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Louis Cholden-Brown
Office of the New York City Comptroller

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UNIONIZING IN THE CHAMBERS OF GOVERNMENT

*Louis Cholden-Brown**

* Senior Advisor and Special Counsel for Policy & Innovation, Office of the New York City Comptroller. Affiliation is provided for identification purposes only. The views expressed are the author's alone and do not represent the position of the Comptroller or any other organization or person with whom he is presently or formerly affiliated. Gratitude goes out to Aditi Bagchi and the attendees at the 2020 Colloquium on Scholarship in Employment and Labor Law.

ABSTRACT

As overall union membership stagnates nationwide due to the contraction of traditionally unionized industries, labor organizations have made historic inroads into new, highly volatile employment sectors, including digital media, tech, political campaigns, and the gig economy. One such sector that has seen new life is state and local legislative employees. Excluded from coverage by the National Labor Relations Act, legislative employees have been subject to disparate labor rights, job protections, and terms and conditions of employment across and within states. While efforts to secure collective bargaining rights for this sector have occurred over the past twenty-five years, the simultaneous yet uncoordinated unionization efforts since August 2019 of staff in six seven states and Congress have brought new national attention to the issue. As member-organizers seek to build a nationwide movement of legislative employee bargaining, this essay considers the lessons of existing and past legislative, judicial, and organizing efforts. Each organizing attempt offers a unique response to a distinct set of laws, actors, and geography; while some of those choices may be replicable elsewhere, more likely any future campaigns will need to be bespoke. As we enter the third year of a pandemic that continues to destabilize traditional workplaces, additional efforts, drawing inspiration and lessons from existing units, will continue to appear and contribute in yet another unique manner to this still-emergent area of public sector organizing.

INTRODUCTION

As overall union membership stagnates nationwide due to the contraction of traditionally unionized industries, labor organizations have made historic inroads into new, highly volatile employment sectors, including digital media, tech, political campaigns, and the gig economy.¹ One such sector that has seen new life is state and local legislative employees. Excluded from coverage by the National Labor Relations Act, legislative employees have been subject to disparate labor rights, job protections, and terms and conditions of employment across and within states. While efforts to secure collective bargaining rights for this sector have occurred over the past twenty-five years, the simultaneous yet uncoordinated unionization efforts since August 2019 of staff in seven states and Congress have brought new national attention to the issue.

¹ Steven Greenhouse, *The Faces of a New Union Movement*, THE NEW YORKER (Feb. 28, 2020), <https://www.newyorker.com/culture/photo-booth/the-faces-of-a-new-union-movement>; Dan Kopf, *Union Membership in the US Keeps on Falling, Like Almost Everywhere Else*, QUARTZ (Feb. 5, 2019), <https://qz.com/1542019/union-membership-in-the-us-keeps-on-falling-like-almost-everywhere-else>.

As member-organizers seek to build a nationwide movement of legislative employee bargaining, this essay considers the lessons of existing and past legislative, judicial, and organizing efforts. Each organizing attempt offers a unique response to a distinct set of laws, actors, and geography; while some of those choices may be replicable elsewhere, more likely any future campaigns will need to be bespoke.

In many jurisdictions, the at-will status,² civil service status,³ total number,⁴ or salaries and benefits⁵ of legislative employees are either directly codified or the processes for determination are outlined by local or state law.⁶ A law adopted by the legislative body corresponding to a putative union may be subject to change as part of negotiations and may, arguably, raise issues of conflict.⁷ Within a state that has approved such legislation, a prospective municipal organizing effort must contend with significant constraints on the areas of bargaining.

² See, e.g., NAPOLEON, OH., CHARTER § 2.10 (2000) (“Council shall appoint... employees to directly serve the Council, all of whom shall serve at the pleasure of Council and all of whom shall be suspended or removed by Council at any time, with or without cause”); *but see* STAMFORD, CT., CODE OF ORDINANCES § 40-152 (2021) (“The services of the position of Legislative Aide are to be obtained on a contractual basis for a period not to exceed five (5) years. Such contract shall be approved with the advice and consent of the Board of Representatives.... Such contract will be in accordance with the terms and conditions of the work specifications attached to this ordinance, and any terms and conditions relative to conditions of employment, which may be negotiated when reasonably necessary to carry out the purposes of this ordinance.”); *see also* MO. REV. STAT. § 21.155(4) (1973) (requiring the passage of a resolution to allow employees to continue in employment after adjournment).

³ See, e.g., CINCINNATI, OH. ADMINISTRATIVE CODE § 101-37 (2021); STAMFORD, CT. CODE OF ORDINANCES § 40-151 (2021); ANNE ARUNDEL CNTY, MD., CODE § 802(13) (2005).

⁴ See, e.g., N.J. REV. STAT. § 40:69A-60.5 (2020) (setting number of permitted staff based on municipal population); CINCINNATI, OHIO CODE OF ORDINANCE § 101-37 (2021) (Each member of council shall have the power of appointment for three full-time and three part-time unclassified positions in the legislative service of the council); BUFFALO, N.Y., CHARTER § 3-7 (2021) (“appoint ... staff to the common council as deemed necessary for the proper functioning of the common council, provided that, until January 1, 2006, such other staff to the common council shall be limited in number to 37.”); MO. REV. STAT. § 21.155(2)-(3) (2021) (each member may employ one stenographer or secretary).

⁵ See, e.g., N.J. REV. STAT. § 40:69A-60.5 (2020) (as of 2019, the salaries of council aides are adopted by ordinance, they were previously capped at \$15,000); CINCINNATI, OHIO, CODE OF ORDINANCE § 101-39 (2021); JERSEY CITY, N.J. CODE OF ORDINANCE § 53-7 (exempting aides from workday regulations).

⁶ See, e.g., CHARTER OF ALBANY CNTY ch. C, art. 2, § 204.

⁷ Sean Greene, *New Castle County Council Overrides Veto, Approves Council Employee Pay Raise*, WDEL.COM (Mar. 11, 2020) https://www.wdel.com/news/new-castle-county-council-overrides-veto-approves-council-employee-pay/article_a4b818ec-6358-11ea-a252-cf7b1ec354c1.html.

While the legislative branch sets its own budget in some political subdivisions, it is capped elsewhere by ordinance or subject to negotiation.⁸ Greater budget flexibility corresponds to an increased ability to raise salaries or fringe costs as part of collective bargaining. In some states and localities, the legislative body is tasked with approving memorandums of understanding and collective bargaining agreements.⁹ Such responsibility can potentially raise the imprimatur of conflicts of interest, either for contracts covering legislative employees or other members of an employee organization with which they have affiliated.¹⁰ Even within these universally at-will relationships, most staff operate under a presumption of job security with an acknowledgment that their tenure will conclude at the end of the elected official's term, which can be upset by sudden departures of the member.¹¹ While many of these considerations weigh on the wisdom or futility of organizing within a given statehouse or municipal legislature, the legality and protections afforded to staff seeking to engage in such activities vary widely.

Section I begins by charting the history of federal labor law, the comparatively recent expansion of collective bargaining to federal employees, and its exclusion of the sub-federal public sector workforce. This section continues with a review of the history of the Congressional Accountability Act, which first applied federal labor and employment law to the legislative branch, and new organizing by congressional staff to finally fully extend its protections. Section I concludes with a survey of the status of state-level public sector

⁸ See, e.g., N.Y.C., N.Y. CHARTER § 243 (2004); ANNE ARUNDEL CNTY., MD., CODE art. VII, § 704 (2005); FLA. STAT. ANN. § 11-135 (Westlaw through 2021 first Reg. Sess. & Spec. "A" Sess. 27 Leg.); ALLEGHENY CNTY. PA. CHARTER § 5-305.01(C) ("The appropriation in each annual operating budget for [the] County Council[...] shall not exceed 0.4% of the County's annual locally levied tax revenues..."); CHARTER OF ALBANY CNTY., N.Y. § 204 ("within the appropriations approved by the county executive for such staff").

⁹ See, e.g., FAIRBANKS, ALASKA CODE OF ORDINANCES § 42-1; CONN. GEN. STANT. ANN. § 5-278 (Westlaw through 2021 Reg. Sess. & 2021 June Spec. Sess.) (The General Assembly may approve any such agreement as a whole by a majority vote of each house or may reject such agreement as a whole by a majority vote of either house.); N.H. REV. ST. ANN. § 273-A:3 (through 2021 Reg. Sess.) (Only cost items shall be submitted to the legislative body of the public employer for approval at the next annual meeting of the legislative body); PROVIDENCE, R.I. CODE OF ORDINANCES § 17-27 (1982) ("No collective bargaining agreement between the City of Providence and any labor organization shall become effective unless and until ratified by the Providence city council.").

¹⁰ CHARTER OF BUFFALO, N.Y. § 3-7 (2000). A potentially similar issue is presented by jurisdictions like Buffalo, NY where the Common Council is empowered "to fix the salary and compensation of every officer and employee of the city except as may be otherwise provided by law."

¹¹ Ass'n of Legis. Emp. (@NYCCouncilUnion), TWITTER (Jan. 26, 2020, 12:38 PM), <https://twitter.com/NYCCouncilUnion/status/1221487531042246656> ("As CM Espinal moves on, 7 staffers are now left in precarious employment. When a CM decides to resign before the end of term, staff are unexpectedly left without jobs. NYC Council needs a clearer process and avenues for employee protection and transition."). Some jurisdictions anticipate this scenario better than others. CINCINNATI, OHIO CODE OF ORDINANCES § 101-37 (2013) ("Should a member of council vacate office before the expiration of a council term, the council may extend the appointment of the council member's appointees for a term not to extend beyond the assumption of office by the council member's successor in office.").

labor law, identifying which jurisdictions do and do not extend the right to organize to governmental employees generally, and in some cases specifically to legislative staff. Section II discusses those statehouses and municipal legislatures where staff have unionized or sought to, as well as legislative efforts in additional states to extend existing public sector labor regimes to the chambers. The article concludes with an analysis of pervasive hurdles and considerations for staff seeking to initiate a collective bargaining campaign.

