COMMENT

IF IT WALKS LIKE A DUCK: REVISITING THE NATIONAL LABOR RELATIONS BOARD'S POLITICAL SUBDIVISION TEST

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For almost ninety years, the National Labor Relations Act (NLRA) has protected the rights of most private sector workers to form and join a union and to collectively bargain. But what does it mean to be a private sector worker? The question is simple enough on its face. A municipal clerk, for example, is clearly a public sector worker, and a stockbroker is likewise a private sector worker. But is a teacher at a publicly funded charter school run by a private non-profit a private sector worker? Is a nurse at a semi-privatized state hospital which receives no public funding a public sector worker?

The NLRA itself provides no guidance for these questions, leaving them for the National Labor Relations Board (NLRB) and the federal judiciary to resolve. To that end, the NLRB has routinely relied on a two-pronged test outlined in the 1970s to determine whether an employer is a "political subdivision" and therefore exempt from NLRA coverage. While the test is simple, it over emphasizes certain characteristics as dispositive and downplays or ignores other important considerations.

Using the University of Wisconsin Hospitals and Clinics Authority nurses' effort to form a union as a case study, this Comment considers the organizing protections available to workers at quasi-public entities (neither fully public nor private) at common law, under Wisconsin law, and under federal law. In an era where state governments routinely contract with private employers and privatize their own state institutions, this Comment ultimately suggests that the NLRB's test is outdated and should be revised to reflect modern practices and better effectuate the purpose of the NLRA and proposes a new test.

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INTRODUCTION

In 2022, nurses at UW Health hospitals in Madison voted to authorize a strike if management failed to recognize their union.[1] The nurses' decision was the culmination of a multiyear push to revive a union that died in 2014 following sweeping legislative changes in 2011.[2] Though the fight for union recognition was cheered by labor advocates,[3] the question remained: Are the nurses legally allowed to do this?

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1. Natalie Yahr, *UW Health Nurses Vote to Strike if Management Doesn't Recognize Union*, CAP TIMES (Aug. 25, 2022), https://captimes.com/news/health/uw-health-nurses-vote-to-strike-if-management-doesn-t-recognize-union/article_d3442f48-333b-546c-9bf7-7bd5627e0ac5.html [https://perma.cc/6LMD-ZZT8].

2. *Id.*

3. *See* Colton Molesky, *Madison Area Lawmakers Support UW Health Nurses at LaborFest*, NBC15, https://www.nbc15.com/2022/09/06/madison-area-lawmakers-support-uw-health-nurses-laborfest/ [https://perma.cc/3QFZ-DCX5] (Sept. 5, 2022, 10:41 PM).

Unsurprisingly, management answered no.[4] Arguing that changes to Wisconsin public sector labor law eliminated UW Health employee unions' right to engage in mandatory bargaining, management set the stage for a standoff that was only cooled by an eleventh-hour détente organized by the governor.[5] As part of this deal, the Wisconsin Employment Relations Commission (WERC)[6] was to consider whether management was obligated to bargain with the union under state law. In late November 2022, WERC issued a ruling agreeing with the employers that the UW Health nurses are subject to the 2011 law's restrictions on organizing.[7] Accordingly, the nurses were left with two legal pathways: either attempt to pursue their collective bargaining goals subject to the restrictive Wisconsin collective bargaining statutes, or attempt to gain recognition under federal law.[8]

The UW Health nurses situation is especially interesting because UW Health is operated by the University of Wisconsin Hospitals and Clinics Authority (UWHCA or Authority), a "political corporation" that was chartered by the legislature and retains some state oversight but operates in practice almost identically to a private corporation.[9] If UW Health were a "private" employer, as opposed to a "political subdivision," its employees could seek a union election under the National Labor Relations Act (NLRA) and sidestep Wisconsin laws hostile to labor rights.[10] This case raises several unresolved questions

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4. *UW Health Statement on the Reports of a Possible Nurses' Strike*, UW HEALTH (Aug. 25, 2022), https://www.uwhealth.org/news/statement-on-possible-nurses-strike [https://perma.cc/8KM3-GGTA].

5. David Wahlberg, *UW Health Nurses, Administrators Reach Tentative Deal to Avert Strike*, WIS. STATE J. (Sept. 13, 2022), https://madison.com/news/local/business/health-care/uw-health-nurses-administrators-reach-tentative-deal-to-avert-strike/article_6f566671-0a2a-56df-9154-98a990fc662a.html.

6. The Wisconsin Employment Relations Commission is a government body that adjudicates labor disputes under state law where the National Labor Relations Board lacks jurisdiction; typically, these are disputes between the government and Act 10–sanctioned labor organizations. The sole chairperson and decisionmaker is James J. Daley, an appointee of former Governor Scott Walker. *WERC News*, WIS. EMP. RELS. COMM'N, http://werc.wi.gov/werc-news/ [https://perma.cc/5AWL-953Z].

7. *Serv. Emps. Int'l Union Healthcare Wis.*, No. 39765 (Wis. Emp. Rels. Comm'n Nov. 25, 2022).

8. While other extralegal pathways exist for workers to achieve the benefits of unionization, these methods typically require a high level of internal organization and offer no statutory guarantees of good faith bargaining by management. *See infra* Section II.A.

9. *See Takle v. Univ. of Wis. Hosps. & Clinics Auth.*, 402 F.3d 768, 770 (7th Cir. 2005) (noting that the UWHCA was functionally privatized in 1996).

10. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959) (holding that NLRB jurisdiction can preempt state jurisdiction over labor disputes).

about how the law does, and should, treat "hybrid entities" that are neither fully public nor private. Quasi-public employees who work for these semi-privatized hybrid entities are left in statutory limbo regarding their federal right (or lack thereof) to organize for better working conditions.

This Comment explores the history of private and public sector labor rights in the United States and in Wisconsin. In doing so, this Comment examines the scope of coverage under each piece of labor legislation, noting that federal legislation only confers collective bargaining rights on "private" employees, and not "political subdivisions." Furthermore, this Comment takes a critical look at the structure of the UWHCA as established by statute and case law, in order to determine whether the Authority is more appropriately considered public or private. This analysis highlights which avenues might be available to the UW Health nurses to achieve their collective bargaining goals. These avenues might include nonmandatory meet-and-confer bargaining (with the threat of wildcat strikes) or mandatory recognition following a National Labor Relations Board (NLRB or Board) union election. Finally, this Comment argues that the UW Health nurses should sustain their legal challenge for NLRB certification to clarify their rights under the law.[11] Certifying the nurses' union would present an opportunity for the Board to develop its own precedent and update an outdated rule with no statutory basis that is used to determine whether an employer is public or private. The factor test currently employed by the NLRB fails to adequately account for hybrid entities and quasi-public employees in the post-privatization landscape and should be replaced by an analysis that more directly considers the entity's operational realities.

I. THE UNION LANDSCAPE IN WISCONSIN AND BEYOND

Though private sector workers make up the vast majority of the United States workforce,[12] public sector workers are far more likely to belong to a labor union than their private sector counterparts. In 2021, roughly half of all American union members were public sector

11. At the time of this Comment's publication, the nurses' union has, in fact, petitioned the NLRB for a certification election. *See Univ. of Wis. Hosps. & Clinics Auth.*, Case 18-RC-308303 (N.L.R.B. Dec. 2, 2022). The NLRB regional director who considered the petition found that the union was not subject to NLRB jurisdiction, and the union appealed that decision. *See infra S*ection II.B. Both parties have submitted briefs on appeal, but, as of November 24, 2023, the Board in Washington has not yet decided whether to grant review of the regional director's decision.

12. AUDREY WATSON, U.S. BUREAU OF LAB. STATS., OCCUPATIONAL EMPLOYMENT AND WAGES IN STATE AND LOCAL GOVERNMENT 2 (2021).

workers.[13] additionally, 33.9 percent of all public sector workers belonged to a union, compared to just 6.1 percent of all private sector workers.[14] This is especially impressive considering that state public sector workers have no organizing protections under federal statute.[15] However, the strength of public sector unions has been eroded by a series of recent Supreme Court decisions,[16] and state legislatures have taken aim at public sector unions across the country.[17] These developments are reminiscent of a bygone era of labor law jurisprudence that was openly hostile to public sector unionism, and they help frame why the UWHCA case is so contentious.

A. A Brief History of Public Sector Unionism in the United States

President Franklin Delano Roosevelt signed the National Labor Relations Act into law in 1935.[18] The act's principal sponsor, Senator Robert F. Wagner of New York, stated that the purpose of the act was to democratize industry and to create and enforce collective bargaining rights for workers so that they could more meaningfully participate in workplace decisionmaking.[19] Despite receiving fierce criticism from prominent leaders of business and industry, the legal establishment, media outlets, and even some left-wing political parties, [20] the Supreme Court upheld the NLRA as constitutional in *NLRB v. Jones & Laughlin Steel Corp*.[21] Declaring it the national "policy of the United States" to

13. Press Release, U.S. Bureau of Lab. Stats., Union Members – 2021 (Jan. 20, 2022), https://www.bls.gov/news.release/pdf/union2.pdf.

14. *Id.*

15. *See infra* Section I.A.

