



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 12, 2010

The Honorable John Cornyn  
United States Senate  
Committee on the Judiciary  
Subcommittee on the Constitution  
517 Hart Senate Office Building  
Washington, DC 20510

RE: Potential Constitutional Problems with S. 3194

Dear Senator Cornyn:

This letter concerns constitutional challenges that States may raise against S. 3194, the so-called Public Safety Employer-Employee Cooperation Act. That proposed legislation is a Congressional attempt to mandate the expansion of labor unions across the country by forcing states and local governments into federally mandated collective bargaining agreements—even if doing so violates state law. S. 3194 intrudes upon states' authority to independently manage relations with its public employees. This is yet another example of Congress exceeding its authority, intruding into states' rights, trampling the 10<sup>th</sup> and 11<sup>th</sup> Amendments, and disregarding the Commerce Clause. As Texas' chief legal officer, I write in defense of our State's sovereign authority under the U.S. Constitution, and I urge Congress to reject this constitutionally defective legislation.

No policy initiative—no matter how important or compelling—can be allowed to trample our Constitution. The federal government has no authority to micromanage local relationships with police and firefighters. The Constitution gives the people of Texas, not unelected bureaucrats in Washington, DC, authority to govern these relationships in our state, which is why S. 3194's attempt to federalize this process is unconstitutional and must be stopped.

Based upon discussions between our offices—and your May 2008 vote against nearly identical legislation—I know this bill also troubles you. In light of our shared concerns, I write for three reasons: One, to ensure that your colleagues are aware of the serious constitutional problems with S. 3194; two, to ask that the Senate Judiciary Committee's Subcommittee on the Constitution hold hearings on these constitutional issues before the Senate takes further action on S. 3194; and three, to suggest that passage of S. 3194 will once again force states to seek redress in the constitutional protections provided by the courts.

### **Texas Law**

Texas law prohibits employees of the State of Texas, including public safety employees, from “enter[ing] into a collective bargaining contract with a labor organization regarding wages, hours, or conditions of employment...” TEX. GOV'T CODE § 617.002. Thus, employees of the State of Texas do not have collective bargaining rights. However, in contrast to the law governing state employees, the Legislature has authorized collective bargaining for firefighters and police officers at the local level—but only if local

residents agree to confer those rights on their firefighters and police officers. TEX. LOC. GOV'T CODE § 174.023.

To obtain collective bargaining rights, local public safety officers must first collect signatures from the lesser of 20,000 voters or 5% of the voting public. *Id.* § 174.051. If that threshold is met, the relevant political subdivision must hold a referendum so that local residents can determine whether their public safety officers should be “entitled to organize and bargain collectively with their public employer regarding compensation, hours, and other conditions of employment.” *Id.* § 174.023. If, after a year, the community or the officers want to rescind collective bargaining rights, the same number of voters can petition for a repeal and another election will be held. *Id.* § 174.053.

At the heart of our state’s system is not only a labor-relations framework that was established by the Texas Legislature—rather than the federal government—but also an appropriate respect for local control. Under this approach, local taxpayers decide based on local considerations whether to give labor unions control over their relationships with local public safety officials.

### **The Federal Act**

In direct conflict with our state labor laws, S. 3194 attempts to require that the State of Texas recognize and bargain with labor unions that represent certain *state* employees—despite the fact that the Legislature chose not to confer collective bargaining rights on any employee of the State. S.3194 § 5(b).

The Texas Legislature also limited the scope of *local* government employees who are eligible for collective bargaining rights to firefighters and police officers—yet S. 3194 attempts to dramatically expand that limited group to entire classes of employees who are not currently eligible for collective bargaining. S. 3194’s supporters misleadingly attempt to advance a federally imposed unionization scheme upon the State of Texas by claiming that it is necessary to protect “first-responders”—a term that most Texans probably think applies to the same police and firefighters who already have collective bargaining rights under state law. However, in reality, S. 3194 would also unionize a broad swath of local and state employees whose job functions bear no relation to the responsibilities of traditional emergency response personnel. The Act defines “law enforcement officer” to include “corrections, probation, parole, and judicial officers” in addition to “an[y] individual involved in crime and juvenile delinquency control or reduction, or enforcement of the criminal laws.” S. 3194 § 3(7) (incorporating definition from 42 U.S.C. § 3796b). Under this extraordinarily broad definition, state and local governments may be forced to bargain with labor unions representing not only police officers, but also any employee of a prison system, a court system, or a probation or parole board, among others.

Thus, S. 3194 not only authorizes collective bargaining rights for state employees in direct violation of Texas law, it also purports to grant those rights to whole classes of local employees who are not included in the state’s collective bargaining statute. Worse, it attempts to federally override the locally controlled system that was established by the Texas Legislature.