I. STATUS OF FEDERAL AND STATE PUBLIC SECTOR COLLECTIVE BARGAINING LAW

Unionization of public sector employees has historically been disfavored, and to the extent that it has been permitted, it is generally accompanied by greater constraints than confronted by private sector employees. While the first union of governmental employees, the National Association of Letter Carriers, was formed in 1889, “gag rules” imposed by President Theodore Roosevelt and William Howard Taft via Executive Orders precluded employee organizations from lobbying Congress.¹² The 1912 Lloyd-LaFollette Act guaranteed federal employees the right “to furnish information to either House of Congress, or to a committee or Member thereof” and allowed them to join labor organizations, as long as such organizations forbade strikes against the government.¹³ The National Labor Relations Act of 1935, which guaranteed private sector employees the right to self-organize, form labor organizations, collectively bargain, and engage in concerted activities including strikes, excluded government employees.¹⁴ President Franklin D. Roosevelt encapsulated the fears that justified this exclusion, arguing that “the process of collective bargaining...cannot be transplanted into the public service...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.”¹⁵

The Labor Management Relations (“Taft-Hartley”) Act of 1947, which severely restricted the activities and powers of labor unions, prohibited federal employees from striking or joining union leadership.¹⁶ Executive Order 10988, issued by President Kennedy in 1962, granted federal employees the

¹² CIVIL SERVICE COMM’N, COLLECTIVE BARGAINING FOR PUBLIC MANAGER (STATE AND LOCAL): PREFERENCE MATERIALS 2 (1975), <https://files.eric.ed.gov/fulltext/ED117381.pdf>.

¹³ 5 U.S.C. § 7211 (1978).

¹⁴ 29 U.S.C. § 157 (1947).

¹⁵ Letter on the Resolution of Federation of Federal Employees Against Strikes in Federal Service (Aug. 16, 1937), available at <https://www.presidency.ucsb.edu/documents/letter-the-resolution-federation-federal-employees-against-strikes-federal-service>.

¹⁶ Labor Management Relations Act of 1947, Pub. L. 80–101, ch. 7, subch. II, 29 U.S.C. § 158(b).

right to engage in collective bargaining through labor organizations, and was subsequently expanded in 1969 by President Nixon and further in 1975 by President Ford.¹⁷ Title VII of the Civil Service Reform Act of 1978, the Federal Service Labor-Management Relations Statute, finally codified collective bargaining rights for executive branch federal employees in statute.¹⁸ However, compared to the permitted scope of bargaining under private-sector labor law, the Federal Service Labor-Management Relations Statute (“FSLMRS”) substantially restricts the subjects on which public-sector unions may negotiate. Wages and fringe benefits, which are fixed pursuant to various federal statutory provisions, are off-limits to bargaining, and federal agencies are expressly given a wide range of substantive management rights.¹⁹

A. *Congressional Accountability Act*

The Congressional Accountability Act (“CAA”) in 1995 altered the exclusion of legislative branch employees from the protections of eleven federal workplace laws, including the FSLMRS, and established the Office of Compliance (“OOC”) to administer the newly-applicable laws.²⁰ The OOC was directed to adhere to existing Secretary of Labor regulations for each of the eleven workplace statutes, unless it determined that modifying such regulations would be more effective for implementation of the covered right.²¹ Failure to issue a rule, or secure Congressional approval, would trigger statutory coverage based on “the most relevant substantive executive agency regulation” except as it pertained to employees’ rights to join a union and engage in collective bargaining under the FSLMRS.²² Though included in the CAA, this carve-out reflected the largely partisan split in the positions of leadership. Senate Majority Leader Trent Lott stated that “[p]ersonally I don’t think there should be unions in those offices” while House Minority Whip Representative David E. Bonior argued that “[a]ll Americans should have the right to organize, to work together for fair and decent wages, safe working conditions and a more just society. That’s a basic American right.”²³

Section 220(e) of the CAA directed that anyone employed on a legislator’s

¹⁷ Exec. Order No. 10988, 27 Fed. Reg. 551 (Jan. 19, 1962); Exec. Order No. 11491, 34 Fed. Reg. 210 (Oct. 31, 1969); Exec. Order No. 11838, 40 Fed. Reg. 27 (Feb. 7, 1975).

¹⁸ Pub. L. No. 95-454, § 701, 92 Stat. 111 (1978).

¹⁹ Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 701, 92 Stat. 1111, 1198 (codified at 5 U.S.C. § 7106).

²⁰ Congressional Accountability Act of 1995, Pub. L. No. 104-1, 109 Stat. 3 (codified at 2 U.S.C. § 1301) [hereinafter Congressional Accountability Act].

²¹ Congressional Accountability Act § 202(d)(2).

²² Congressional Accountability Act § 411.

²³ Eric Schmitt, *Congress Staff May Not Gain Right to Union*, N.Y. TIMES (July 23, 1996), <https://www.nytimes.com/1996/07/23/us/congress-staff-may-not-gain-right-to-union.html>.

personal staff, as well as staff employed by a committee or leadership, was to be excluded from exercising FSLMRS rights if the OOC determined that “such exclusion is required because of ... a conflict of interest or the appearance of a conflict; or ... Congress's constitutional responsibilities.”²⁴ A congressional failure to approve the OOC rule regarding these issues would result in a denial of such protections to the listed employees.²⁵ The special provisions governing 220(e) rulemaking were designed to address potential conflicts that employee unionization would bring to Congressional labor law functions.

Opponents hypothesized that problematic situations included unionization by those committee staff overseeing union and management issues such as “where Printers Union Local 999 comprised of the Senate Labor Committee managed a Senate investigatory hearing on crime” in the union, or “where Teamster members of the House Rules Committee expedite the bill that would create a legislative ban on striker replacement workers.”²⁶ Others argued that congressional unionization did not raise concerns distinct from the Executive Branch, being that agency legislative affairs office employees, who are not excluded from the FSLMRS, had comparable legislative responsibilities and “Schedule C” appointees who regularly filled agency policy-making positions, and who too were protected by FSLMRS, were political rather than career appointees like Congressional staff.²⁷

Before issuing final rules, the OOC received written comments from two House committee chairs and an additional House member, each of whom argued that broad exclusions from FSLMRS coverage were warranted. Alternatively, the Inspector General of the House, the Secretary of the Senate, and representatives of three unions each maintained that the OOC should create no categorical exclusions, but should instead adjudicate employee eligibility for FSLMRS protection on a case-by-case basis.²⁸ A 28-page submission from House Oversight Chair Rep. Bill Thomas objecting to initial recommendations from the Board noted that due to the small size of offices and lack of physical barriers between employee work stations, screening employees for confidential information regarding the member's legislative positions and strategies or labor-management issues would be virtually impossible and union membership would “directly impair the alter ego relationship between

²⁴ Congressional Accountability Act of 1995 § 220(e).

²⁵ *Id.* at § 220.

²⁶ James T. O'Reilly, *Collision in the Congress: Congressional Accountability, Workplace Conflict, and the Separation of Powers*, 5 GEO. MASON L. REV. 1, 33 (1996).

²⁷ James J. Brudney, *Congressional Accountability and Denial: Speech or Debate Clause and Conflict of Interest Challenges to Unionization of Congressional Employees*, 36 HARV. J. ON LEGIS. 1, 71–72 (1999).

²⁸ *Id.* at 12–13.

a member and a unionized staffer” by creating a potential conflict of interest between union loyalty and loyalty to a member and their legislative priorities.²⁹

The OOC adopted final regulations and submitted them to Congress for approval on August 19, 1996.³⁰ The OOC found that no exclusions were necessary: just as the provisions of the FSLMRS “are sufficient to allow the Executive Branch to carry out its constitutional responsibilities, [they similarly] are fully sufficient to allow the Legislative Branch to carry out its constitutional responsibilities.”³¹ Further, the argument that collective bargaining is “inherently inconsistent” with the conduct of Congress’ constitutional responsibilities was directly at odds with the statutory instruction to adhere to the existing law to “the greatest extent possible.”³² The Board rejected Members’ interest in “hiring and firing on the basis of ‘political compatibility,’” the close working relationships between covered staff and their principals, and the close physical quarters of the offices, as justifications for additional permissible exclusions.³³ The majority report determined that the FSLMRS’s exclusion of supervisory, managerial and confidential employees categorically resolved any conflicts of interest faced by employees whose jobs involved labor-management policy or practices.³⁴ Moreover, the suggestion “that exclusion of employees in personal, committee, leadership and party caucus offices” was necessary to address “the most important legislative conflict of interest issue—the appearance or reality of influencing legislation,” had no foundation in the law which the Board is bound to apply.³⁵

A concurrence noted that as the FSLMRS narrowly confined the permitted subjects of bargaining and by barring strikes and slowdowns eliminated most of labor’s leverage, any fears of extending it to Congressional staff were misplaced, “unless one fears the (minimal) requirement that a Congressional employer and its employees communicate about terms and conditions of employment (or, at least those not set by statute) before the employer sets them.”³⁶ Two of the five Board members dissented from the final rule.³⁷ The dissent faulted the Board for relying “upon past precedents and concepts which we believe inapplicable or at least not determinative of the complex

²⁹ Schmitt, *supra* note 23.

³⁰ 142 CONG. REC. 22,000 (1996).

³¹ 142 CONG. REC. 22,004 (1996).

³² *Id.*

³³ *Id.*

³⁴ 142 CONG. REC. 22,002 (1996).

³⁵ *Id.*

³⁶ 142 CONG. REC. 22,008 (1996).

³⁷ *Id.*

issue raised.”³⁸ The dissenters found the comparison of Executive Branch functions with the legislative process “to be without any legal or constitutional support.”³⁹ They acknowledged that case-by-case adjudication of coverage might be the best means of assuring procedural due process, but still expressed concerns that given the transient nature of congressional offices and employees, which in some circumstances might change biennially, case-by-case adjudication might not be resolved “until the employee or the office itself is no longer part of Congress.”⁴⁰

Because the regulations did not make the exemptions he had sought in his testimony, House Oversight Chairman Thomas, perhaps responding to an invitation from the dissent,⁴¹ attempted to remand them to the Board, claiming they “fail[ed] to address issues of fundamental importance to the House of Representatives.”⁴² The remand was rejected by Board Chair Glen Nager, who responded that “the action of the committee raises serious concerns with respect to the independence of the board.”⁴³ The remand led to a stalemate that has persisted to the present, and which was described by Senator Chuck Grassley, author of the CAA, in 1998 as “a disgrace to the principles supporting the CAA.”⁴⁴ In 1996, Congress extended the same eleven workplace statutes to employees of the White House and the Executive Office of the President.⁴⁵

Notwithstanding Congress’ failure to adopt the OOC regulations, within two years, there appeared to be little interest among staff to unionize. In a 1997 survey conducted by The Hill, only nine of eighty respondents indicated an interest in organizing, though fifty-nine indicated that they did not believe their employing member would be opposed.⁴⁶ Staffers who had previously met in hopes of forming a union acknowledged that their efforts had flagged as the prospects dimmed.⁴⁷ While Members of Congress are able to voluntarily recognize unions in their office in the absence of the adopted regulations

³⁸ 142 CONG. REC. 22,010 (1996).