16. Fewer than fifty years ago, a unanimous Supreme Court upheld the right of public-sector unions to collect fair-share dues from free-riding nonmembers. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). However, the Roberts Court overturned *Abood* on First Amendment grounds in a 5-4 decision divided along ideological lines. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2460 (2018). The *Janus* decision followed several other Roberts Court decisions that severely limited the holding in *Abood*. *See Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 322 (2012); *Harris v. Quinn*, 573 U.S. 616, 620 (2014).

17. Emma García & Eunice Han, *The Impact of Changes in Public-Sector Bargaining Laws on Districts' Spending on Teacher Compensation*, ECON. POL'Y INST. (Apr. 29, 2021), https://www.epi.org/publication/the-impact-of-changes-in-public-sector-bargaining-laws-on-districts-spending-on-teacher-compensation/ [https://perma.cc/UW8B-LKR8].

18. James A. Gross, *National Labor Relations (Wagner) Act*, *in* THE OXFORD ENCYCLOPEDIA OF AMERICAN BUSINESS, LABOR, AND ECONOMIC HISTORY (Melvyn Dubofsky ed., 2013).

19. *Id.*

20. *Id.*

21. 301 U.S. 1 (1937).

promote collective bargaining and worker self-organization,[22] the NLRA also recognized:

> [The] right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment.[23]

To enforce these rights, the NLRA granted broad authority to the Board to adjudicate labor disputes that fall within its jurisdiction—which includes nearly all disputes between employers and employees.[24] The NLRB's expansive jurisdiction is subject to one major caveat: "employer" was defined by the NLRA to *exclude* government actors and their subdivisions.[25] That is to say, the NLRA protects the labor organizing rights of private employees, but it does not confer rights to or grant the Board oversight over almost any public workers.[26]

Interestingly, "[t]he legislative history of the NLRA does not explain the exclusion of the public sector."[27] The simplest explanation is that, at time of passage, Congress felt it simply lacked authority under federalist principles to regulate the states and their political subdivisions. Therefore, the theory goes, the Wagner Act's drafters did not even attempt to make such a regulation to avoid risking the fate of the NLRA to a generally anti-union judiciary.[28] Fears of public sector strikes crippling the government also animated anti-union sentiments toward public sector labor organizing.[29] Another possible animus for the political subdivision exemption was that public sector employment was nonprofit

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22. 29 U.S.C. § 151.

23. 29 U.S.C. § 157.

24. *See* 29 U.S.C. § 160.

25. 29 U.S.C. § 152(2) ("The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof . . . .").

26. *But see* 29 C.F.R. § 102.135(c)(1) (2022) (deeming the U.S. Postal Service an "employer" for purposes of the NLRA).

27. JOSEPH E. SLATER, PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900–1962, at 91 (2004).

28. *Id.* at 91–92.

29. R. W. Fleming, *Public Employee Unionism*, 9 GA. L. REV. 1, 2–3 (1974) ("Moreover, there was a strongly held theory that the right to strike . . . against a public employer was intolerable as a rejection of the sovereignty of government.").

employment, and thus a major rationale for unionism—the worker's right to a fair share of the employer's profits—was absent from government employment.[30]

Absent any federal or state laws to protect the right of public sector workers to unionize and collectively bargain, public sector labor relations were left to the courts, who largely regarded early twentieth century cases involving public sector unions with the same hostility they showed to private sector unions before the passage of the NLRA.[31] Though President John F. Kennedy issued Executive Order 10988 to extend collective bargaining rights to federal employees,[32] the federal government has remained silent on the issue of public sector collective bargaining at the state level.

B. The Scope of Public Sector Labor Rights in Wisconsin

With both Congress and the judiciary unable or unwilling to recognize a right to state public sector collective bargaining, the debate turned to state legislatures. Wisconsin passed the Employment Peace Act (heavily modeled off the NLRA) in 1939, but, like the NLRA, the act also excluded public employees from its jurisdiction.[33] Twenty years later, however, following its tradition of pioneering labor rights legislation, Wisconsin passed the first statewide legislation recognizing the right of public employees to organize unions.[34]

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30. *Id.* at 3.

31. *See* SLATER, *supra* note 27, at 73–79 (discussing several state court decisions from the early twentieth century that limited or prohibited the practice of unionization and collective bargaining for public employees). *See also Ry. Mail Ass'n v. Murphy*, 44 N.Y.S.2d 601 (Sup. Ct. Albany Cnty. 1943) ("To tolerate or recognize any combination of Civil Service employees of the Government as a labor organization or union is not only incompatible with the spirit of democracy, but inconsistent with every principle upon which our Government is founded. Nothing is more dangerous to public welfare than to admit that hired servants of the state can dictate to the Government the hours, the wages and conditions under which they will carry on essential services vital to the welfare, safety and security of the citizen."), *abrogated by Ry. Mail Ass'n v. Corsi*, 47 N.Y.S.2d 404 (App. Div. 1944).

32. *See* Exec. Order No. 10988, 27 Fed. Reg. 551 (Jan. 17, 1962).

33. Justin C. Smith, *Select Aspects of the Wisconsin Employment Peace Act*, 45 MARQ. L. REV. 338, 338–39 (1962) (describing the Employment Peace Act and its reforms); WIS. STAT. §§ 111.02–.19 (2021–22) (the Employment Peace Act covers labor relations between employers and employees and, like the NLRA, excludes the government and its political subdivisions from its coverage through its definition of "employer").

34. SLATER, *supra* note 27, at 167–84 (noting that Wisconsin passed the first workers' compensation statute and led the nation in reforms on unemployment compensation, workplace safety, and child labor before passing the first of its kind public sector bargaining bill in 1959).

Chapter 111 of the Wisconsin Statutes covers labor relations between workers and management in the private sector,[35] in public utilities,[36] in municipal government,[37] and in state government.[38] This framework governed labor relations in Wisconsin for decades, and between these statutes and the NLRA, most Wisconsin workers maintained considerable, defined rights to self-organization and collective bargaining.

That changed in 2011, when the recently elected Republican Governor Scott Walker signed a "budget repair bill" which, in effect, severely limited the collective bargaining rights of state public employees.[39] The bill, Act 10, purported to completely strip the right to collectively bargain from employees of day and home healthcare providers, the University of Wisconsin system, and the University of Wisconsin Hospitals and Clinics Authority.[40] All other employees considered "public" were grouped into two categories: "public safety employees" (*e.g.*, police and firefighters) who retained their previously held rights to collectively bargain, and "general employees" (everyone else), who maintained their right to collectively bargain, but under crippling circumstances.[41] The effect of Act 10 on public sector unions cannot be overstated:

> From 2006 to 2015, unionization rates among Wisconsin public workers declined from just over 53.5 to 26.1 percent, a drop of slightly more than 50 percent. Most of this decline came in

35. Employment Peace Act, WIS. STAT. §§ 111.02–.19 (2021–22).

36. WIS. STAT. §§ 111.50–.64 (defining the bargaining rights of public utility employees and prohibiting strikes by those workers).

37. Municipal Employment Relations Act, WIS. STAT. §§ 111.70–.77 (defining the bargaining and organizing rights of local government employees).

38. State Employment Labor Relations Act, WIS. STAT. §§ 111.81–.94 (defining the bargaining and organizing rights of state employees).

39. Martin H. Malin, *Life After Act 10?: Is There a Future for Collective Representation of Wisconsin Public Employees?*, 96 MARQ. L. REV. 623, 625–31 (2012).

40. *Id.* at 630–31.

41. *Id.* at 630–33 (explaining that Act 10 removed the rights of general employees to bargain for any condition of work except base wage increases up to the consumer price index and imposed union-certification requirements that were far more stringent than those for private employees). The distinction between "public safety" and "general" employees was likely politically motivated. *See Wisconsin Educ. Ass'n Council v. Walker Council*, 705 F.3d 640, 665 (7th Cir. 2013) (Hamilton, C.J., concurring) (noting that the five unions that endorsed Governor Walker's 2010 election campaign represent members that were classified as public safety employees and thus exempt from Act 10's restrictions; workers represented by all other public sector unions, who did *not* endorse Walker, were classified as general employees).

the period from 2011 to 2015, almost exactly corresponding to the adoption of Act 10 and its aftermath.[42]

C. The UWHCA in Statutory Context

Under this landscape, the operating presumption was that the University of Wisconsin Hospitals and Clinics Authority could not legally bargain with the union as the employees' exclusive representative.[43] But this general understanding is complicated by the unique circumstances surrounding the creation of the Authority. Prior to 1996, the Authority was a part of the University of Wisconsin.[44] In that year, the hospital was reorganized and largely privatized pursuant to 1995 Wisconsin Act 27 in order to better compete with private hospitals by loosening the constraints of state oversight.[45] Under this privatized scheme, UWHCA was authorized (pre–Act 10) to enter into collective bargaining agreements as it saw fit.[46] Furthermore, the UWHCA was statutorily defined as an "employer" for purposes of the Employment Peace Act, notwithstanding the Peace Act's definition of employer which otherwise excluded political subdivisions.[47] Though Act 10 repealed these provisions,[48] it seems clear that the legislative intent behind Act 27 was to create an independent, nonprofit entity that functioned—for all intents and purposes—like a private corporation would.[49]

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42. David Nack, Michael Childers, Alexia Kulwiec & Armando Ibarra, *The Recent Evolution of Wisconsin Public Worker Unionism Since Act 10*, 45 LAB. STUD. J. 147, 150 (2020).