In sum, the Act would impose a cumbersome, bureaucratic, one-size-fits-all approach to a decision that the Texas Legislature has decided to delegate to local taxpayers. Equally troubling, the Act would allow the federal government to intrude upon the State’s authority to regulate relations with its own public employees and further, would interfere with the State’s ability to manage public safety within its own territory.

Our quarrel is with this constitutionally suspect Act, not with the brave men and women who protect and serve the public. They deserve not only our gratitude—but also legal protection that prevents parochial

concerns from interfering with their official duties. But those policy decisions—such as the availability of civil service or meet-and-confer-rights—lie with the Texas Legislature, not the federal government.

### **Tenth Amendment Concerns**

The Tenth Amendment of the U.S. Constitution states that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” As the United States Supreme Court confirmed in *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976), “there are attributes of sovereignty attaching to every state government which may not be impaired by Congress . . . One undoubted attribute of State sovereignty is the States’ power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions.” Justice Rehnquist’s majority opinion, which recognized the threat that legislation like S. 3194 poses to the principles of federalism and dual sovereignty on which our Nation was founded, noted that such federal over-reach usurps “functions essential to the separate and independent existence” of the States. Further, the Court’s decision acknowledges that, in the area of public sector employment, “congressionally imposed displacement of State decisions may substantially restructure traditional ways in which local governments have arranged their affairs.” *Id.* at 845, 849. Accordingly, the Court in *National League of Cities* struck down federal legislation that would have extended the Fair Labor Standards Act to public sector employees who performed traditional governmental functions at the state and local levels.

Admittedly, the Court reversed course nine years later when *National League of Cities* was overturned by a 5-4 majority in *Garcia v. Metropolitan Transit Authority*, 469 U.S. 528 (1985). But as Justices O’Connor and Rehnquist predicted in their dissenting opinions in *Garcia*, the Court may well reverse course yet again. Given the Court’s increasingly enlightened view of states’ rights, there is now a distinct possibility that the Court will once “again assume its constitutional responsibility” to enforce the Tenth Amendment by returning to the holding of *National League of Cities*. *Id.* at 589 (O’Connor, J., dissenting).

### **Commerce Clause Concerns**

The Constitutional problems that plague this imprudent legislation do not stop at the Tenth Amendment. S. 3194 also may run afoul of the Commerce Clause because it purports to regulate matters that likely do not fall within Congress’ authority to regulate interstate commerce. When *National League of Cities* and *Garcia* were decided, there appeared to be virtually no limits on what the Supreme Court would permit Congress to regulate under its Commerce Clause authority. The parties in those cases did not question—and thus the Court did not decide—whether federal regulation of state employees is a valid exercise of Commerce Clause power. Importantly, since *Garcia* was decided in 1985, the Court’s Commerce Clause jurisprudence has taken a dramatic turn in favor of the States. The Court’s decisions in *United States v. Lopez* (1995) and *United States v. Morrison* (2000) have begun to reshape the legal landscape. As the Congressional Research Service (CRS) observed in August, 2009, those cases “suggest that the regulation of labor-management relations for public safety officers may not be sufficiently related to commerce and may be invalidated if challenged.”

In *Lopez*, the Court sorted the Commerce power into three categories: (1) the regulation of the channels of interstate commerce, (2) the regulation of the instrumentalities of interstate commerce, and (3) the regulation of economic activities that affect interstate commerce. *Lopez*, 514 U.S. at 559. Proponents of S. 3194 may claim that the Act regulates economic activities that affect interstate commerce. But as the CRS recognized, this is not at all clear. To the extent the bargaining relationship between public safety employees and their state and local government employers actually affects interstate commerce, it appears to do so in an impermissible way that would require the Court to “pile inference upon inference.” *Lopez*,

514 U.S. at 567. As the Supreme Court observed in *Lopez*, such a stretched and skewed interpretation would “convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.” *Id.* Some have attempted to defend S. 3194 by arguing that state and local emergency response personnel are crucial to the national response to terrorist attacks and natural disasters. But as explained above, the Act’s definition of “law enforcement officer” goes far beyond emergency response personnel. Surely even the proponents of the Act would find it difficult to explain how the rights of state prison guards or municipal court clerks—who work for either political subdivisions or state agencies entirely within the State of Texas—to bargain collectively has any conceivable effect on interstate commerce.