³⁹ *Id.*

⁴⁰ 142 CONG. REC. 22,011 (1996).

⁴¹ *Id.* (“If this dissent has some resonance, perhaps the Congress might consider returning it to the Board with some guidance as to its intentions regarding the factors to be considered and methodology to be followed by the Board in reaching its recommendations.”).

⁴² A.B. Stoddard, *Impact of Labor Law on the Hill is Minimal*, THE HILL, Mar. 19, 1997 (available via LexisNexis).

⁴³ *Id.*

⁴⁴ Senator Charles Grassley & Jennifer Shaw Schmidt, *Practicing What We Preach: A Legislative History of Congressional Accountability*, 35 HARV. J. ON LEGIS. 33, 48 (1998).

⁴⁵ Presidential and Executive Office Accountability Act, Pub. L. No. 104-331, 110 Stat. 4053 (1996) (codified as amended in scattered sections of 3 U.S.C.).

⁴⁶ Stoddard, *supra* note 42.

⁴⁷ *Id.*

and staff are not prohibited from organizing, they lack protections extended to other federal workers and lack recourse if a Member refuses to recognize the putative unit. Instead, in recent years, various of the ten staff associations have joined together to produce a policy report on racial justice and reform, increase diversity among Capitol Hill staff, and address the aftermath of the January 6th attack on the Capitol.⁴⁸

However, in February 2022, it became evident that these public activities did not fully encapsulate the extent of staff grievances nor the scope of their organizing intentions. The results of a five-hundred person survey conducted by the Congressional Progressive Staff Association released in January revealed that 47% of respondents struggled to pay bills, 85% of respondents believed Congress was a toxic work environment, and 91% of respondents wanted to see more protections to give them a voice at work.⁴⁹ Having initially dodged the question, Speaker Nancy Pelosi clarified her support via Twitter for a hypothetical staff unionization effort on February 3, 2022.⁵⁰ The next day, the Congressional Workers Union (“CWU”) went public and quickly garnered the social media support of over seventy members of Congress.⁵¹ That same week, CWU revealed that they had been organizing for a year “amid a growing reckoning with poor pay and hostile working conditions” and were seeking “meaningful changes to improve retention, equity, diversity, and inclusion on Capitol Hill.”⁵² According to CWU organizers, notwithstanding certain terms and conditions that were statutorily protected from bargaining, such as health insurance, they could still bargain over telework policies and health safety protocols, vacation time, paid sick and family leave, and disciplinary and office procedures as well as pay as long as the

⁴⁸ Luke Broadwater, *Congressional Aides Unite to Push for Change at the Capitol After the Riot*, N.Y. TIMES (Mar. 11, 2021), <https://www.nytimes.com/2021/03/11/us/congressional-aides-capitol-riot.html>.

⁴⁹ CONG. PROGRESSIVE STAFF ASS’N, BRIEFING: CONGRESSIONAL WORKING CONDITIONS SURVEY 7, <https://static1.squarespace.com/static/616b86c93a6fd661d131ee40/t/61f08a1ce6f4ed211c8d51d6/1643153948206/CPSA+Briefing.pdf> (last visited Mar. 29, 2022).

⁵⁰ Bryan Metzger and Kayla Epstein, *Pelosi Says She Would Support Congressional Staff Unionizing 'If and When Staffers Choose to Exercise That Right'*, BUS. INSIDER (Feb. 3, 2022), <https://www.businessinsider.com/nancy-pelosi-dodges-dear-white-staffers-instagram-capitol-hill-unionization-2022-2>. Pelosi’s Deputy Chief of Staff Drew Hammill tweeted: “Like all Americans, our tireless Congressional staff have the right to organize their workplace and join together in a union. If and when staffers choose to exercise that right, they would have Speaker Pelosi’s full support.” Drew Hammill (@Drew_Hammill), TWITTER (Feb. 3, 2022, 4:17 PM), https://twitter.com/Drew_Hammill/status/1489347324216238083.

⁵¹ Emily Wilkins & Ian Kullgren, *Hill Staff Trying to Unionize Need Bosses’ Approval First*, BLOOMBERG L. (Feb. 7, 2022), <https://news.bloomberglaw.com/daily-labor-report/hill-staff-trying-to-unionize-need-their-bosses-approval-first>.

⁵² Congressional Workers Union (@Congress_Union), TWITTER (Feb. 4, 2022, 11:00 AM), https://twitter.com/Congress_Union/status/1489629962705551361.

total remained within the office's Member's Representational Allowance,⁵³ which was increased by 21% in March, the largest increase since it was established in 1996 alongside the CAA.⁵⁴ At the outset, CWU membership measured in the double-digits of Democratic staff from among the approximately 10,000 total employees.⁵⁵ Organizers shared, however, that conversations had begun with a few staffers grousing prior to the January 6th attack, but the events of January 6th were "the straw that broke the camel's back...[as] that question of people just not feeling safe has been a huge part of it" and interest grew into weekly meetings.⁵⁶

While support from Pelosi and Schumer was effusive, Republican leaders from both houses were united in opposition, variably characterized it as "nuts" and "a terrible idea."⁵⁷ Even Senator Grassley, who years earlier had taken to the pages of a law journal to decry the failure to adopt the proposed rules at initial completion, faced with a potentially imminent unionization effort, categorized the potential 500 bargaining units as "complicated."⁵⁸ In the House, the Democratic majority can adopt the resolution for their member offices and committees introduced by Rep. Andy Levin at CWU's direct request, which boasted 165 cosponsors, by a simple majority. Advancing the resolution in the Senate to perform the corresponding activation or agree to the concurrent resolution necessary for Congressional Budget Office or OCWR staff themselves to unionize, however, would require a sixty vote majority.⁵⁹ Such a threshold is likely beyond reach especially in light of skepticism expressed by Sen. Joe Manchin, though Sen. Sherrod Brown has signaled his intention to introduce the resolution regardless.⁶⁰

⁵³ Emily Wilkins (@emrwilkins), TWITTER (Mar. 3, 2022, 5:13 PM), <https://twitter.com/emrwilkins/status/1499508209446539278/photo/2>.

⁵⁴ Abby Vesoulis, *Inside the Capitol Hill Staffers' Effort to Unionize Congress*, TIME (Mar. 26, 2022), <https://time.com/6160944/capitol-hill-staff-union-congress/>.

⁵⁵ Kayla Epstein, *After Pelosi's Comments, Capitol Hill Staffers Are Trying to Unionize. Here's the Complicated Process it Would Take to Make That a Reality*, BUS. INSIDER (Feb. 4, 2022), <https://www.businessinsider.com/capitol-hill-staff-congressional-workers-union-process-pelosi-levin-2022-2>.

⁵⁶ Chris Cioffi and Jim Saksa, *Hill Staffers Are Organizing. What Could Their Unions Look Like?*, ROLL CALL (Feb. 9, 2022), <https://rollcall.com/2022/02/09/hill-staffers-unionizing-what-could-that-look-like/>.

⁵⁷ Jordain Carney & Cristina Marcos, *Questions Loom Over How to Form Congressional Staff Union*, THE HILL (Feb. 10, 2022), <https://thehill.com/homenews/house/593605-questions-loom-over-how-to-form-congress-staff-union>; John Nichols, *Congressional Staffers Are Organizing a Much-Needed Union*, THE NATION (Feb. 11, 2022), <https://www.thenation.com/article/economy/congress-staff-union/>; Caroline Vakil, *Congressional Staffers Launch Efforts to Unionize Amid Support From Democratic Leadership*, THE HILL (Feb. 4, 2022), <https://thehill.com/homenews/house/592897-congressional-staffers-launch-efforts-to-unionize-amid-support-from-democratic>.

⁵⁸ Grassley & Schmidt, *supra* note 44; Carney & Marcos, *supra* note 57.

⁵⁹ Nichols, *supra* note 57.

⁶⁰ *Id.*

The Office of Congressional Workplace Rights (“OCWR”), the name OOC assumed under the Congressional Accountability Act of 1995 Reform Act, in a response to a letter from House Administration Committee Chair Zoe Lofgren unanimously, in a sharp departure from the 3-2 initial OOC vote, endorsed and urged the adoption of the original 1996 220(e) regulations.⁶¹ The regulations, union proponents noted, were identical to the 220(d) provisions that Congress had adopted and under which the various covered offices like the Architect and Capital Police had been bargaining for a quarter-century.⁶² The Committee held an oversight hearing on March 2, 2022, to, in the words of the Chair, “move the House forward on recognizing Congressional workers’ right to organize.”⁶³ While all the Democratic members in attendance signaled their support, the Republican minority characterized a congressional union as “a solution in search of a problem,” and their invited witness argued that allowing member staffers to unionize could unconstitutionally interfere with individual member’s Article I obligations to represent constituents.⁶⁴ Testimony from the OCWR General Counsel clarified that if the 1996 proposed regulations were adopted, staff in each member office and the majority and minority staff of each committee would need to organize within each separately to unionize as they are all governed individually. Thus, while there is a potential for more than 500 bargaining units, more likely just the personal staff of Democratic members and the majority staff of committees would elect to organize if authorized this session. Following the hearing, CWU issued a statement saying that the “hearing made clear that absolutely nothing remains in the way of our right to unionize but the question of when House leadership will bring the resolution to the floor for a vote. Fulfilling

⁶¹ Congressional Accountability Act of 1995 Reform Act, Pub. L. No. 115-397, tit. III, § 308, 132 Stat. 5297, 5325–26 (2018); Letter from Rep. Zoe Lofgren to Barbara Childs Wallace (February 8, 2022), available at <https://docs.house.gov/meetings/HA/HA00/20220302/114451/HHRG-117-HA00-Wstate-UelmenJ-20220302.pdf>; Letter from OCWR Chair to Chairperson Lofgren (February 22, 2022), available at https://cha.house.gov/sites/democrats.cha.house.gov/files/documents/2022.02.22%20Letter%20from%20OCWR%20Chair%20to%20Chairperson%20Lofgren%20re%20collective%20bargaining%20regulations_0.pdf.

⁶² Rep. Andy Levin tweeted: “The significance of the House not adopting the OCWR regulations for 26 years is not that the regulations are stale. They are being used for other Hill employees all the time. It’s that the House has failed to honor the human rights of its own employees for . . . 26 years.” Rep. Andy Levin (@RepAndyLevin), TWITTER (Mar. 2, 2022, 3:00 PM), <https://twitter.com/RepAndyLevin/status/1499112425299357703>.