43. *See, e.g.*, Shamane Mills, *With Contracts Ending, Unions Phasing out at UW Hospital & Clinics*, WIS. PUB. RADIO (June 30, 2014, 6:30 PM), https://www.wpr.org/contracts-ending-unions-phasing-out-uw-hospital-clinics [https://perma.cc/Q36G-LJAS] ("Act 10 legally prohibits us from engaging in collective bargaining," according to a UW Health human resources professional.).

44. *Takle v. Univ. of Wis. Hosps. & Clinics Auth.*, 402 F.3d 768, 770 (7th Cir. 2005).

45. WIS. LEGIS. AUDIT BUREAU, AN EVALUATION: UNIVERSITY OF WISCONSIN HOSPITALS AND CLINICS AUTHORITY 3–9 (2001), https://legis.wisconsin.gov/lab/reports/01-12full.pdf [https://perma.cc/X4MK-D5U8]. This report also refers to the Authority as an "independent, nonprofit public entity." *Id.* at 9.

46. WIS. STAT. § 233.03(10) (2009–10).

47. WIS. STAT. § 111.815(1).

48. 2011 Wis. Act 10, Assemb. B. 11, 100th Leg., Jan. 2011 Spec. Sess (Wis. 2011).

49. *Takle*, 402 F.3d at 770. *See also* WIS. LEGIS. AUDIT BUREAU, *supra* note 45, at 3–9.

II. COLLECTIVE BARGAINING FOR QUASI-PUBLIC EMPLOYEES

This Part considers the options available to the UW Health nurses (and other similarly situated workers occupying the space between public service and private industry) to gain recognition for their union. First, this Part briefly examines non-statutory modes of bargaining and discusses why statutory bargaining might be preferable. Then, it explores whether the union is barred from certification as the exclusive bargaining representative of the workers under the NLRA. Finally, this Part argues that the NLRB should update its standard for determining whether an employer is a "political subdivision" for purposes of the NLRA to better effectuate the purposes of that law, and that the UW Health nurses' unionization efforts may be a good vehicle to drive this change.

A. Meet-and-Confer Negotiations and Voluntary Bargaining as an Alternative to NLRB Certification

The traditional common law approach to the employment contract suggests that any employee, at any time, may meet and confer with their employer to seek better wages, hours, or working conditions.[50] But employers are under no obligation to bargain back; indeed, a single employee making demands of an employer stands little chance of getting those demands when the employer can easily replace the employee.[51] Collectively, employees have greater bargaining power and are more likely to have their needs met by the employer.[52] Even absent any laws protecting unions or collective bargaining, groups of employees may use their leverage as a group—notably their power to initiate a work stoppage—to exact demands from the employer.[53]

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50. *See, e.g.*, *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. 507, 518–19 (1884), *overruled on other grounds by Hutton v. Watters*, 179 S.W. 134, 138 (Tenn. 1915) (describing the doctrine of at-will employment, in which employees and employers can sever employment for any reason, as a product of the freedom of contract).

51. *See* P.H. CASSELMAN, LABOR DICTIONARY: A CONCISE ENCYCLOPAEDIA OF LABOR INFORMATION 30 (1949) (noting that the theory that individual workers can effectively bargain for higher wages is "obsolete").

52. *The Union Advantage*, U.S. DEP'T OF LAB., [https://web.archive.org/web/20230308032347/https://www.dol.gov/general/workcenter/union-advantage] ("Union members have better job safety protections and better paid leave than non-union workers, and are more secure exercising their rights in the workplace.").

53. *See* Nack, Childers, Kulwiec & Ibarra, *supra* note 42, at 156–57 (noting that Wisconsin public employees, barred from collectively bargaining over working conditions, rely on an informal meet-and-confer process to meet some of their needs).

Still, this approach carries risks. While labor legislation such as the NLRA protects covered workers' organizing activities,[54] uncovered workers are subject to retaliation and termination. Attempting to collectively bargain without a statutory right to bring management to the table requires that workers be well organized and willing to risk adverse outcomes. If uncovered workers are not willing to initiate a work stoppage,[55] their bargaining power is not significantly higher as a collective than it would be as individuals.[56]

Related to meet-and-confer bargaining is voluntary bargaining. Like meet-and-confer negotiations, voluntary bargaining requires the sufferance of the employer.[57] But if an employer chooses to subject itself to the collective bargaining process, there is no legal bar that would prevent structured collective bargaining at common law.[58] However, despite the Wisconsin Attorney General's opinion that the UWHCA could voluntarily recognize the union and submit itself to mandatory bargaining,[59] the WERC decision seems to have closed the door for the nurses' union to obtain voluntary recognition under Wisconsin law.[60] With this in mind, the UW nurses' union attempted to sidestep the legal questions about the status of UWHCA and sought to meet their demands with meet-and-confer bargaining.[61] However, even if the Authority does

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54. 29 U.S.C. §§ 157–58 (making it illegal to prevent employees covered by the NLRA from engaging in concerted activities for mutual aid or protection).

55. While the NLRA provides some job security protections for covered, striking workers, *id.*, workers outside NLRB jurisdiction have no such protections under federal statute. Uncovered workers can be fired or disciplined for walking off the job if they are not independently protected by state law. This does not mean that unsanctioned work stoppages never happen, or that they are not effective, however. For example, in West Virginia, well-organized public-school teachers' unions went on strike (despite a state law declaring work stoppages unlawful) and ended up winning a pay raise. Mike Elk, *Wave of Teacher's Wildcat Strikes Spreads to Oklahoma and Kentucky*, GUARDIAN (Apr. 2, 2018, 7:42 AM), https://www.theguardian.com/us-news/2018/apr/02/teachers-wildcat-strikes-oklahoma-kentucky-west-virginia [https://perma.cc/47RD-TV74] (discussing the success of the West Virginia strike even absent statutory protections from adverse employment actions).

56. Gary Goodpaster, *Coalitions and Representative Bargaining*, 9 OHIO ST. J. ON DISP. RESOL. 243, 246 (1994) (noting the leverage that a group threat to strike brings).

57. *Del. River Port Auth. v. Fraternal Ord. of Police*, 290 F.3d 567, 574 n.11 (3d Cir. 2002) (public authority was free to choose to collectively bargain with employees even absent an obligation to do so).

58. *Id.*

59. Wis. Att'y Gen. Op., OAG-01-22, ¶¶ 27–32 (June 2, 2022), https://www.doj.state.wi.us/sites/default/files/OAG-01-22.pdf.

60. *Serv. Emps. Int'l Union Healthcare Wis.*, No. 39765 (Wis. Emp. Rels. Comm'n Nov. 25, 2022).

61. *See* Yahr, *supra* note 1.

agree to confer with the union about wages and working conditions, the lack of legal protections and risk of possible retaliation makes legal recognition, if available, a favorable option.

B. Statutory Recognition under the NLRA

Though the NLRB's jurisdiction over labor disputes is broad, the NLRA does not apply to employers that are "political subdivisions" of state governments.[62] The Authority, though retaining some characteristics of state organization,[63] functions essentially as a private corporation in practice. Thus, it operates in the quasi-public sphere, defying clear characterization as either a private corporation or a public entity. This ambiguity leaves workers without clear guidance as to what their rights and obligations are vis-à-vis their employment contracts.[64]

III. NLRB JURISDICTION AND THE *HAWKINS* CASE

When considering whether an entity created or sanctioned by an act of a state legislature is subject to the NLRA, the NLRB cannot rely on the text of the NLRA itself for guidance. Despite exempting states and their "political subdivisions" from coverage, the NLRA does not define what exactly constitutes a political subdivision.[65] Early cases did not define the exemption because "[e]ntities claiming the exemption clearly fell within the intended scope of the clause."[66] But the line between the public and private sectors has blurred. In the decades following the passage of the act, the trend of privatization of government functions has changed the collective bargaining landscape.[67] In light of this, the Board

62. 29 U.S.C. § 152(2).

63. *See infra* Section II.B.3.

64. This is illustrated by the fact that, at the time of writing, there is no conclusive answer as to whether the UWHCA nurses' union is subject to NLRB jurisdiction. *See supra* note 11. Such ambiguity might diminish organizing opportunities, as workers are less likely to spend the time and resources necessary to form a union if their right to form one is not conclusively established.

65. 29 U.S.C. § 152(2); *NLRB v. Nat. Gas Util. Dist.*, 402 U.S. 600, 605 (1971) ("The term 'political subdivision' is not defined in the Act and the Act's legislative history does not disclose that Congress explicitly considered its meaning.").

66. M. Edward Taylor, *The Political Subdivision Exemption of the National Labor Relations Act and the Board's Discretionary Authority*, 1982 DUKE L.J. 733, 734.