As the CRS—which, as a creature of Congress, traditionally has an expansive view on Congressional authority—noted in August 2009, it is far from clear that the work of police officers and firefighters is an economic activity, or that regulation of labor relations for public safety officers is sufficiently related to interstate commerce to survive a Commerce Clause challenge. The CRS further stated that prior legislation that is nearly identical to S. 3194 “would not seem to regulate the channels or instrumentalities of interstate commerce” and concluded that “[w]hether the Commerce Clause provides sufficient authority to support” such action “may not be entirely certain.” These concerns largely stem from the fact that collective bargaining between a governmental body and its employees involves public services provided by states and local governments—not, as the CRS put it, the “the production, distribution, or consumption of a commodity for which there is an interstate market.”

Despite significant doubts about Congress’ authority to regulate in this area using the interstate Commerce Clause, the text of S. 3194 suggests the bill’s authors relied on the Commerce Clause in an attempt to justify congressional authority to enact the measure. S. 3194 § 2. But the bill’s authors do so at their own peril because Congress’ own research arm has acknowledged serious concerns about Congress’ authority to impose collective bargaining on the states via the Commerce Clause. I believe the CRS was correct to predict that legislation like S. 3194 “may be invalidated if challenged.”

### **Eleventh Amendment Concerns**

The Eleventh Amendment of the U.S. Constitution guarantees States, as sovereign bodies under our Constitutional system, immunity from suit in courts of law. As a result, the states are generally insulated from suits—unless they waive that immunity by consenting to suit. For example, in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Supreme Court held that Congress lacks power under the Commerce Clause to abrogate the States’ sovereign immunity from suits in federal court. The Court’s *Seminole Tribe* decision struck down a provision of the Indian Gaming Regulatory Act that attempted to allow tribes to enforce their statutory rights against states in the federal courts. In doing so, the Court recognized that “each State is a sovereign entity in our federal system” and that “it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without [the sovereign’s] consent.” *Id.* at 54.

Yet, S. 3194 purports to create causes of action in federal court that would enable the Federal Labor Relations Authority—as well as labor unions and individual union members—to sue state employers to enforce their rights under the Act. S. 3194 § 5(c). Because these provisions are not designed to remedy the violation of employees’ or unions’ constitutional rights, Congress cannot rely upon the Fourteenth Amendment to subject the States to suit in federal court. That is, the States’ constitutionally guaranteed sovereign immunity is generally impenetrable. However, if States violate an individual or group’s Constitutional rights, the Court has found that the Enforcement Clause of the Fourteenth Amendment opens States up to otherwise prohibited legal challenges—such as civil rights lawsuits. But that Fourteenth Amendment analysis is not applicable in this case because the only basis for S. 3194 is the

Commerce Clause. And as the Supreme Court has repeatedly affirmed since *Seminole Tribe*, the Eleventh Amendment simply does not allow Congress to use the Commerce Clause to subject the States to suit in federal court. See *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); *Florida v. College Savings Bank*, 527 U.S. 627 (1999); *College Savings Bank v. Florida*, 527 U.S. 666 (1999).

Furthermore, recent sovereign immunity decisions from the Court have repeatedly recognized that principles of federalism limit Congress' power—which may indicate the Court's willingness to return to the holding of *National League of Cities*. In *Alden v. Maine*, 527 U.S. 706 (1999), the Court invalidated a federal law that subjected States to suit in state courts. Quoting the Federalist Papers, Justice Kennedy's majority opinion affirmed precisely the constitutional principle that formed the basis of the Court's holding in *National League of Cities*:

When a 'La[w] . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions ... it is not a 'La[w] ... proper for carrying into Execution the Commerce Clause,' and is thus, in the words of The Federalist, 'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.'"

*Id.* at 732-33 (quoting *Printz v. United States*, 521 U.S. 898 923-24 (1997) (quoting *The Federalist* No. 33, at 204)).

If S. 3194 is enacted, the ensuing legal challenges will provide the Supreme Court with the opportunity, as predicted by Justices Rehnquist and O'Connor, to revive the rule that Congress cannot interfere with "the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions." *National League of Cities*, 426 U.S. at 845. The more recent writings of Justice Kennedy lend credence to the likelihood that such challenges will prevail.

## Conclusion

If passed, S. 3194 would level a grave blow against "democratic liberty and the federalism that secures it" by forcing a federal takeover of state and local governments' relationships with local public safety officials. At a time when unprecedented expansions of federal power already threaten our Constitutional structure, Congress should avoid the unconstitutional impact that S. 3194 would have on the "vital role reserved to the states by the constitutional design." *Alden*, 527 U.S. at 713. As a former Texas Attorney General, you not only understand the important role that states play under our constitutional system—but also appreciate the importance of preserving the carefully balanced state-federal relationship that was established by our Founding Fathers. That balance will be destroyed if the federal government can, by legislation, force the states against their will to provide collective bargaining to a broad swath of public employees.

Sincerely,



Greg Abbott  
Attorney General of Texas