⁶³ Press Release, Committee on House Administration, Lofgren Announces Upcoming Hearing On Congressional Workers’ Right To Organize, (Feb. 28, 2022), <https://cha.house.gov/media/press-releases/lofgren-announces-upcoming-hearing-congressional-workers-right-organize>.

⁶⁴ Jim Saksa, *Parties Clash Over Unionizing Hill Staff at House Hearing*, ROLL CALL (Mar. 2, 2022), <https://rollcall.com/2022/03/02/parties-clash-over-unionizing-hill-staff-at-house-hearing/>.

your promise to protect workers' rights starts with your own. It's time to get this done."⁶⁵

Administrative hurdles and questions do persist even in the House. For one, OCWR has identified a linguistic deficiency in the resolution introduced by Rep. Levin, but the potential reversal of partisan control following the November midterm elections act as an impending deadline to pass the resolution.⁶⁶ If adopted prior to the new session and the Republicans do seize control, outstanding questions remain including whether there is a nondelineated mechanism to revert the authorization to bargain and whether a bargaining unit organized by majority staff of a committee this session will remain such into the next, at least until decertified, if the Democrats transition into the minority or instead follow them.⁶⁷ Rep. Levin however, says that absent his resolution, "our staff lacks the legal right to form a union without retaliation...[a]nd I really think it's inappropriate for people to try to slow the progress of the resolution by getting into the practical realities of how bargaining will unfold if the workers go ahead."⁶⁸ In the interim, though, recognizing that the swift action they hoped for is not forthcoming, the CWU is pursuing voluntary recognition by individual members.⁶⁹

B. Status of the Law in the States

Currently, the FSLMRS does not extend collective bargaining rights to state and municipal public employees.⁷⁰ Since 1959, when Wisconsin became the first state to create a framework for municipal collective bargaining,⁷¹ each state has adopted unique rules governing public-sector unionization, with merely fifteen states continuing to deny public employees the right to

⁶⁵ Jacqueline Alemany & Theodor Meyer, *Jan. 6 Committee Alleges Trump, Allies Engaged in Potential Crimes by Trying to Overturn Election*, WASH. POST (Mar. 3, 2022), <https://www.washingtonpost.com/politics/2022/03/03/jan-6-committee-alleges-trump-allies-engaged-potential-crimes-by-trying-to-overturn-2020-election/>.

⁶⁶ Vesoulis, *supra* note 54.

⁶⁷ Wilkins & Kullgren, *supra* note 51; Cioffi & Saksa, *supra* note 56.

⁶⁸ Chris Cioffi & Jim Saksa, 'Eyes on the Prize': Hill Union Backers Should Keep Momentum Going, *Levin Says*, ROLL CALL (Feb. 23, 2022), <https://rollcall.com/2022/02/23/eyes-on-the-prize-hill-union/>.

⁶⁹ Tobi Raji, et al., *The Congressional Workers Union Wants House Democrats to Prioritize Unionization Efforts on the Hill*, WASH. POST (Feb. 17, 2022), <https://www.washingtonpost.com/politics/2022/02/17/congressional-workers-union-wants-house-democrats-prioritize-unionizations-efforts-hill/>.

⁷⁰ The Public Service Freedom to Negotiate Act would set a minimum nationwide standard of collective bargaining rights that states must provide.

⁷¹ 1959 Wis. Sess. Laws 509.

collectively bargain.⁷² In some states, only certain employees are permitted to collectively bargain. For instance, in Texas, while state and local officials are generally prohibited from entering into collective bargaining agreements regarding hours, wages, or employment conditions,⁷³ other state statutes authorize Lone Star State political subdivisions to bargain with firefighters and police officers, and the City of Houston is authorized to bargain with all of its employees.⁷⁴

Several states explicitly exclude either state or local legislative employees from statutes authorizing collective bargaining by public employees, including Illinois,⁷⁵ Florida,⁷⁶ Wisconsin,⁷⁷ Ohio,⁷⁸ Vermont,⁷⁹ Maryland,⁸⁰ and South Dakota.⁸¹ While many states explicitly carve out the legislative branch, such an exclusion is generally not made explicit in statutes authorizing collective bargaining at the municipal level.⁸² It is uncertain whether this is attributable to the part-time nature of many local governing bodies, which may lead to particular staff constraints, or to a generally slap-dash approach to cities by the state. However, the separation of powers is often far less well-defined in local governmental structure.⁸³ This lack of definition potentially obviates concerns about executive interference in purely internal functions of the legislative branch. Though unadjudicated, public employee relations statutes in other jurisdictions that fail to explicitly exempt legislative bodies can

⁷² See JEFFREY H. KEEFE, ECON. POLICY INST., LAWS ENABLING PUBLIC-SECTOR COLLECTIVE BARGAINING HAVE NOT LED TO EXCESSIVE PUBLIC-SECTOR PAY 1 (2015), <https://www.epi.org/publication/laws-enabling-public-sector-collective-bargaining-have-not-led-to-excessive-public-sector-pay/>; MILLA SANES & JOHN SCHMITT, CTR. FOR ECON. AND POLICY RESEARCH, REGULATION OF PUBLIC SECTOR COLLECTIVE BARGAINING IN THE STATES 4–5 (Mar. 2014), <http://cepr.net/documents/state-public-cb-2014-03.pdf>; Gary Boyer, *AG Herring Celebrates Enactment of Collective Bargaining Legislation*, WFXR, (May 1, 2021), <https://www.wfxrtv.com/news/regional-news/virginia-news/ag-herring-celebrates-enactment-of-collective-bargaining-legislation/>; Sam Brasch, *Colorado Could Be The Next State To Let Its Employees Collectively Bargain*, CPR NEWS, (Apr. 16, 2019), <https://www.cpr.org/2019/04/16/colorado-could-be-the-next-state-to-let-its-employees-collectively-bargain/>.

⁷³ TEX. GOV'T CODE ANN. § 617.002 (West, LexisNexis through 2021 Reg. Sess.).

⁷⁴ TEX. GOV'T CODE ANN. § 146.001 (West, LexisNexis through 2021 Reg. Sess.); TEX. GOV'T CODE ANN. § 174.023 (West, LexisNexis through 2021 Reg. Sess.).

⁷⁵ 5 ILL. COMP. STAT. ANN. 315/3 (Lexis through 2021 Sess.).

⁷⁶ FLA. STAT. § 447.203(3) (2021).

⁷⁷ WIS. STAT. § 111.81-7 (West 2015).

⁷⁸ OHIO. REV. CODE ANN. § 4117.01-C (West 2015).

⁷⁹ VT. STAT. ANN. tit. 3, § 902-5.

⁸⁰ MD. CODE ANN., (State Personnel and Pensions) § 3-102 (West 2018).

⁸¹ S.D. CODIFIED LAWS § 3-18-1 (2020).

⁸² See, e.g., S.D. CODIFIED LAWS § 3-18-1(7) (2021).

⁸³ *Separation of Powers in Municipal Government: Division of Executive and Legislative Authority*, 1978 BYU L. REV. 961, 961 (1978).

be read to extend collective bargaining rights to such employees, including in Oregon, New York, and New Jersey.⁸⁴

II. UNIONIZING STATEHOUSES AND CITIES

Over the past decade, legislation has been introduced in at least seven states to clarify the inclusion of legislative employees within public sector labor laws. In several other states, such as in Wisconsin from 2001 to 2005, attempts were made earlier but have since ceased.⁸⁵ These legislative efforts illuminate the varied challenges of securing bargaining rights for statehouse employees.

A. State-level Organizing Campaigns

To date, three statehouses have seen some of the legislative staff unionize, while a fourth effort fell victim to legal hurdles, and a fifth is presently underway. Maine preceded the others by nearly two decades and remains the only state to have adopted authorizing legislation, though Washington is days away at the time of publication and Oregon passed a bill clarifying employer-side procedures.⁸⁶

i. Maine

While bills to extend collective bargaining rights to Maine legislative employees were introduced as early as 1987, the exclusion was not lifted for non-partisan staff until 1998.⁸⁷ During the debate over the bill, opponents noted that “legislative employees already have a grievance procedure, which is about the only thing that becoming organized would do for them,” and cautioned against “destroying a relationship that now exists between the staff ... and the Legislature.”⁸⁸

Supporters countered that the General Assembly should “live under the laws that it passes on to everybody else,” and since existing processes placed the burden of redress solely on the shoulders of staff, the legislation provided for a positive and objective process for communication between leadership

⁸⁴ See, e.g., N.J. STAT. ANN. § 34:13A-3(d) (West 2021).

⁸⁵ Wis. Assemb. 180, 2001-02 Leg. (Wis. 2001); Wis. Assemb. 576, 2003-04 Leg. (Wis. 2003); Wis. Assemb. 369, 2005-06 Leg. (Wis. 2005).

⁸⁶ S. 113-1312, 1st Sess., at 1 (Me. 1987); H.R. 118-2096, 2d Sess., at 3 (Me. 1997).

⁸⁷ See S. 113-1312, 1st Sess., at 1 (Me. 1987); H.R. 118-2096, 2d Sess., at 3 (Me. 1997).

⁸⁸ *House Legislative Record of the One Hundred and Eighteenth Legislature of the State of Maine (House, April 3, 1998 (H2170-2203)*, 3 ME. STATE LEGISLATURE 2170, 2179 (1998), <https://www.maine.gov/legis/lawlib/lldl/legisrecord118.htm>.

and staff.⁸⁹ One member claimed that the staff with whom he spoke frequently expressed concern over “how political their nonpolitical jobs could become” if the bill was adopted and placed them in undesirable positions.⁹⁰ However, a mass staff letter received after the hearing referenced “the need to establish a clear, consistent mechanism by which legislative employees can have access to the process by which decisions concerning our livelihood are made.”⁹¹

Though the legislation went into effect immediately, it was not until 2003 that an agreement was reached with the Legislature to organize staff into two bargaining units.⁹² Twenty-four Administrative Staff titles joined Maine State Employees Association Local 1989 after a card check process, and the “professional” employees— attorneys, analysts, paralegals, and researchers— opted to be represented by the Independent Association of Nonpartisan Legislative Professionals, an unaffiliated employee organization, through a secret ballot election.⁹³

ii. Delaware

On January 14, 2020, Delaware State Legislative staffers announced their intent to affiliate with the American Federation of State, County and Municipal Employees (“AFSCME”) Council 81 and create a unit of forty-four staffers of the approximately 170 employees at Legislative Hall, which would have created the first statehouse union of partisan staff.⁹⁴ However, the effort stalled the subsequent month, when the union reversed course on the legality of the endeavor in a letter.⁹⁵ While the staff had initially suggested that a 2009 executive order and 2019 law eliminating set bargaining units supported their legal case, outside counsel wrote that “[i]t simply does not make sense to pursue an organizing effort because of the restrictions set forth in the

⁸⁹ *Senate Legislative Record (Senate, April 7, 1998 (S2314-2377))*, 3 ME. STATE LEGISLATURE 2314, 2349 (1998), <https://www.maine.gov/legis/lawlib/lldl/legisrecord118.htm>; *House Legislative Record of the One Hundred and Eighteenth Legislature of the State of Maine (House, April 3, 1998 (H2170-2203))*, 3 ME. STATE LEGISLATURE 2170, 2184 (1998), <https://www.maine.gov/legis/lawlib/lldl/legisrecord118.htm>.