67. *See* Jon D. Michaels, *Privatization's Progeny*, 101 GEO. L.J. 1023, 1044–46 (2013) (noting that pervasive trends toward privatization and marketization of bureaucracy have led to rollbacks in collective bargaining protections for workers); Jessica P. Driscoll, Comment, *Charter Schools*, 8 GEO. J. ON POVERTY L. & POL'Y 505 (2001) (noting that whether a charter school is considered "public" or "private" under various sources of law is a hotly litigated issue).

has adopted a standard generally referred to as the *Hawkins* test to clarify an entity's status.[68]

There is no federal preemption clause in the NLRA.[69] However, as the country's primary federal legislation regarding industrial relations, courts have consistently held that the NLRA (and the accompanying NLRB jurisdiction) preempts state laws that operate concurrently with it.[70] Accordingly, courts have held that federal law, not state law, governs the interpretation of the NLRA.[71] Therefore, determinations by state legislatures or courts that an organization is a private entity or a political subdivision are not determinative of an entity's coverage under the act.[72] State-level legislative proclamations that a chartered entity is "public" therefore carry little dispositive value when determining the NLRA's coverage of a given entity.[73]

Thus, when determining whether an employer is bound by the strictures of the NLRA, the NLRB sidesteps the pronouncements (and, in some cases, the expressed intent[74]) of state governments and instead applies a fact-specific test[75] that considers the entity's level of political and governmental accountability.[76] In *Hawkins*, the Supreme overruled

68. *See infra* Section III.A. This test is also referred to as the *Hawkins County* test or the *Natural Gas* test.

69. *See* 29 U.S.C. §§ 151–69.

70. Despite the act's apparent silence on the issue, the Supreme Court has consistently held that the NLRA preempts state law with overlapping jurisdiction. *See, e.g.*, *Bethlehem Steel Co. v. N.Y. State Lab. Rels. Bd.*, 330 U.S. 767 (1947); *San Diego Bldg. Trades v. Garmon*, 359 U.S. 236 (1959).

71. *NLRB v. Randolph Elec. Membership Corp.*, 343 F.2d 60, 62 (4th Cir. 1965) ("In the absence of a plain indication to the contrary . . . it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law."). *See also NLRB v. Nat. Gas Util. Dist.*, 402 U.S. 600, 603–04 (1971) (agreeing with the Fourth Circuit's holding in *Randolph* that state law does not govern how the NLRA is interpreted).

72. *Randolph*, 343 F.2d at 62–63 (granting no weight to a North Carolina legislative proclamation that certain entities were "political subdivisions" for purposes of the NLRA); *21st Century Cyber Charter Sch.*, Case 04-RC-272006, at 8 (N.L.R.B. 2021) ("[T]he fact that Pennsylvania statutes describe charter school trustees and administrators as 'public officials,' designate charter schools as 'public employers' for purposes of assessing tort liability, and give charter school employees the right to organize under the Pennsylvania Public Employee Relations Act (PPERA) is not determinative . . . .").

73. *Randolph*, 343 F.2d at 62–63.

74. *Id.*

75. *See Nat. Gas Util. Dist.*, 167 N.L.R.B. 691, 691 (1967) (outlining two-factor test that clarifies whether an entity is a political subdivision).

76. *Voices for Int'l Bus. & Educ., Inc. v. NLRB*, 905 F.3d 770, 774 (5th Cir. 2018) ("The key is that for both of the Board's definitions of political subdivision, ultimate authority over policymaking remains with the public.").

the Board's finding of jurisdiction over labor relations at the Natural Gas Utility District of Hawkins County, Tennessee.[77]

A. Hawkins*: The Birth of the Two-Factor Political Subdivision Test*

The Natural Gas Utility District of Hawkins County was a utility provider created under a 1937 Tennessee law that enabled citizens to petition their county court to establish "utility districts" to provide a "wide range of public services," including sewage, power, and water.[78] If the court chose to grant the citizens' petition, the resulting utility district would be "granted not only all the powers of a private corporation . . . but also 'all the powers necessary and requisite for the accomplishment of the purpose for which such district is created, capable of being delegated by the legislature.'"[79] The districts created under this law were subject to Tennessee's open records laws and the districts' decisions could be challenged in court.[80] Utility districts were managed by officials appointed to four-year terms by the county judge, and those officials could be removed from their office under the political procedures outlined in the Tennessee code.[81] Workers at the Hawkins County Utility District, which was organized under this law, sought to certify the Plumbers and Steamfitters as their union's exclusive bargaining representative.[82] When the utility district refused to bargain with the union, the union petitioned the NLRB to intervene.[83] The Board applied a two-factor test to conclude that the district was a private corporation, not a political subdivision, and therefore was subject to NLRB jurisdiction.[84] On appeal, the Sixth Circuit reversed, finding the district was an exempt political subdivision.[85]

After considering the above findings of fact, the Supreme Court affirmed the Sixth Circuit opinion, ultimately concluding that the Board's two-part test for determining whether an entity is a "political subdivision" within the meaning of the NLRA was permissible, but that

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77. *NLRB v. Nat. Gas Util. Dist.*, 402 U.S. 600 (1971).

78. *Id.* at 605–06.

79. *Id.* at 606 (first quoting TENN. CODE ANN. § 6-2610 (1955), then quoting TENN. CODE ANN. § 6-2612 (1955)).

80. *Id.* at 607.

81. *Id.*

82. *Id.* at 601–02.

83. *Id.*

84. *See Nat. Gas Util. Dist.*, 167 N.L.R.B. 691, 691 (1967) (outlining the two-factor test that clarifies whether an entity is a political subdivision).

85. *NLRB v. Nat. Gas Util. Dist.*, 427 F.2d 312, 314 (6th Cir. 1970), *aff'd but criticized*, 402 U.S. 600 (1971).

the Board misapplied the facts of the case.[86] Under the Board's test, an entity is considered a political subdivision if it is "(1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate."[87] The "or" that connects the prongs means that jurisdiction can be denied based upon either prong; an entity need not satisfy both requirements to be considered a "political subdivision" under the act. Ultimately, the Court applied the Board's test[88] and concluded that the district was a political subdivision and exempt from NLRB jurisdiction.[89]

1. THE "ADMINISTRATIVE ARM" PRONG

The first prong of the test—that an entity may be considered a political subdivision when it is "created directly by the state, so as to constitute departments or administrative arms of the government"[90]—seems straightforward enough. For example, no one would seriously doubt that the Wisconsin Department of Justice does not satisfy this prong. The Department of Justice is created directly by statute.[91] Its duties and powers as an agency of the Wisconsin executive branch are likewise legislatively defined.[92] Therefore, the Wisconsin Department of Justice would be an exempt employer under the NLRA, as a state political subdivision.[93] The requirement that an entity be *directly* created by the legislature is often dispositive. But when the entity is merely organized

86. *Nat. Gas Util. Dist.*, 402 U.S. at 608–09.

87. *Id.* at 604–05.

88. It should be noted that this exact articulation of the test was not actually found in the Board's 1967 decision. *See Nat. Gas Util. Dist.*, 167 N.L.R.B. at 691. Rather, the second prong of the test the Board used in its 1967 decision was simply whether the entity was "administered by State-appointed or elected officials." *Id.* at 691–92. Though a subtle change, the Court's articulation of the second prong arguably broadened the scope of the exemption to include entities (like the Natural Gas Utility of Hawkins County, Tennessee) that were managed by individuals who were neither appointed nor elected officials, but rather merely responsible to them. *Nat. Gas Util. Dist.*, 402 U.S. at 604–05. Thus, entities run by individuals or boards that could be sanctioned or removed by state officials could therefore be considered exempt under the Supreme Court's modified articulation of the standard.

89. *Id.* at 609.

90. *Id.* at 604.

91. WIS. STAT. § 15.25 (2021–22) (declaring unambiguously that "[t]here is created a department of justice under the direction and supervision of the attorney general.").

92. *See generally* WIS. STAT. ch. 165 (outlining in detail the offices, duties, and powers of the Department of Justice).

93. *See* 29 U.S.C. § 152(2).

by private actors before being incorporated into a legislative scheme, the first prong is not satisfied and the exemption analysis continues to the second prong.[94] This is true even when the legislature is explicitly involved in the creation of the private entity.[95] For these reasons, most charter schools—though sanctioned by the state to provide public education—are generally not exempt under the first prong.[96] There is no on-point case law discussing the disposition of the first prong of the *Hawkins* analysis when the state creates, then subsequently privatizes, an entity.[97]

2. THE "POLITICAL ACCOUNTABILITY" PRONG

If the first prong of the *Hawkins* exemption test is not satisfied, the second level of analysis asks the NLRB to conclude whether the entity is "administered by individuals who are responsible to public officials or to the general electorate."[98] Essentially, this test considers whether the entity is subject to meaningful political oversight. The Board considers individuals accountable to public officials when those individuals are themselves elected to the role,[99] when they are appointed by an elected

94. *Chi. Mathematics & Sci. Acad. Charter Sch., Inc.*, 359 N.L.R.B. 455, 461 (2012) ("[P]rivate individuals established CMSA first as a nonprofit corporation, and only then did CMSA establish the Academy. The State of Illinois, by enacting its Charter Schools Law, has in essence authorized individuals, acting through private corporations, to establish and operate charter schools, with the Charter Schools Law acting as the 'framework' or 'roadmap' by which the schools are operated. . . . [W]e find that CMSA does not satisfy the first prong of the *Hawkins County* test, because no conduct on the part of the State of Illinois was required to bring it into existence.").

95. *See Shelby Cnty. Health Care Corp.*, 343 N.L.R.B. 346 (2004) (finding that the first *Hawkins* prong was satisfied where the state government explicitly conditioned its dissolution of a public hospital on the creation of the private Shelby County Health Care Corp., thereby directing a private actor to create the entity).

