedoms now enjoyed by public sector workers under *Janus*. With a National Right to Work Act, both public-sector and private-sector employees will be free to choose whether to support a union and its advocacy.

Unfortunately, some propose to make an already inequitable situation even worse by stripping all private sector workers of Right to Work protections. A prime example is the "Protecting the Right to Organize Act," H.R. 2474, which would permit unions to impose forced fee requirements on private sector workers notwithstanding state Right to Work laws.

While this effective repeal of state Right to Work laws is the worst feature of H.R. 2474, it is not its only negative feature. The bill also gives union officials more power to impose compulsory unionism on individual workers, such as by:

- Empowering the National Labor Relations Board (NLRB) to overturn secret ballot votes in which workers reject monopoly union representation and then impose that representation on the very workers who voted against it;

- Granting only unions and their agents the right to act as parties in certification election proceedings;

- Imposing forced unionism on millions of independent contractors, such as ridesharing drivers, via the California-invented "ABC Test";

- Allowing union officials to collectivize employees across multiple employers at once and making it much harder for independent workers to achieve decertification, by codifying the Obama-era *Browning-Ferris* decision;

- Allowing union officials to engage in secondary coercion and to file harassing civil suits to coerce employers to succumb to union organizing demands; and

- Empowering union officials to impose first contracts with forced fee requirements on employees through binding-interest arbitration.

All of these provisions are designed to magnify union power over workers who may believe they would be better off without a union. Rank-and-file workers want Congress to protect them *from* union officials, not to give union officials even more power to control their lives and paychecks.

While *Janus* freed public sector workers from forced fee requirements, many of these workers remain subject to forced representation requirements. Under monopoly bargaining, euphemistically known as "exclusive representation," the government requires workers to accept a union as their mandatory agent for speaking and

dealing with the government over certain issues, irrespective of whether each individual worker approves or not. This results in individual workers losing the power to speak for themselves in dealing with their government employer.

The Supreme Court in *Janus* recognized that this form of government compelled representation "substantially restricts the nonmembers' rights" and causes a "significant impingement on associational freedoms." Indeed, monopoly representation turns the democratic process on its head. Instead of citizens choosing their representatives in government, the government is choosing representatives to speak for its citizens.

Public-sector monopoly bargaining is such a fundamentally flawed idea that Congress should, at a minimum, leave it up to the states and not get involved. Currently, state labor relations are governed not by federal law, but by state law. Two states, Virginia and North Carolina, do not allow government entities to enter into collective bargaining agreements with unions at all. The 10th Amendment protects the rights of states to set their own policies with regards to labor relations.

For most of American history, federal and state governments rightly refused to engage in union monopoly bargaining. This is due to fundamental differences between the public and private sectors.

In the private sector, negotiations between an employer and a monopoly bargaining representative concern issues that affect that employer and its employees. In the public sector, negotiations between government officials and union representatives concern political issues that affect third-parties: individual citizens.

That why's President Franklin Roosevelt, who signed the National Labor Relations Act into law, was firm in his opposition to monopoly bargaining in the public sector. He said:

> All Government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with Government employee organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employees

> alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters.
> …
>
> Particularly, I want to emphasize my conviction that militant tactics have no place in the functions of any organization of Government employees. Upon employees in the Federal service rests the obligation to serve the whole people, whose interests and welfare require orderliness and continuity in the conduct of Government activities. This obligation is paramount. Since their own services have to do with the functioning of the Government, a strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied. Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable.

Even George Meany, former president of the AFL-CIO said in 1955 that "It is impossible to bargain collectively with the government."

Since then, of course, the thinking of union officials has changed. As public sector monopoly bargaining has swelled to encompass nearly half of all unionized employees in the country, union officials have grown dependent on that revenue stream.

In state after state where unions have gained monopoly bargaining powers in the public sector, costs skyrocket while quality of service declines. But monopoly bargaining allows unions to become the most powerful force in state politics and to pour millions of dollars and thousands of man-hours into electing public officials, allowing unions to sit on both sides of the negotiating table.

We have seen this play out in states like California and Illinois, where unfunded pension obligations and inefficiencies caused by wasteful work rules and featherbedding have set state and local budgets on a glide path toward insolvency.

And often, when states try to address these problems, union officials call a strike, as we have seen recently in schools around the country. And who are they striking against? Voters, taxpayers, and citizens who rely on vital public services are at the mercy of union officials who can grind government operations to a halt if they think it will get them what they want.

Many states that have given union officials so much artificial political power have come to regret it. As they start to correct matters, Congress should stay out of their way, not make their job harder.

Thank you for your attention, and I look forward to answering your questions.