⁹⁰ *House Legislative Record of the One Hundred and Eighteenth Legislature of the State of Maine (House, April 3, 1998 (H2170-2203))*, 3 ME. STATE LEGISLATURE 2170, 2185 (1998), <https://www.maine.gov/legis/lawlib/lldl/legisrecord118.htm>.

⁹¹ *Id.* at 2180.

⁹² ME. LABOR RELATIONS BD., ANNUAL REPORT 4–5 (2003), https://digitalmaine.com/cgi/viewcontent.cgi?article=1081&context=mlrb_docs.

⁹³ *Id.*; Paul Blest, *Historic Union Drive Makes Delaware the First State Again*, THE AM. PROSPECT (Jan. 14, 2020), <https://prospect.org/labor/historic-union-drive-makes-delaware-first-state-again/>.

⁹⁴ *Id.*

⁹⁵ Sarah Gamard, *General Assembly Staffers Can’t Legally Unionize, Says Organization Helping Them Unionize*, DEL. NEWS J., (Feb. 24, 2020), <https://www.delawareonline.com/story/news/politics/2020/02/24/delaware-general-assembly-staffers-cant-unionize-union-lawyer-says/4858209002/>.

law.⁹⁶ The letter noted “a question about whether the Public Employment Relations Board could ever establish a bargaining obligation for the General Assembly” as the staff was exempt from civil service.⁹⁷ In the unlikely event they were able to find a way “past this hurdle,” the letter indicated there was a “clear separations of powers issue” and “we would be asking the judicial branch to impose a requirement upon the legislative branch through the executive branch.”⁹⁸ Among those hurdles was a 2010 Delaware Supreme Court decision that court bailiffs were not covered by the Public Employment Relations Board (“PERB”).⁹⁹ In that ruling, the Court found that since

[t]he Chief Justice has exercised the authority to supervise judicial branch employees’ labor relations by promulgating Judicial Branch Personnel Rules. Those Rules recognize the right to organize, but do not cede responsibility to the executive branch to decide labor relations issues...we hold that the PERB does not have jurisdiction over the Union’s petition to represent bailiffs.¹⁰⁰

Member-organizers said that despite a labor-friendly legislature, their positions remained at-will and “a union will help us do a better job of retaining talent, providing basic worker protections and delivering results” for Delaware.¹⁰¹ Pointing to recent state legislation expanding a worker’s right to organize, they characterized the campaign as “a natural place to go with the work we’re already doing.”¹⁰² Despite its brevity, the public effort was beset with controversy, including a war of words with House Democratic leadership over alleged retaliation against those organizing, including intimidation, changing work conditions and terminations, and threats of litigation by minority staff “blindsided” by the announcement.¹⁰³ The minority staff suggested their employers did not mistreat them and that “their reputations have been tarnished in the eyes of some community members because of a lie” and as such they were considering taking action to “remedy the damage done to

⁹⁶ Blest, *supra* note 93; Letter to Michael Begatto, Exec. Dir. of AFSCME, from Lance Geren (Feb. 19, 2020), <https://www.delawareonline.com/story/news/politics/2020/02/24/delaware-general-assembly-staffers-cant-unionize-union-lawyer-says/4858209002/>.

⁹⁷ Letter to Michael Begatto, *supra* note 96.

⁹⁸ *Id.*

⁹⁹ Superior Ct. v. State Pub. Emp. Rel’s Bd., 988 A.2d 429, 431 (Del. 2010).

¹⁰⁰ *Id.*

¹⁰¹ See Blest, *supra* note 93; Juliana Feliciano Reyes, *Delaware General Assembly Staffers Want to Form County’s First ‘Partisan-Inclusive’ Legislative Worker Union*, PHILA. INQUIRER (Jan. 15, 2020), <https://www.inquirer.com/jobs/labor/legislative-staff-union-delaware-general-assembly-afscme-20200115.html>.

¹⁰² Blest, *supra* note 93.

¹⁰³ Delaware General Assembly Union (@DelawareGAUnion), TWITTER (Feb.18, 2020, 4:32 PM), <https://twitter.com/delawaregaunion/status/1229881307754303489>; Sarah Gamard, *Democratic Lawmakers Clash With Group Attempting to Unionize In General Assembly*, DEL. ONLINE: THE NEWS J. (Feb. 19, 2020), <https://www.delawareonline.com/story/news/politics/2020/02/19/democratic-lawmakers-clash-group-attempting-unionize-general-assembly/4799777002/>.

some of our staff members' reputations" and ensure a fair and legal process."¹⁰⁴

iii. Colorado

In March 2021, Colorado statehouse legislative staff announced the culmination of a three-year effort to organize alongside campaign workers as the Political Workers Guild ("PWG") of Colorado affiliated with the Communications Workers of America, Local 37074.¹⁰⁵ The announcement came after bureaucratic hurdles and COVID-19 scuttled the successful collection of a majority of cards during 2020 when the "imbalances and inequities became more obvious."¹⁰⁶ At present, PWG Colorado lacks the authority to collective bargain, which would require either an Executive Order or legislation.¹⁰⁷ Instead, it is an open union that aides are not obligated to join. In lieu of formal power, PWG has focused instead on persuasion, including a successful push for legislation making the part-time employees eligible for state health benefit plans, though aides remain precluded from testifying even on such pertinent legislation.¹⁰⁸

iv. Oregon

On May 28, 2021, Oregon State House staff voted to join IBEW Local 98, which was selected in part because the union did not actively endorse in local elections.¹⁰⁹ The vote capped off a campaign begun the prior July that had unfolded entirely virtually due to COVID-19 restrictions at the Capitol.¹¹⁰ Despite years-long interest in unionizing amid questions and "persistent myths" of legal feasibility, the effort came to the fore following changes to

¹⁰⁴ Mari Lou, *Senate Republican Caucus Speaks on Unionization Talk*, WGMD.COM (Jan. 29, 2020), <https://www.wgmd.com/senate-republican-caucus-speaks-on-unionization-talk/>.

¹⁰⁵ Mariane Goodland, *Legislative Aides at the State Capitol to Unionize*, COLO. POLITICS (Mar. 9, 2021), https://www.coloradopolitics.com/news/legislative-aides-at-the-state-capitol-to-unionize/article_39c59fc8-8102-11eb-ae46-8bbe88f1ca95.html.

¹⁰⁶ *Id.*; Sally Davidow, *Colorado's Legislative and Campaign Workers are Forming a Union*, NEWSGUILD (Mar. 9, 2021), <https://newsguild.org/colorados-legislative-and-campaign-workers-are-forming-a-union/>.

¹⁰⁷ Davidow, *supra* note 106.

¹⁰⁸ S. 21-244 (Colo. 2021); Heather Bradley, Brooke Holmes, Logan Davis, & Meredith Phillips, *Opinion: We're Colorado Legislative Aides and Political Workers. Here's Why We Formed a Union*, COLO. SUN (Mar. 28, 2021), <https://coloradosun.com/2021/03/28/political-workers-guild-opinion/>.

¹⁰⁹ Sam Stites & Dirk VanderHart, *Oregon Legislative Employees Become First in the Nation to Unionize*, OR. PUB. BROAD. (May 28, 2021), <https://www.opb.org/article/2021/05/28/oregon-legislature-staff-members-first-to-unionize/>.

¹¹⁰ *Statehouse Pioneers: Oregon Legislative Aides First in U.S. to Unionize*, IBEW (Aug. 12, 2021), http://www.ibew.org/media-center/Articles/21Daily/2108/210812_Statehouse.

Capitol policies around pay and harassment policies.¹¹¹

While both the Speaker and Majority Leader issued statements supporting the staff, the Oregon DOJ nevertheless objected to the unit's petition on the Legislature's behalf before the Employment Relations Board ("ERB"), a move the legislative leaders sought to cast "more as clarifying questions" than opposition.¹¹² Their submission argued that the Legislature was not a "public employer" under the State Personnel Relations Law, that this group of employees would not be an appropriate bargaining unit that met the definition of a "community of interest" required under the law because they worked for ninety separate and often diametrically opposed offices, and that staff were categorically excluded as "managerial," "supervisory," or "confidential" employees.¹¹³ The DOJ also claimed that the Legislature "cannot deliberate regarding management prerogatives behind closed doors and with limited representatives as other public employers routinely do," and, as a result, it "will be constitutionally prevented from negotiating with a bargaining unit in any meaningful way."¹¹⁴ In April, the Board rejected these arguments and ordered the May election.¹¹⁵ The ERB found that while the Legislature could have excluded its own employees from the definition of public employees under the PECBA, as it had expressly from other laws, such a statutory exclusion was absent.¹¹⁶

In April, due to concerns raised by the DOJ that statutes were unclear on who would bargain with employees on behalf of the 90 legislators, the Senate adopted SB 759 to clarify that the Legislative Administrator would fill the role, mirroring a 1983 law clarifying that the chief justice of the Oregon Supreme Court has authority to bargain with unionized judicial employees, but it failed to move in the House.¹¹⁷ On August 5th, Rep. Kim Wallan, who expressed concern about union money in campaigns and the use of staffers' dues to defeat her re-election, filed a suit challenging the union as "fundamentally incompatible" with the Legislature's work and separation of powers

¹¹¹ Jake Thomas, *Oregon Legislative Aides Move Forward with First-of-its Kind Union*, SALEM REPORTER (May 4, 2021), <https://www.salemreporter.com/posts/4159/oregon-legislative-aides-move-forward-with-first-of-its-kind-union>; Dirk VanderHart, *Oregon Capitol Aides are One Step Closer to Forming a Union*, OR. PUB. BROADCASTING (Apr. 6, 2021), <https://www.opb.org/article/2021/04/06/oregon-capitol-aides-are-step-closer-to-forming-union/>.