96. *E.g.*, *Chi. Mathematics & Sci. Charter Sch.*, 359 N.L.R.B. 455, 460 (2012); *Hyde Leadership Charter Sch.—Brooklyn*, 364 N.L.R.B. 1137, 1141 (2016); *LTTS Charter Sch., Inc.*, 366 N.L.R.B. No. 38, 3 (2018).

97. The closest case is probably *Shelby Cnty. Health Care Corp.*, 343 N.L.R.B. 346 (2004). This case, however, does not involve the direct privatization of government assets, but rather an indirect privatization through the closure of government facilities conditioned upon private companies adhering to certain government objectives. *See id.* More recently, the Fifth Circuit concluded that a Louisiana charter school, which was created as part of a statutory scheme to replace public schools with charter schools, was *not* an exempt political subdivision, but this case similarly did not involve direct privatization. *Voices for Int'l. Bus. & Educ., Inc. v. NLRB*, 905 F.3d 770 (5th Cir. 2018).

98. *NLRB v. Nat. Gas Util. Dist.*, 402 U.S. 600, 604–05 (1971).

99. *Id.* at 608–09.

official,[100] or when they are subject to removal by an elected official.[101] In cases where the entity is under total control of a politically accountable official, this clearly satisfies the requirement.[102] Where the entity is governed by a board composed of both politically accountable officials and private officials, the analysis is murkier. Generally, if a majority of the entity's governing board is politically accountable, the NLRB considers the entity to have satisfied the second prong of the *Hawkins* test.[103]

To date, the NLRB seems happy resolving almost all jurisdictional cases involving political subdivision questions with the *Hawkins* razor. However, the Court's recognition of the test in *Hawkins County* does not say conclusively whether the test is always dispositive of these jurisdictional issues, or whether the test is simply weighted heavily.[104] Indeed, the test has no textual basis in the statute—it has simply become the standard mode of analysis through precedent.[105] Thus, in the right circumstances, other "actual operations and characteristics" might swing the balance in favor of exemption or coverage.[106]

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100. *Id.* at 605 (finding that the utility was accountable to public officials because board members were appointed by the county judge, an elected official).

101. *LTTS Charter School*, 366 N.L.R.B No. 38, at 3 (holding that a charter school was *not* subject to NLRB jurisdiction because of a Texas law that allowed the state government to disband the charter school's board).

102. *See supra* Section III.A.1 & note 91 (considering the example of the Wisconsin Department of Justice). The Wisconsin Attorney General, an elected official, has administrative control over the agency, thus satisfying the second prong.

103. *Midwest Div.—MMC, LLC v. NLRB*, 867 F.3d 1288, 1297 (D.C. Cir. 2017) ("[T]he pertinent question is 'whether a majority of the individuals who administer the entity . . . are appointed by and subject to removal by public officials.'" (citing *Pilsen Wellness Ctr.*, 359 N.L.R.B. 626, 628 (2013)).

104. *See Voices for Int'l Bus. and Educ., Inc. v. NLRB*, 905 F.3d 770, 776 (5th Cir. 2018) (noting that the *Hawkins* Court also considered other factors beyond the test, including tax status, eminent domain powers, and open records laws after undergoing the two-pronged analysis).

105. Gregory P. Ho, *The "Political Subdivision" Exemption of the National Labor Relations Act*, 13 COLUM. J.L. & SOC. PROBS. 183, 201 (1977) ("After [*Hawkins*] it could be persuasively argued that the Board's tests are no more than guidelines requiring a supplemental investigation into the actual operations and characteristics of the entity before the Board. . . . [T]he Court's opinion [in *Hawkins*] leaves open the question of whether the tests, as mere guidelines, must be followed at all. Thus a decision supported by facts concerning an entity's 'actual operations and characteristics' might be upheld even when the Board's tests dictate another conclusion.").

106. *Id.*

B. The Hawkins *Test as Applied to the UWHCA and Its Employees*

Applying the above factors to the UWHCA, the NLRB Regional Director declined to exercise its jurisdiction and found the Authority to be an exempt employer.[107] Considering the "legislatively created" prong, there is no doubt that the Authority was created by the legislature.[108] At first blush, then, the UWHCA appears to satisfy the test. However, the regional director charged with determining whether the NLRB has jurisdiction over the UWHCA stated that this question was a close case.[109]

In making her decision, the regional director considered that while Wisconsin statutes do not consider the UWHCA to be a "political subdivision" of the state,[110] state law determinations as to the political subdivision status of an entity are not binding on the NLRB.[111] Even so, looking at the structure of the Authority, it is clear that it is not a "department or administrative arm"[112] of the state of Wisconsin even though it was legislatively created. Rather, the Authority in almost all other respects acts like a private hospital and does not carry out an exclusive governmental function.[113] Thus, under existing doctrine, a decisionmaker applying the NLRB precedent could find that the UWHCA is a private corporation created by the state legislature.[114] Second, there

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107. Regional Director Decision and Order, *Univ. of Wis. Hosps. & Clinics Auth.*, Case 18-RC-308303, at 18 (N.L.R.B. 2023) [hereinafter RD Decision and Order]. The union has petitioned for the Board in Washington to review the regional director's decision. Union's Request for Review of Regional Director's Decision Dismissing Petition, *Univ. of Wis. Hospitals & Clinics Auth.*, Case 18-RC-308303 (2023). At time of writing, the Board has not decided whether to review the regional director's decision. Appeals in federal court could follow.

108. WIS. STAT. § 233.02(1) (2021–22) ("There is created a public body corporate and politic to be known as the 'University of Wisconsin Hospitals and Clinics Authority.'").

109. RD Decision and Order, *supra* note 107, at 16–17.

110. *See, e.g.*, WIS. STAT. § 11.1207(3) ("Every person who has charge or control in a building . . . by any political subdivision thereof, *or* by the University of Wisconsin Hospitals and Clinics Authority . . . .") (emphasis added).

111. RD Decision and Order, *supra* note 107, at 17. *See also NLRB v. Randolph Elec. Membership Corp.*, 343 F.2d 60, 62–63 (4th Cir. 1965).

112. *Nat. Gas Util. Dist.*, 402 U.S. 600, 604–05 (1971).

113. As Wisconsin and the United States rely primarily on private medical care, there can be no argument that medicine is a function that is typically carried out by government departments or agencies. Nor is the Authority's educational function exclusive to the state. *See* MEDICAL COLLEGE OF WISCONSIN, mcw.edu [https://perma.cc/3MFX-4N69] (conveying information about a privately owned and operated medical school in Wisconsin).

114. *See Takle v. Univ. of Wis. Hosps. & Clinics Auth.*, 402 F.3d 768, 771 (7th Cir. 2005) (holding that, in the context of sovereign immunity, "[w]hat we have . . . is a state's creation of a private entity, with the state using its leverage as the creator of the entity to insist that it serve the state's interests as well as its own").

is the fact that UWHCA is effectively a legislatively created public entity that was subsequently privatized. In the sovereign immunity context, federal courts consider privatization efforts, however incomplete, to sever an entity's public status.[115] The regional director ultimately concluded that the UWHCA was *not* an administrative arm of the state, and therefore not exempt from NLRB jurisdiction under the first prong of the *Hawkins* test.

However, even though the regional director found that the UWHCA was not exempt under the first prong, the second *Hawkins* prong remained. The Authority is governed by a statutorily defined board of directors, of which an 11-5[116] majority are "politically accountable" in the sense that they are appointed by elected officials.[117] On appeal, the NLRB may determine that the Authority is exempt as a political subdivision under the second *Hawkins* prong for this reason.[118] A party seeking to avoid the exemption might argue that a majority of the UWHCA Board members are not subject to removal by the political process.[119] In this way, one could argue that, because a majority of the board are not subject to removal once appointed, the board is not

115. *Id.* (holding UWHCA cannot enjoy "the benefits both of not being the state and so being freed from the regulations that constrain state agencies" while also enjoying the benefits of its status as a government actor). *See also Richardson v. McKnight*, 521 U.S. 399, 410–11 (1997) (noting that privatization frees an entity of civil-service restraints, providing greater flexibility which offsets the accompanying decrease in governmental privileges).

116. Per WIS. STAT. § 233.02 (2021–22), the Authority's Board must include six members appointed by the governor and approved by the senate, two members from the joint committee on finance, three members from the University of Wisconsin Board of Regents, and the secretary of administration. The statute also designates the Chancellor of UW-Madison, the Dean of the UW-Madison medical school, a department chair of UW-Madison medical school, and another UW-Madison health profession school's faculty member as board members.

117. The regional director only made conclusive determinations that at least nine out of sixteen board members were "politically accountable" within the meaning of *Hawkins*. RD Decision and Order, *supra* note 107, at 13. This majority was enough to satisfy the test, but it highlights that a given board member's "political accountability" or lack thereof is an issue subject to dispute.

118. *See Midwest Div.—MMC, LLC v. NLRB*, 867 F.3d 1288, 1296–97 (D.C. Cir. 2017).