¹¹² Dirk VanderHart, *Oregon Lawmakers Will Introduce a Bill To Help Their Employees Unionize*, OR. PUB. BROADCASTING (Feb. 11, 2021), <https://www.opb.org/article/2021/02/12/oregon-state-legislature-bill-help-lawmakers-labor-union/>.

¹¹³ IBEW Local 89, Case No. RC-001-21 30 (2021) (representation).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ S. 759, 2021 Reg. Sess. (Or. 2021).

that would “compromise the integrity of the legislative branch and erode trust by the people toward their elected lawmakers.”¹¹⁸

III. THE WRONG DIRECTION

In fact, two states have repealed statutes that provided collective bargaining coverage for legislative staffers. A prior definition of “public employee” within the California Government Code provisions relating to state employee organizations encompassed legislative employees but was amended by the State Employer-Employee Relations Act of 1978, which established the present collective bargaining for state government employees.¹¹⁹ Likewise, in Connecticut, the Public Employees Relation Act adopted in 1975 initially included the legislative branch within the definition of an “employer.”¹²⁰ However, the statute was amended in 1977 upon the unanimous recommendation of the Legislative Management Committee to exclude legislative staff.¹²¹ The Committee argued that continued inclusion of legislative employees “would appear to make for a very unhealthy situation” and “invi[t]e resentment and misunderstanding on both sides,” whereas the employees would fare better under an arrangement where Legislative Management Committee staff offered recommendations to the Committee regarding salaries and work conditions than in a scenario where they were forced to negotiate with the very people for whom they worked.¹²²

A. *Mixed Legislative Success*

In recent years, legislative proposals, including some that had been rejected over the course of many sessions, have secured committee hearings in several states. The outcomes of those sessions elucidate the various rationales that have inspired legislators, many themselves former staffers, to introduce such bills, as well as a series of recurring concerns that have typified the opposition.

For example, in 2011, the Hawaii House Labor Committee, over the opposition of the Department of Labor and Industrial Relations, recommended passage of a measure to eliminate an explicit statutory exclusion of the

¹¹⁸ Katie Streit, *Medford Lawmaker Stands Against State Legislative Staff Efforts To Unionize*, FREEDOM FOUND. (Aug. 9, 2021), <https://kobi5.com/news/local-news/medford-lawmaker-stands-against-state-legislative-staff-efforts-to-unionize-163716/>.

¹¹⁹ CAL. LEGIS., ASSEMBLY DAILY J., Reg. Sess., at 16571-72 (1974).

¹²⁰ 1975 Conn. Acts 780 (Spec. Sess.).

¹²¹ 1977 Conn. Acts 11 (Reg. Sess.).

¹²² See DENNIS MELTZER, CONN. OFF. OF LEGIS. RSCH. REP. 87-R-0005 3 (1987).

legislative branch of both the state and counties from collective bargaining.¹²³ While the Committee determined that allowing legislative employees to unionize would provide them with a larger role in establishing working conditions, their report expressed practical concerns with establishing a single bargaining unit for all types of non-supervisory legislative employees, as existing bargaining units were statutorily arranged by job classification or profession, and the bill was amended to retain the rights of the Legislature to hire and terminate at will.¹²⁴

Similarly, in 2000 and 2002, California legislators introduced legislation to respectively directly amend the State Employer-Employee Relations Act and to specify that employees of the Legislature have the same rights with respect to working conditions as persons employed in the private sector.¹²⁵ Both attempts, however, failed to be adopted.¹²⁶ In 2017, the Legislature granted collective bargaining rights to Judicial Council employees, leaving the Legislature itself as the only branch of government whose employees were precluded from unionizing.¹²⁷ That year, new legislation to establish a separate framework for representation and collective bargaining for specified employees of the Legislature outside the civil service regime was introduced with one sponsor.¹²⁸ When it was resubmitted in 2021, forty-four legislators were signed onto the bill.¹²⁹ However, the bill analysis issued to accompany a 2019 hearing on the measure argued that collective bargaining could force the Legislature to exceed its Constitutional spending cap.¹³⁰

In other states, legislation has either failed to obtain a hearing or still awaits one. In Minnesota, legislation was first introduced in 2011 but as members depart, bills, including a 2019 venture, are repeatedly orphaned, though new legislation was introduced in January 2022.¹³¹ Legislation has also been introduced in Massachusetts since 2013.¹³² There, IBEW Local 2222 continues to organize staff seeking an end to long-standing conflicts

¹²³ H.R. 2103, 25th Leg., Reg. Sess. (Haw. 2010); H.R. STAND. COM. REP. NO. 7-10, 25th Leg. (Haw. 2010).

¹²⁴ H.R. 385, 26th Leg., Reg. Sess. (Haw. 2011); H.R. STAND. COM. REP. NO. 229, 26th Leg. (Haw. 2011).

¹²⁵ Assemb. B. 2350, 2000 Leg., (Cal. 2000); Assemb. B. 1028, 2001 Leg., (Cal. 2001).

¹²⁶ Assemb. B. 2350, 2000 Leg., (Cal. 2000); Assemb. B. 1028, 2002 Leg., (Cal. 2002).

¹²⁷ Assemb. B. 83, 2017 Leg., (Cal. 2017).

¹²⁸ Assemb. B. 2048, 2018 Leg., (Cal. 2018).

¹²⁹ Assemb. B. 314, 2021 Leg., (Cal. 2021).

¹³⁰ ASSEMB. COMM. ON PUB. EMP. AND RET., AB 969 at 9 (Cal. 2019).

¹³¹ H.F. 964, 87th Leg. (Minn. 2011); H.F. 2729, 92d Sess. (Minn. 2022); S.F. 1075, 91st Sess. (Minn. 2019).

¹³² H.R. 3131, 192nd Gen. Ct. (Mass. 2021); H.R. 1613, 191st Gen. Ct. (Mass. 2019); H.R. 3373, 188th Gen. Ct. (Mass. 2013).

around salaries, job descriptions and hiring decisions and a sense of instability from the repeated turnover of the Senate Presidency.¹³³ In July 2020, after an Ohio House staffer tested positive for COVID-19 and amid furor about transparency from the Speaker's Office, House Democrats introduced legislation to eliminate an enumerated statutory provision that banned collective bargaining for legislative staff.¹³⁴ Pending Kentucky legislation introduced in February 2022 to grant collective bargaining right to state employees would expressly include legislative staff but would require all public employers to negotiate together as a single union, while Illinois legislation first introduced in 2020 would address salary and workload disparities between House and Senate staff.¹³⁵

In January 2020, the New York Assembly, following sexual harassment hearings the prior year during which staffers testified about a culture of abuse and retaliation at the Capital, introduced legislation to extend collective bargaining rights to state legislative employees.¹³⁶ The legislation garnered the support of the Sexual Harassment Working Group, which asserted that “[l]egislative employees deserve all of the labor protections available to the workforce, including recognizing their right to unionize,” and that the legislation “builds on the lessons learned in last year’s sexual harassment hearings, and the bold unionization work by the NYC Council employees.”¹³⁷ Others questioned whether the bill had the deleterious effect of misleading staff into believing that they presently lacked the right to unionize.¹³⁸

¹³³ Mike Deehan, *Mass. State Senate Staff Mulls Move To Unionize*, WGBH (Aug. 15, 2019), <https://www.wgbh.org/news/politics/2019/08/15/mass-state-senate-staff-mulls-move-to-unionize>; *FAQ, STATE HOUSE EMP. UNION*, <https://statehouseemployeeunion.org/> (last visited Oct. 24, 2021) (noting that “[e]very attorney we have discussed this with has a different opinion. If we need enabling legislation, we will get it.”).

¹³⁴ H.R. 733, 133rd Gen. Assemb., Reg. Sess. (Ohio 2020); *House Democrats Announce Plans For A Bill Allowing Legislative Staff To Unionize Following Positive COVID-19 Case In The Ohio House*, OH. HOUSE OF REP. (Jul. 14, 2020), <https://www.ohiohouse.gov/news/democrat/house-democrats-announce-plans-for-a-bill-allowing-legislative-staff-to-unionize-following-positive-covid-19-case-in-the-ohio-house-103461>.

¹³⁵ H.B. 592, 2022 Reg. Sess. (Ky. 2022); H.B. 4587, 101st Gen. Assemb. (Ill. 2020); *Kifowit Files Legislation That Would Allow Legislative Assistants to Unionize*, WSPY NEWS (Feb. 18, 2020), https://www.wspynews.com/news/local/kifowit-files-legislation-that-would-allow-legislative-assistants-to-unionize/article_524e5a24-5289-11ea-9b72-03682f20de8e.html.

¹³⁶ S. 9623, 2020 Reg. Sess. (N.Y. 2020); Dennis Slattery, *New York State Lawmaker Wants to Give Legislative Staffers Ability to Unionize*, NY DAILY NEWS (Jan. 30, 2020), <https://www.nydailynews.com/news/politics/ny-state-lawmaker-dan-quart-stffers-unionize-collective-bargain-20200130-kx6ujy5qbvdxp12chiptclmwfq-story.html>. There is no companion legislation in the State Senate, though one Senator in summer 2019 indicated ongoing work by his office to that effect. James Skoufis (@JamesSkoufis), TWITTER (Nov. 10, 2019, 6:25 PM), <https://twitter.com/JamesSkoufis/status/1193670969400922119>.

¹³⁷ Slattery, *supra* note 136.

¹³⁸ @zaranasirnyc, TWITTER (Jan. 30, 2020, 3:03 PM), <https://twitter.com/ZaraNasirNYC/status/1222973535389409282>.

Proponents, however, point to case law that obfuscated whether a legislator, the legislature, or the state is the ultimate employer for the purposes of civil rights and sexual harassment law.¹³⁹

In New Hampshire, the state Supreme Court overturned a Public Employee Labor Relations Board determination that House permanent, full-time employees were “public employees” protected by the Public Employee Labor Relations Act.¹⁴⁰ The Court concluded that

the legislature did not intend to include itself as a public employer for purposes of the Act” and that “without an explicit expression of intent, we will not assume that the legislature intended to surrender to the Governor the authority both to negotiate the terms and conditions of employment for its employees, and to exclusively represent it in negotiations with its employees.¹⁴¹

The petitioner was eventually elected to the NH Legislature and repeatedly introduced legislation to override the judgment.¹⁴² As recently as 2018, his bill was decried by a House Committee as a “perennial attempt” unprompted by staff but rather “a solution looking for a problem” and which was “flawed in that it would take away the authority of the presiding officers to deal directly with hiring and firing.”¹⁴³ However, in 2019, both the Senate and House moved distinct bills covering nonpartisan employees.¹⁴⁴ Republican leadership opposed the legislation, arguing that “unionizing legislative staff will make it more difficult for our employees to effectively do their job” especially if the union endorses a candidate challenging an incumbent legislator or if the union endorsed a losing candidate and staff ended up working for their opponent.¹⁴⁵

An impending signature from Washington Governor Jay Inslee may bring the first legislative victory for partisan statehouse employees in March 2022 after a tumultuous session. Legislation to extend collective bargaining rights

¹³⁹ Andrew Gounardes & Yuh-Line Niou, *What Albany’s Sex Harassment Victims Deserve: Close Loophole That Blocks State Employees from Getting Justice in Court*, N.Y. DAILY NEWS (Feb. 7, 2020), <https://www.nydailynews.com/opinion/ny-oped-what-albanys-sex-harassment-victims-deserve-20200207-exck6xhrpfe5tdse76rzw05bai-story.html>. Chapter 139 of 2022 was signed on March 16, 2022, to close this loophole in the human rights law.

¹⁴⁰ Appeal of House Legislative Facilities Subcomm., 685 A.2d 910, 911 (N.H. 1996).

¹⁴¹ *Id.* at 911–12.

¹⁴² See H.B. 363-FN, N.H. Gen. Ct., 2020 Sess. (N.H. 2020); H.B. 1301-FN N.H. Gen. Ct., 2018 Sess. (N.H. 2018); H.B. 1405-FN, N.H. Gen. Ct., 1998 Sess. (N.H. 1998); see also H.B. 1432-FN, N.H. Gen. Ct., 2016 Sess. (N.H. 2016).

¹⁴³ *Hearing on H.B. 1301-FN Before the H. Comm. on Legis. Admin.*, 2018 Leg., 165th Sess. 20 (N.H. 2018) (statement of Rep. Sherman Packard, Member, H. Comm. on Legis. Admin.).

¹⁴⁴ N.H. SENATE, SENATE JOURNAL 248 (2019); N.H. HOUSE OF REPRESENTATIVES, HOUSE RECORD 56 (2020). As of March 26, 2022, Cushing had reintroduced the bill into the House of Representatives, but no Senate bill was presently active. H.B. 1041, N.H. Gen. Ct., 2022 Reg. Sess. (N.H. 2022).

¹⁴⁵ Press Release, New Hampshire Senate Republican Office, Sen. Morse, French Oppose Anti-Worker Legislation Passed in Senate (Feb. 15, 2019).

to state legislative employees was first introduced in 2011, but languished until early 2022 when a House bill introduced in January garnered forty sponsors representing 70% of the House Democratic majority.¹⁴⁶ However, the legislation failed to secure a floor vote by February 15, the deadline established for a bill could be passed in its chamber of origin accordingly to the session calendar, which was understood to doom its passage until 2023, when House and Senate leadership promised to take it up again.¹⁴⁷ In response to the failed legislative push, over 100 staff, who are organizing with IUPAT Local 116 but were prohibited from directly lobbying the legislature by ethics rules, staged a sick-out which drew the support of the Speaker and Majority Leader.¹⁴⁸ However, the sponsor was able to seize upon a loophole permitting legislation essential to the budget to be introduced after the February 15 deadline to submit a revised proposal which created labor relations office, a timeline for bargaining, and require interim work for legislation next year to grant legislative staffers bargaining rights that passed the House, 56-41, on March 1 and was adopted by the Senate on the last day of session March 10.¹⁴⁹ The adopted legislation delayed bargaining an additional year beyond the initial proposal by obligating a newly created Office of State Legislative Labor Relations to study issues related to the implementation of bargaining and give a final report to the Legislature by Oct. 1, 2023.¹⁵⁰ Such timeline would permit the Legislature to in the 2024 session pass additional legislation outlining the bargaining process recommended by the new office, though failure to do so would allow staffers' bargaining rights to go into effect automatically on May 1, 2024, with the collective bargaining agreement taking effect on July 1, 2025.¹⁵¹

Each bill responds uniquely to state-specific circumstances. In Minnesota, state employees are legislatively split into 17 bargaining units along

¹⁴⁶ H.B. 2041, 2011 Reg. Sess. (Was. 2011); Austin Jenkins, *Washington Legislative Staffers Stage Sick-Out After Unionization Bill Dies*, NORTHWEST NEWS NETWORK (Feb. 16, 2022), <https://www.nwnewsnetwork.org/2022-02-16/washington-legislative-staffers-stage-sick-out-after-unionization-bill-dies>.

¹⁴⁷ *Id.*

¹⁴⁸ Jenkins, *supra* note 146; Reid Wilson, *Washington State Legislative Staff Stage Sick-Out Over Labor Organizing Bill*, THE HILL (Feb. 6, 2022), <https://thehill.com/homenews/state-watch/594602-washington-state-legislative-staff-stage-sick-out-over-labor-organizing>; International Union of Painters and Allied Trades (@GoIUPAT), TWITTER (Jan. 11, 2022, 12:14 PM), <https://twitter.com/GoIUPAT/status/1480951282101891075>.

¹⁴⁹ Brett Davis, *How Washington's Legislative Unionization Bill Passed, After Initial Defeat*, LONGVIEW NEWS-J. (Mar. 14, 2022), https://www.news-journal.com/how-washingtons-legislative-unionization-bill-passed-after-initial-defeat/article_f541b287-01bc-5e20-817e-d9fd87d18eaf.html.

¹⁵⁰ Janey Valentine, *Washington Legislature Considers Collective Bargaining for Legislative Staff*, BALLOTPEdia NEWS (Feb. 25, 2022), <https://news.ballotpedia.org/2022/02/25/washington-legislature-considers-collective-bargaining-for-legislative-staff/>.

¹⁵¹ H.B. 2124, 2022 Reg. Sess. (Wash. 2022).

occupational lines, so the proposed legislation would create two units: one for legislative employees of support, administrative, technical, and security employees (“Legislative Unit”) and a second one for professional employees (“Legislative Professional Employees Unit”).¹⁵² Meanwhile, while in Washington, the proposed legislation would provide collective bargaining rights without “lumping them into civil service law, which would be like trying to fit a square peg into a round hole.”¹⁵³

B. Municipal Efforts

While several states have expressly excluded legislative staff from collective bargaining statutes, such blanket carveouts are less common in municipal labor relations schemes. Recently, greater unionization success has been witnessed amongst political subdivisions, with legislative staff unionizing in at least six municipal legislative bodies, half of them in the last two years.¹⁵⁴

In August 2019, the three members of the staff of Denver District 10 Council Member Chris Hinds, who himself had joined the union prior to his election, joined the International Brotherhood of Teamsters, Local 17 to secure “salary protections and an above-standard sexual harassment policy.”¹⁵⁵ In California, legislative staffers in both San Francisco and Oakland are members of citywide unions.¹⁵⁶ However, in Oakland, while Council staff have negotiated some special provisions, such as the provision of food to staff when the Members are provided with meals at closed session meetings, professional staff are not entitled to various protections of the citywide contract

¹⁵² S.F. 1075, 91st Leg. (Minn. 2019).

¹⁵³ Jan. 29, 2019 House Labor & Workplace Standards Committee at 47:13, <https://www.tvw.org/watch/?eventID=2019011305>.

¹⁵⁴ The most recent interaction of the HOPE ASCME Local 123 collective bargaining agreement covering City of Houston employees now covers Council employees. 2021 MEET AND CONFER AGREEMENT BY AND BETWEEN THE HOUSTON ORGANIZATION OF PUBLIC EMPLOYEES AND THE CITY OF HOUSTON 28 (2021), https://afscmeatwork.org/system/files/2021_hope_meet_and_confer_agreement.pdf; HOPE AFSCME LOCAL 123 CONSTITUTION AND BYLAWS 2 (2009), <https://www.hopetx.org/system/files/hope-constitution-and-bylaws-revised.pdf> (including City Council in Downtown District). *But see* MEET AND CONFER AGREEMENT BY AND BETWEEN THE HOUSTON ORGANIZATION OF PUBLIC EMPLOYEES AND THE CITY OF HOUSTON 3 (2011), <http://www.houstontx.gov/hr/files/employee-relations/HOPE%20Final.pdf> (agreement excluding the Council).

¹⁵⁵ Andrew Kenney, *Denver Councilman’s Staff of 3 Unionizes in Small Victory for Teamsters*, DENVER POST (Aug. 6, 2019), <https://www.denverpost.com/2019/08/06/denver-council-union-teamsters-17/>; Press Release, Int’l Brotherhood of Teamsters, Denver City Council Office Employees Join Teamsters (Aug. 6, 2019), <https://teamster.org/2019/08/denver-city-council-office-employees-join-teamsters/>.

¹⁵⁶ 1835 *Legislative Assistant*, DEP’T OF HUM. RES. CLASSIFICATION & COMP. DATABASE, <http://cit-idex.sfgov.org/cgi-bin/dhr/findClass.cgi?MyID=1835>; AGREEMENT BETWEEN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO AND IFPTE LOCAL 21, AFL-CIO 2, <https://sfdhr.org/sites/default/files/documents/MOUs/Local-21-MOU-2019-2022.pdf>; MEMORANDUM OF UNDERSTANDING BETWEEN CITY OF OAKLAND AND INTERNATIONAL FEDERATION OF PROFESSIONAL & TECHNICAL ENGINEERS 2–3, 105, 111, <https://cao-94612.s3.amazonaws.com/documents/oak070598.pdf>.

including salary steps, overtime, hours of work and just cause protections.¹⁵⁷ The Oakland aides are not permitted in closed session, nor are they privy to either confidential or closed session materials.¹⁵⁸ On September 24, 2019, SEIU Local 1021 submitted a petition to add the Legislative Aides employed by the Berkeley City Council to its Community Services Unit.¹⁵⁹ On October 25, 2019, the City notified the union that, though it was unclear whether the aides were managerial or confidential employees excluded from coverage, it would not oppose the petition for certification.¹⁶⁰ Accordingly, on December 2, 2019, the Berkeley Personnel Board officially accepted their accretion with a modification maintaining their at-will employment status.¹⁶¹

On November 18, 2019, New York City Council (“Council”) staff announced the creation of a new labor union, the Association of Legislative Employees (“ALE”) and the launch of a card campaign across the 900 Council employees.¹⁶² Organizers attributed the formation of ALE to avoiding conflicts of interest with existing public-sector unions, which considered the potential unit “politically risky.”¹⁶³ Unionization efforts by Council staff date to at least 1978, and in the mid-2000s, a nascent effort went as far as producing buttons and a logo.¹⁶⁴ However, the current endeavor found its roots in direct activism in 2016, when Council aides held a silent protest as the Council boosted Members’ salaries without commensurate guaranteed raises for staff.¹⁶⁵ The movement then intensified in the wake of the suspension, rather than expulsion, of Council Member Andy King in October 2019, after his second substantiated case of staff harassment.¹⁶⁶ In January 2020, following

¹⁵⁷ MEMORANDUM OF UNDERSTANDING, *supra* note 156 at 2–3, 105, 111.