119. *See* WIS. STAT. § 233.02–.04 (outlining no process of removal for board members). Wisconsin's general statutes for removal of public officials are similarly silent on the Authority. *See* WIS. STAT. § 17.06. A minority of board members (the joint finance committee chairs) may be removed by the normal electoral process by virtue of their positions in the legislature. The regional director's decision considered this argument but found that the evidence that the board was not subject to removal procedures "inconclusive." RD Decision and Order, *supra* note 107, at 14–15.

"responsible to public officials."[120] As an entity need only satisfy one prong of the *Hawkins* test to be considered a political subdivision,[121] the regional director's decision[122] (and the likeliest outcome on appeal under current precedent) is that the NLRB lacks jurisdiction over the UWHCA nurses' union under the second prong of the *Hawkins* test. But one important question remains: is the *Hawkins* test alone dispositive of an entity's "political subdivision" status under the NLRA? The Board has an opportunity to resolve that question if it chooses to review the regional director's decision.

IV. BEYOND *HAWKINS*? ANALYZING THE PUBLIC AND PRIVATE CHARACTERISTICS OF A QUASI-PUBLIC ENTITY'S OPERATIONAL REALITIES

While the *Hawkins* test factors lean toward the NLRB finding a political subdivision exemption for UWHCA, the analysis need not end there. As the Supreme Court has not declared that the two-pronged test in *Hawkins* is the *sole* test for determining whether an entity is a political subdivision (and, indeed, considered other arguments in the *Hawkins* decision),[123] the Board could make a jurisdictional determination based on operational factors beyond the *Hawkins* factors.[124]

A. The Need for a New "Political Subdivision" Test

The case of the UW Health nurses' union highlights the need for the NLRB to move beyond the overly simplistic *Hawkins* test and to adopt new guidelines to determine whether an employer is a "political subdivision" within the meaning of 29 U.S.C. § 152(2). Except for its

120. *NLRB v. Nat. Gas Util. Dist.*, 402 U.S. 600, 608 (1971) ("Plainly, commissioners who are beholden to an elected public official for their appointment, *and are subject to removal procedures applicable to all public officials*, qualify as 'individuals who are responsible to public officials or to the general electorate' within the Board's test.") (emphasis added).

121. *See supra* Section III.A.2 (noting that the disjunctive "or" in the *Hawkins* test leaves two separate avenues for finding that an entity is a political subdivision).

122. RD Decision and Order, *supra* note 107, at 18.

123. *See Voices for Int'l Bus. & Educ., Inc. v. NLRB*, 905 F.3d 770, 776 (5th Cir. 2018) (acknowledging that the *Hawkins* Court looked to other factors beyond the two-pronged test).

124. *See* Ho, *supra* note 105, at 201. Of course, because federal courts have almost exclusively used the *Hawkins* test since the decision came out, a decision to rework or entirely abandon the *Hawkins* test would likely invite federal litigation. *See supra* Section I.A & note 11. The Roberts Court is unusually hostile to labor, and the NLRB's leadership might be incentivized to be more conservative with its rule changes so as to avoid the Court's scrutiny.

oversight structure and the fact that it has a chapter devoted to it in the Wisconsin Statutes, the UWHCA acts in a manner virtually indistinguishable from a private employer.[125] The changing nature of the economy in the decades since the New Deal due to the forces of privatization[126] and the ubiquity of state participation in interstate commerce[127] have weakened the traditional rationales for the political subdivision exception. Furthermore, the *Hawkins* test has already produced inconsistent results turning on technical (rather than functional) differences in the charter school contexts, suggesting that the bright-line two-factor test may no longer be fit for purpose.[128] As the *Hawkins* test does not have a statutory basis, the NLRB could adopt a new test without action by Congress,[129] so long as the Supreme Court agrees that whatever

125. *See supra* Section I.C.

126. *See supra* Part I. Privatization, at its core, presupposes that an entity motivated by profit-seeking produces more efficient and desirable results than an entity that is not motivated by its balance sheet. Thus, the idea that non-profit workers should not unionize because there is no profit to share does not apply to a privatized entity such as the UWHCA. In any event, private non-profit workers may—and often do—unionize. *See, e.g.*, *About NPEU*, NONPROFIT PROF. EMPS. UNION, npeu.org [https://perma.cc/BP6K-KWKC] (providing information about a national union that represents workers in non-profit spaces).

127. *See supra* Section I.A. One possible reason that the NLRA exempted "political subdivisions" was because Congress felt it could not constitutionally intrude on a given state's authority for federalism reasons. If a creature of the legislature, such as the UWHCA participates willingly in interstate commerce, like the UWHCA does, the federalism rationale for considering such an entity a "political subdivision" is diminished.

128. While NLRB precedent has trended toward finding that charter schools are not exempt political subdivisions under the *Hawkins* test, for example, *KIPP Academy Charter Sch.*, 369 N.L.R.B. No. 48 (2020), the same test occasionally produces a different outcome on largely technical grounds. *See LTTS Charter Sch., Inc.*, 366 N.L.R.B. No. 38 (2018) (finding that an otherwise private charter school, which was not created directly by the state, was an exempt political subdivision using the *Hawkins* test because the Texas Education Agency could theoretically dissolve the charter's board of directors under certain conditions). Though not a meaningless distinction, it should be noted that state governments routinely retain the power to dissolve private corporate forms when certain conditions are met. *E.g.*, WIS. STAT. § 180.1420 (2021–22) (describing the conditions under which the Wisconsin state government may administratively dissolve a corporation). No one would argue that the state's retention of this power vis-à-vis private corporations turns all such corporations into political subdivisions.

129. *See* Ho, *supra* note 105, at 201; *See also* Daniel Wiessner, *Labor Law Landscape Likely to Shift in 2022 Under Biden-Era NLRB*, REUTERS, https://www.reuters.com/legal/transactional/labor-law-landscape-likely-shift-2022-under-biden-era-nlrb-2021-12-30/ [https://perma.cc/WX5V-DFFR] (Dec. 30, 2021, 10:16 AM) (discussing the myriad rule changes enacted or expected by the Biden NLRB, suggesting that long-held NLRB rules are subject to discretionary change if they are no longer fit for purpose).

test the Board decides on properly reflects what it means to be a political subdivision.[130]

B. An Operational Realities Test for Determining an Entity's Exempt Political Subdivision Status under the NLRA

A better test would take into consideration, and weight appropriately, the totality of the circumstances to more accurately determine whether an entity is public or private for purposes of the NLRA. Such a test might consider some or all of these non-exhaustive factors: (1) whether the entity was created by the legislature; (2) whether the entity is managed by politically accountable individuals; (3) whether the entity performs an essential function of the state government; (4) whether the entity performs an exclusive function of the state government; (5) the extent to which the entity is financially dependent on the state; (6) whether the entity is granted privileges and immunities, such as immunity from suit, not typically granted to similarly situated private entities; (7) whether the entity's employees are considered public employees and enjoy the benefits of public employees, such as pensions and constitutional protections; (8) the extent to which the entity is engaged in commerce outside the state in which it is intended to be a political subdivision; and (9) the extent to which an exercise of jurisdiction over the entity would effectuate the purposes of the act. These factors are akin to an "operational realities" test[131] and are adapted from tests that are used to determine an entity's status as public or private under different parts of federal law.[132]

The first two factors of this test incorporate the prongs of the *Hawkins* test by asking a court to consider the entity's relationship to a political body.[133] Undoubtedly, the enduring utilization of these factors

130. *See, e.g.*, *NLRB v. Nat. Gas Util. Dist.*, 402 U.S. 600 (1971) (considering whether the Board's test could accurately determine whether an entity is private or a political subdivision).

131. Ho, *supra* note 105, at 201. The *Hawkins* Court also considered operational realities before applying the two-pronged test that has become the standard. *Hawkins*, 402 U.S. at 606–09 (discussing other operational realities such as tax status).

132. *E.g.*, *Rose v. Long Island R.R. Pension Plan*, 828 F.2d 910 (2d Cir. 1987) (considering whether an entity performs essential state functions to determine whether it is a political subdivision for purposes of ERISA); *Takle v. Univ. of Wis. Hosps. & Clinics Auth.*, 402 F.3d 768 (7th Cir. 2005) (applying a totality of the circumstances test to determine whether an entity is a political subdivision for purposes of sovereign immunity); *Koval v. Wash. Cnty. Redevelopment Auth.*, 574 F.3d 238, 243 (3d Cir. 2009) (weighting state-like privileges such as eminent domain heavily when determining that an entity was a political subdivision under ERISA).

133. *See Hawkins*, 402 U.S. at 604–05.

in current NLRB jurisprudence[134] suggests that these two factors could be dispositive in many instances. However, in cases where the answers to these questions are close or unclear—as with the UWHCA nurses' union case—these factors alone do not fully capture whether an entity is a "political subdivision" because the prongs fail to consider important operational considerations.

The next two factors—whether the entity performs essential and exclusive state functions—seek to flesh out that classification by considering whether the entity does the sort of things that one would expect a government agency to do, or whether it is merely a market participant with a government charter. As with the first two factors, these factors are not in and of themselves dispositive. Certain essential functions of the state, such as public safety and education, are routinely performed by private actors.[135] Furthermore, certain exclusive functions of the state have, in some cases, been privatized as well.[136] But, in conjunction with the other portions of the proposed test outlined above, an entity's performance of an essential or exclusive state function can tip the scale in favor of finding that it is a political subdivision rather than a private entity.[137]

The next factor considers the extent to which the entity relies on state funding or is financially independent thereof. Political subdivisions are typically, though not exclusively, dependent on some level of state financial support, while entities that are not financially dependent on the

134. Regional Director's Decision and Direction of Election, *21st Century Cyber Charter School*, Case No. 04-RC-272006, at 8 (N.L.R.B. 2021).