¹⁵⁸ BERKELEY PERS. BD., DEC. 2, 2019 COMMISSION PACKET 33, https://www.cityofberkeley.info/uploadedFiles/Human_Resources/Commissions/Commission_for_Personnel_Board/December%202019%20Personnel%20Board%20Packet.pdf.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ CITY OF BERKELEY, DECEMBER 2, 2019 PERSONNEL BOARD MINUTES 1–2 (2019), [https://www.cityofberkeley.info/uploadedFiles/Human_Resources/Commissions/Commission_for_Personnel_Board/Minutes%202019-12-02%20\(final\).pdf](https://www.cityofberkeley.info/uploadedFiles/Human_Resources/Commissions/Commission_for_Personnel_Board/Minutes%202019-12-02%20(final).pdf).

¹⁶² *Association of Legislative Employees (ALE) Becomes Largest Legislative Staff Union in the Nation*, UNITED WE BARGAIN (Aug. 26, 2021), <https://www.nycouncilunion.com/press>.

¹⁶³ Kathleen Culliton, *Council Staffers Launch Union Efforts*, PATCH (Nov. 18, 2019), <https://patch.com/new-york/new-york-city/council-staffers-launch-union-efforts>.

¹⁶⁴ Kathleen Cudahy (@KathleenCudahy), TWITTER (Nov. 18, 2019, 12:15 PM), <https://twitter.com/KathleenCudahy/status/1196477002351611906>; Mike Schnall (@MikeSchnall), TWITTER (Nov. 16, 2019, 7:47 AM), <https://twitter.com/mikeschnall/status/1195684909303697409>.

¹⁶⁵ Bob Hennelly, *DC 37 Looks to Organize City Council Staffers*, THE CHIEF LEADER (Nov. 8, 2019), https://thechiefleader.com/news/open_articles/dc-37-looks-to-organize-city-council-staffers-free-article/article_6c71a6e8-0178-11ea-af02-0f87d15afb41.html.

¹⁶⁶ *Letter to Speaker Johnson and the New York City Council from Staff*, MEDIUM (Nov. 1, 2019), <https://medium.com/@nycouncilstaff/open-letter-to-speaker-johnson-and-the-new-york-city-council-from-staff-a55c522ba4cc>; Harassment Free NYCC (@HarassFreeNYCC), TWITTER (Sept. 30, 2020, 1:20 PM), <https://twitter.com/HarassFreeNYCC/status/1311355277933936648>.

a shift in strategy, ALE representatives achieved majorities amongst Councilmanic Aides and non-supervisory titles within the Council Finance Division, whose approximately 450 combined staff represented just over half of total Council employees, and formally requested voluntary recognition.¹⁶⁷ In December 2020, the 23 staff in Finance titles secured voluntary recognition.¹⁶⁸ After the union refreshed membership cards which had lapsed due to coronavirus-related delays, the Council adopted an April 2021 resolution authorizing the Speaker to recognize the Council Member staff with final certification secured in August.¹⁶⁹

CONCLUSION

The recently voluntary recognition campaigns, which created units of a previously unseen scale, provide myriad strategic questions and somewhat fewer answers for staff seeking to initiate their own efforts and legislative bodies contending with the legal framework and logistics of such requests. As additional media attention places a spotlight on these efforts, and with the potential for the 2020 census to restructure local legislatures across the country, all should prepare for future creative entries into this space, whether with or ongoing legislative efforts.¹⁷⁰

While it might be assumed that certain institutional or statutory conditions would provide a shared context for the emergence of legislative bargaining, the small universe of attempts to date suggest that success is largely a function of the sheer strength of an assurgent left and a collective response to societally prevalent harassment, but otherwise devoid of pattern. While the temporal proximity of the Berkeley, Denver, Delaware, and New York City efforts was attributable to nothing more than happenstance and a national resurgence of interest in public sector labor activism, the successful campaigns in Colorado and Oregon drew upon the pitfalls and public discourse of these predecessors to achieve unique measures of success. This twelve-month doubling of the unionized legislative bodies nationwide offers an opportunity to reflect upon a set of existentially distinct approaches to a common goal within an equal number of distinct legal and administrative contexts.

¹⁶⁷ Samar Kurshid, *City Council Staff Union Expects Recognition and Start to Contract Bargaining 'Soon'*, GOTHAM GAZETTE (July 30, 2020), <https://www.gothamgazette.com/city/9633-new-york-city-council-staff-union-recognition-collective-bargaining>.

¹⁶⁸ Sydney Pereira, *City Council Staff Union Becomes First Legislative Union in NY State*, GOTHAMIST (Dec. 17, 2020), <https://gothamist.com/news/city-council-staff-union-becomes-first-legislative-union-ny-state>.

¹⁶⁹ Jeff Coltin, *New York City Council Aides Are Officially Unionized, After 21-Month Campaign*, CITY & STATE N.Y. (Aug. 22, 2021), <https://www.cityandstateny.com/politics/2021/08/new-york-city-council-aides-are-officially-unionized-after-21-month-campaign/184742/>.

¹⁷⁰ See, e.g., N.J. REV. STAT. § 40-69A-60.5 (setting the number of legislative staff permitted by the municipal population).

Perhaps most notably, such organizing attempts have largely developed independently from local legal change. Only in Washington was an organizing campaign directly tied to legislative change; while legislation was enacted in Maine, no certification was filed for six years after the bill's passage. Rather, anecdotal evidence would suggest that prior involvement in new forms of labor organizing or through assurgent political activist fora represent the sole common thread tying together the fortuitous, shared timing. Indeed, nearly two decades lapsed between the recognition of the Maine statehouse unions and the next non-municipal attempt at Legislative Hall in Dover. In a rebuke to the skeptics who contend that legislative staff joining existing labor organizations would present conflicts of interest—less than half the organizing efforts forewent joining an extant union. It is perhaps not surprising to the casual observer that each request for recognition as a bargaining unit was directed toward a Democratic Party-controlled legislature.¹⁷¹

Logistical hurdles may proliferate depending on the institutional structure, geography and targeted job titles of the legislative body to be organized. Of the six cities with organized Councils, the size of the unit ranges from three in Denver, where the Teamsters represent one of thirteen offices, to approximately 450 in New York City, where ALE represents all fifty-one member offices and a central Council division. In New York City, while the Finance titles organized all represented staff in a single building, the Councilmanic Aide title encompassed more than fifty job sites across the city, and an attempt to organize member staff in a statehouse could require a bargaining unit to organize across hundreds of miles. Maintaining a shared identity across such a distance, let alone creating opportunities for meaningful participation in contract negotiation or enforcement or substantive support during grievance processes, requires intensive introspection and strategizing. While in Denver, staff elected to organize within a single member office, the legality of such an approach is tenuous in other jurisdictions and must be weighed against the administrative burden of numerous micro-unit negotiations. The high turnover rate inherent to the job, in contrast with many other public-sector workers who may spend their entire careers with a single government agency, increases the stakes for these scale determinations. Staff are often not in their positions long enough to get a unified campaign going, fail to perceive a long-term benefit,¹⁷² and can require frequent re-enrollment or decertification.

Another potential issue raised by the multi-member nature of the

¹⁷¹ While the Republicans control the Colorado Senate, PWG operates as a minority union.

¹⁷² Rebecca C. Lewis, *New York City Staff Unionization Bid Could be Gamechanger*, CITY & STATE (Nov. 20, 2019), <https://www.cityandstateny.com/politics/2019/11/the-new-york-city-council-staff-unionization-bid-could-be-a-game-changer/176691/>.

legislatures is who and how determinations are made on their behalf of them as a single employer under the respective law. While in Maine, the Legislative Council handles collective bargaining negotiations on behalf of the institutions,¹⁷³ the role of individual members of the body who are the direct, if not legally ultimate, employers of staffers versus the authority vested in the internally elected presiding officer remains an open question as potentially larger units seek to organize.¹⁷⁴ While many proposals have sought to integrate legislative staff into existing public-sector employee unionization regimes directly, others like the California legislation have proposed bespoke rules or regulations.

In localities where the statehouse may dictate many aspects of legislative staff compensation or employment status, an evaluation of whether unionization is nonetheless valuable can be highly case-specific. Absent the ability to bargain for wages, a calculus of the comparative value of dues dollars to achievable grievance or other limited reforms may in some municipalities obviate against organizing. Efforts to expand to certain municipalities were ultimately abandoned due to state statutes that established at-will status for legislative employees and governed permissible wage ceilings.

The COVID-19 pandemic and the uneven implementation of telecommuting policies and other safeguards only heightened staff calls for a collective voice that could advocate on their behalf. While the public health crisis delayed public movement on the already underway NYC, Colorado, and Delaware negotiations and posed unique hurdles to wet-signature requirements for unions collecting cards, the switch to digital platforms proved conducive for additional conversations in and amongst staff at different stages of organizing. As we enter the third year of a pandemic that continues to destabilize traditional workplaces, additional efforts, drawing inspiration and lessons from existing units, will continue to appear and contribute in yet another unique manner to this still-emergent area of public sector organizing.

¹⁷³ See *Meeting Summary of January 24, 2008 Meeting of Legislative Council of 123rd Maine State Legislature*, 123 Sess. 11 (Me. 2008), <https://legislature.maine.gov/doc/548>.

¹⁷⁴ N.Y.C. Council Res. 1608-2021 (N.Y. 2021). See also *Meeting Summary of January 24, 2008 Meeting of Legislative Council of 123rd Maine State Legislature*, 123 Sess. 11 (Me. 2008), <https://legislature.maine.gov/doc/548>.

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