135. *See Takle*, 402 F.3d at 770 ("Most hospitals are private, though that cannot be the complete test; there are more private security guards in the United States than there are police officers, but it is hard to imagine a state privatizing the state police.").

136. The ability to incarcerate individuals is regarded as an exclusive state function but is delegated in many parts of the United States to private corporations. *See* KRISTEN M. BUDD & NIKI MONAZZAM, THE SENT'G PROJECT, PRIVATE PRISONS IN THE UNITED STATES 1 (2022), https://www.sentencingproject.org/reports/private-prisons-in-the-united-states (noting that twenty-seven states and the federal government allow private parties to exercise punitive functions traditionally exclusively reserved to the state).

137. Federal courts have adopted a similar test—the "public function" test—to determine whether a private actor is liable for constitutional civil rights violations under 42 U.S.C. § 1983. *See Street v. Corr. Corp. of Am.*, 102 F.3d 810, 814 (6th Cir. 1996) ("The public function test requires that the private entity 'exercise powers which are traditionally exclusively reserved to the state.'" (quoting *Ellison v. Garbarino*, 48 F.3d 192, 195 (6th Cir. 1995))). Thus, inmates in private prisons, for example, theoretically have the same constitutional rights as inmates housed in prisons staffed by public employees because the private prisons perform a public function. *But see Richardson v. McKnight*, 521 U.S. 399 (1997) (holding that private prison guards are not state actors for purposes of state sovereign immunity).

state are typically considered to be private entities.[138] Thus, an entity that receives no funding from the state is more likely than not to function in the marketplace as a private actor because it needs to raise funds in that market to preserve itself. Though quasi-public entities might be privileged in other ways[139] compared to a private actor that is not a direct creature of the legislature, their operational realities—namely, the necessity to remain financially solvent through market participation—makes them more like private corporations than political subdivisions.

Consideration of these special abilities granted to some quasi-public entities naturally leads to the next factor: whether the entity maintains privileges normally reserved to an administrative arm of the state. Privileges that could be considered as factors weighing in favor of finding that an entity is a political subdivision might include the right to sue, the right to issue bonds, and the right to exercise eminent domain. Conversely, certain constraints that normally attach only to private actors, such as the ability to be sued without the protection of sovereign immunity or official immunity, would be considered evidence that an entity is not a political subdivision.[140]

The next factor considers whether the employees are public employees. Though a state's declaration that something is "public" does not necessarily make it so for NRLA purposes,[141] a worker's access to public benefits typically only granted to state employees, such as a state pension, would be evidence that the worker's employer is a political subdivision. On the other hand, a worker who is not granted those benefits might be more appropriately considered a private sector employee.[142]

Next, the NLRB and the courts might consider the entity's engagement in interstate commerce. To be sure, most, if not all, government agencies are engaged in work that has at least some tenuous

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138. *See, e.g.*, *Majerus v. Milwaukee County*, 159 N.W.2d 86, 87–88 (Wis. 1968) (holding that the Wisconsin State Armory Board was not an arm of the state for sovereign immunity purposes because it was financially independent of the state, being able to hold, disburse, and raise funds on its own and did not rely on taxpayer funding).

139. *See id.* at 87 (noting that the armory board could issue bonds so that it was better able to perform the function that the legislature designated to it).

140. *See Rouse v. Theda Clark Med. Ctr., Inc.*, 735 N.W.2d 30, 40 (Wis. 2007) (noting that the right to sue and be sued is evidence that an entity is private rather than political, though it is not dispositive).

141. *NLRB v. Randolph Elec. Membership Corp.*, 343 F.2d 60, 62 (4th Cir. 1965) (noting that the interpretation of federal laws such as the NLRA does not rely on state determinations as to the character of a person or entity).

142. Consider again the private prison guard. Though their paycheck comes (indirectly) from the state, they are not considered state employees. And, unlike their public sector counterparts, they do not have the privilege of official immunity to shield them from litigation. *See Richardson*, 521 U.S. at 412.

connections to interstate commerce because they affect the conduct of actors who substantially impact interstate commerce.[143] But this factor would consider whether the entity actively participates in interstate markets as a producer of goods or services.[144] An entity that markets goods or services in other states clearly acts beyond the scope of a state political subdivision, which exists to benefit state residents and those that interact with the state.

Finally, the NLRB might consider whether exercising its jurisdiction over a quasi-public entity's labor dispute effectuates the purposes of the NLRA. Because it is the "national policy"[145] of the United States to promote collective bargaining and the NLRA was designed to have widely expansive coverage, the Board might consider the availability of other alternative collective bargaining rights under state law when deciding whether a quasi-public entity should be subject to the NLRA.[146] In order to effectuate the national policy of collective bargaining, the Board should lean toward finding jurisdiction in close cases where the state laws are less protective of unions and lean against finding jurisdiction in cases where state laws are more protective of unions.[147]

C. The Operational Realities Test as Applied to the UWHCA Nurses' Union

There are many operational factors that weigh in favor of finding that the UWHCA is not a political subdivision for purposes of the NLRA.

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143. *See Bibb v. Navajo Freight Lines*, 359 U.S. 520, 528–30 (1959) (striking down an Illinois regulation because of the knock-on effect that the regulation had on interstate commerce).

144. It is not enough to be a mere "market participant" in literal terms, because nearly all bona fide political subdivisions are market participants in some way. For example, a typical government worker likely types on a computer that was designed in Washington or California, manufactured abroad with components sourced from around the United States and the world, and shipped across the borders of multiple states. But the purchase and use of that computer alone would not offer any insight as to whether the entity is a political subdivision.

145. 29 U.S.C. § 151.

146. The NLRB frequently considers how its actions would effectuate the intent of the NLRA when making decisions. *See, e.g.*, *Thryv, Inc.*, 372 N.L.R.B. No. 22, 11 (2022) (noting that after employer's unfair labor practices interfered with collective bargaining, NLRB issued expansive remedies "to best effectuate the purposes of the [NLRA]"); *Northwestern Univ.*, 362 N.L.R.B. 1350, 1350 (2015) (declining to exercise jurisdiction over college athlete's players union because "it would not effectuate the policies of the [NLRA] to assert jurisdiction in this case").

147. Unions will occasionally argue against NLRB jurisdiction when their rights fall under state collective bargaining laws. *E.g.*, *KIPP Acad. Charter Sch.*, 369 N.L.R.B. No. 48 (2020) (on appeal by the union after the regional director found NLRB jurisdiction).

Like private companies, the Authority sets its own personnel structures[148] and budget[149] without legislative oversight, and must provide for its own insurance.[150] It can adopt its own bylaws, sue and be sued, enter into leases, and take out loans without any legislative oversight.[151] It can also buy, sell, and lease real estate for its own use,[152] but it must pay to keep its lease on campus at the University of Wisconsin-Madison.[153] While the Wisconsin Department of Justice's Civil Litigation Unit generally defends state political subdivisions in legal matters,[154] UWHCA contracts privately for its own legal services.[155]

Notably, the Authority does not receive any general fund tax revenue from the State of Wisconsin.[156] UWHCA also operates hospitals *outside of Wisconsin*.[157] While it would be highly unusual if the Wisconsin Department of Natural Resources operated facilities in Iowa, for example, UWHCA has owned and operated a network of hospitals in Rockford, Illinois since 2015.[158] Because this unusual fact distinguishes the Authority from virtually any other bona fide political subdivision of any state in the country, it may be the most persuasive argument against application of the *Hawkins* test to determine whether UWHCA is a political subdivision.

Finally, the NLRB's exercise of jurisdiction over the UWHCA dispute would effectuate the purposes of the NLRA. Without a state law framework for the adjudication of labor disputes between the Authority

148. WIS. STAT. § 233.04(2) (2021–22).

149. WIS. STAT. § 233.04(5).

150. WIS. STAT. § 233.04(6).

151. WIS. STAT. §§ 233.03(1)–(2).

152. WIS. STAT. § 233.03(16).

153. WIS. STAT. § 233.04(7).

154. *E.g.*, *Civil Litigation Unit*, WIS. DEP'T OF JUST., https://www.doj.state.wi.us/dls/civil-litigation-unit [https://perma.cc/7EVP-8QTC] (listing the variety of legal services provided to state subdivisions).

155. WIS. STAT. § 233.04(3). Despite the fact that the Wisconsin Department of Justice has an Employment Law division to represent state subdivisions, UWHCA is represented in the nurses' union dispute by a private firm. *See* Opening Brief of the University of Wisconsin Hospitals and Clinics Authority, *Serv. Emps. Int'l Union Healthcare Wis.*, No. 39765 (Wis. Emp. Rels. Comm'n Nov. 25, 2022), https://wisconsinexaminer.com/wp-content/uploads/2022/10/2022.09.23-Opening-Brief-of-University-of-Wisconsin-Hospitals-and-Clinics-Authority.pdf [https://perma.cc/WSS5-WPEN] (noting that Quarles & Brady LLP represents UWHCA).

156. *Rouse v. Theda Clark Med. Ctr., Inc.*, 735 N.W.2d 30, 40 (Wis. 2007).

157. *UW Health in Northern Illinois: Expert Health Care, Expanded*, UW HEALTH, https://www.uwhealth.org/about-us/uw-health-northern-illinois [https://perma.cc/X727-KN78] (explaining that several hospitals in northern Illinois merged with UW Health in 2015).

158. *Id.*

and the union,[159] the nurses have no statutory limitations or protections if the NLRB were to decline to exercise jurisdiction.[160] Thus, to fulfill the NLRA's policy goals of near-universal coverage and the promotion of collective bargaining,[161] this factor would also weigh in favor of finding that the UWHCA is *not* a political subdivision.

Still, some operational factors weigh in favor of finding that the UWHCA is a political subdivision of the state of Wisconsin. The fact that there is some level of political accountability imposed on a majority of UWHCA Board members tends to suggest that the Authority is subject to at least a degree of government oversight.[162] Additionally, most UWHCA employees are considered state employees under state law.[163] And the Authority's board meetings are subject to Wisconsin's open meeting laws, unlike a private corporation.[164] But, on balance, these operational factors seem to be outweighed by the Authority's private characteristics.[165] Accordingly, if the NLRB were to look beyond the *Hawkins* test and take a comprehensive look at the Authority's day-to-day structure, it might find that its relationship to the state is too tenuous to be considered a "political subdivision" within the meaning of 29 U.S.C. § 152(2).

D. The Benefits of an Operational Realities Test

By considering all these factors, the NLRB would ensure that state governments cannot selectively engage in privatization of public entities without also giving the employees the rights granted to private employees, such as the collective bargaining rights granted by the NLRA. The application of this factor test would likely not significantly change the collective bargaining landscape. Applying the suggested factors to a charter school, for example, would still likely yield a finding

159. *Serv. Emps. Int'l Union Healthcare Wis.*, No. 39765 (Wis. Emp. Rels. Comm'n Nov. 25, 2022).

160. *See supra* Section II.B. In states that still offer robust protections for public sector unions, unlike Wisconsin, this factor would be less important, as those workers would retain a state law remedy. In such cases, the balance would tip the other way.

161. *See supra* Section I.A.

162. *See supra* note 117 (noting that the regional director concluded that at least nine out of sixteen UWHCA Board members are either elected officials or appointed by elected officials).

163. *Takle v. Univ. of Wis. Hosps. & Clinics Auth.*, 402 F.3d 768, 771 (7th Cir. 2005) (noting that UWHCA employees remained on state payroll for pension purposes after privatization).

164. WIS. STAT. § 19.83(1) (2021–22).

165. *See Takle*, 402 F.3d at 771.

that a charter school is not a political subdivision,[166] while application to a state-sanctioned utility district would still likely yield a finding that a utility district is a political subdivision.[167]

E. Feasibility Concerns

Admittedly, an operational realities test is more complicated than the razor-like *Hawkins* test, which requires only two analyses[168] that are relatively straightforward in most cases. A two-pronged test with dispositive yes-or-no factors is theoretically easier for decisionmakers to apply than a multi-faceted factor test requiring that decisionmaker to weigh factors based on individual circumstances. But the failure to reinvigorate the "political subdivision" test in light of changing political and economic circumstances, including privatization, would prevent many workers from vindicating their collective bargaining rights. In any case, the NLRB routinely applies fact-intensive multifactor tests in other contexts with little issue.[169] Thus, even if the operational realities test is more complicated and flexible than the *Hawkins* test, the NLRB should have few issues in applying it.

F. The Proposed Test Replaces Outdated Standards with More Flexible Ones Better Suited to the Modern Economy

Other developing areas of labor and employment law illustrate the necessity to update administrative tests to fully effectuate labor legislation. In response to the changing nature of work in the twenty-first century, in which more and more workers provide services for companies like Lyft or Doordash, the U.S. Department of Labor has recently

166. Charter schools are created by the legislature but do not act as an arm of the state and are not politically accountable like a utility district would be. They are financially dependent on the state and perform an essential function of the state, but they do not form an exclusive arm of the state. They do not have the privileges and immunities that state entities enjoy, and their employees are not employees of the state. And many, though not all, charter schools operate in multiple states. *See KIPP Regions*, KIPP PUBLIC SCHOOLS, https://www.kipp.org/schools/kipp-regions/ [https://perma.cc/K587-JJQ5] (noting that KIPP operates charter schools across the country).

167. *See NLRB v. Nat'l Gas Util. Dist.*, 402 U.S. 600, 605–07 (1971) (considering the utility district's operational realities outside the scope of the *Hawkins* test—such as funding and oversight—but nevertheless concluding that the utility is an exempt political subdivision).

168. *Id.* at 605.

169. *See, e.g.*, *SuperShuttle DFW, Inc.*, 367 N.L.R.B. No. 75 (2019) (applying a nonexhaustive ten-factor test to determine whether a worker was an employee or an independent contractor).

proposed rule changes that would alter how workers are classified.[170] Under previously used factor tests, these workers were considered "contractors" and were therefore exempt from many labor protections provided exclusively to "employees."[171] Reflecting the changing nature of the economy, the proposed rules recognize that a typical gig worker does not operationally function differently than a typical employee in most respects.[172] Similarly, the NLRB should consider updating its political subdivision test in order to reflect the fact that trends toward privatization in some states and increasing involvement of the government in the market in other states have blurred the lines between public and private, rendering the *Hawkins* test no longer fit for purpose.[173] Additionally, the fears that may have prompted the drafters of the NLRA to exempt political subdivisions, such as the ability of striking workers to hold the state hostage[174] and the practical constitutional concerns about federalism,[175] are noticeably absent in the situation of semi-privatized entities because these entities are typically divorced from the essential and exclusive functions of the state and are engaged fully in interstate commerce.

Because the UW nurses' union maintains many of these characteristics,[176] it should fight for recognition under the NLRA and advance these theories to help develop and clarify the law surrounding quasi-public employees. This is especially important for quasi-public workers in states like Wisconsin where an employer's status as a political subdivision all but determines whether its employees have a right to organize for better wages and working conditions.[177] As noted above, under an operational realities test such as the one this Comment proposes, the UWHCA would more properly be considered a private employer. On one hand, the UWHCA is legislatively created,[178] is overseen by officials

170. *See* Rachel M. Cohen, *The Coming Fight over the Gig Economy, Explained*, VOX (Oct. 12, 2022, 7:30 AM), https://www.vox.com/policy-andpolitics/2022/10/12/23398727/biden-worker-misclassification-independent-contractorlabor [https://perma.cc/YR9P-M2GJ].

171. *Id.*

172. *Id.*

173. *See Takle v. Univ. of Wis. Hosps. & Clinics Auth.*, 402 F.3d 768, 771 (7th Cir. 2005) (suggesting that entities should not be able to gain the benefits of private or public status without also adopting the constraints that bind a similarly situated public or private entity).

174. Fleming, *supra* note 29, at 3.

175. SLATER, *supra* note 27, at 90–92.

176. *See supra* Part II.

177. *See supra* Section I.B.

178. WIS. STAT. § 233.02(1) (2021–22).

with some modicum of political accountability,[179] and pays its employees through the state payroll.[180] However, it provides neither an exclusive nor essential state function,[181] is financially independent of the state,[182] does not enjoy state privileges such as sovereign immunity,[183] and provides services for sale in other states.[184] On balance, the UWHCA is therefore more properly considered a private employer, even if the *Hawkins* test would yield a different result. The inconsistency between the *Hawkins* result and the result of a test that engages in a more fact-intensive analysis that considers *all* elements of an entity's relationship to the state government highlights the shortcomings of the NLRB's current precedent.

CONCLUSION

A more comprehensive test than the *Hawkins* test would better fulfill the statutory purpose of the NLRA and improve employer-employee relations by promoting collective bargaining in a greater subsection of the workforce. The landscape of government activity in the market has changed dramatically in the decades since the NLRA was passed—in large part due to the specter of privatization.

Just as the Department of Labor has recognized that the modern gig economy has broken traditional distinctions between "contractor" and "employee," the NLRB should recognize that decades-old distinctions between private corporations and political subdivisions fail to accurately reflect a changing landscape. The UW nurses' union, which lacks the labor protections that private employees have despite working in an environment that is functionally the same as those private employees, illustrates this discrepancy. The recently settled issue of charter schools similarly makes plain the fact that the legal assumptions underlying federal labor laws have changed in recent decades. Accordingly, the NLRB should modify the *Hawkins* test and treat entities that act in most all respects like private entities as if they are in fact private entities to effectuate the Act's goals of expansive coverage.

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179. *See* WIS. STAT. § 233.02.

180. *Takle v. Univ. of Wis. Hosps. & Clinics Auth.*, 402 F.3d 768, 770–71 (7th Cir. 2005).

181. *See supra* notes 107–15 and accompanying text.

182. *Rouse v. Theda Clark Med. Ctr.*, 735 N.W.2d 30, 40 (Wis. 2007).

183. *Id.*

184. *See UW Health in Northern Illinois*, *supra* note 157 (explaining that several hospitals in northern Illinois merged with UW Health in 2015).