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February 15, 2018

TO: Members of the Assembly Committee on Federalism and Interstate Relations
FR: Representative Dale Kooyenga
RE: support for Assembly Bill 879 – federal coercion

Thank you for holding a hearing on Assembly Bill 879. This bill relates to coercive conditions attached to federal funding.

Over the last several years, the coercive conditions attached to federal funding has become excessive. This bill establishes a framework through which future legislatures can evaluate the conditions for receipt of federal funding and determine whether or not it is in the state's interest to accept those conditions.

Regardless of which party is in power in Washington, the tendency of the federal government to pressure states to act in accordance with the political will of Washington is universal and timeless. The unfortunate result is coercive and onerous requirements have built up and gone unexamined for decades in state and federal law.

We have introduced this bill as a means by which to identify, evaluate and with the assistance of the Attorney General, fight back on some of the more egregious infringements on state's rights.

This bill requires the Legislative Fiscal Bureau and the Legislative Council to submit a joint report following each biennial budget to the governor, attorney general and the legislature that identifies coercive conditions attached to federal funds. Additionally, the bill does not create a permanent recurring report as the legislation sunsets in 2039 if a future legislature does not act to retain the provisions.

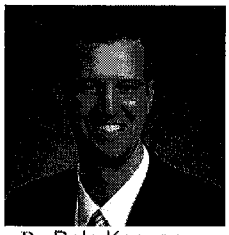
Lastly, during the senate public hearing on the companion bill, a concern was raised regarding the ability of the legislature to compel the governor to consult with governors of other states. In response to this concern, we have introduced an amendment to delete this provision.

Thank you for hearing this bill and I respectfully ask for your support.

THE FEDERALIST
A PUBLICATION OF FORREST MEDIA

What Military Uniforms' 'Flag First' Can Teach Us About Good Government

The American flag has 50 divinely beautiful stars in the canton with each one representing our 50 states. So, even in battle, as a unified national fighting force, the states lead the way.



By Dale Kooyenga
FEBRUARY 1, 2017

Army Drill Sergeant Henry was born to be a drill sergeant. He looked like a drill sergeant. His chiseled features were striking, and only his bulging eyes stuck out further than his bulging biceps. Everything about this man was flawless, topped with his meticulously worn drill sergeant cap.

During basic training, Drill Sergeant Henry asked us if we knew why the American flag is "backwards" on U.S. military uniforms. We all stood there clueless—a common pose for recruits in basic training—and Drill Sergeant Henry reminded us that we didn't know anything until he taught us so, of course, we didn't know the answer.

At 6'7" and the only soldier in basic training heading off to Officer Candidate School, I received more than my share of the drill sergeant's attention. Drill Sergeant Henry eyeballed me, "Come on college boy, didn't they teach you anything about the American flag in all your education?" I responded, "No, drill sergeant, I was not taught why the flag flies backward on the U.S. Army uniform."

Drill Sergeant Henry then informed us that when you head into battle, some mother's son would run ahead of another mother's son, and that fortunate soldier would run as fast as he could with the U.S. flag. "And did that flag fly with the stars in the back? Hell, no! Because when a flag is on the move, the stars are leading the way. Yes, the stars lead us into battle and they are always moving forward."

The American flag has 50 divinely beautiful stars in the canton with each one representing our 50 states. So, even in battle, as a unified national fighting force, the states lead the way. This, of course, is wholly appropriate, for the states created the federal government and our Constitution, not the other way around.

Government Is For Us, Not Us For Government

The symbolism of our flag is a reflection of our framers' reality: We are a republic, not a Washington DC-based, centralized power that dictates to the states what they can and cannot do. There are limits to federal power. The Constitution details what the federal government (and states) cannot do to citizens. The Tenth Amendment is clear that the federal government's power is limited, and all other power is reserved to the states or states' citizens.

The first three words of the Constitution—"We the People"—declare that the document was written for citizens, not the government. The role of the federal government is to

ensure that our individual freedoms are protected. Examples of this protection are the right to bear arms, freedom of speech, and protections of civil rights.

The federal government has effectively neutered the Tenth Amendment by collecting tax revenue from the states and then returning the same dollars with thousands of conditions that effectively federalize state and local government operations. It does something similar on the regulatory front when it approves or disapproves state implementation plans for federal programs, forcing states into the role of field agencies of the federal government.

States Do Most Government Jobs Better

I am a citizen-soldier. I'm a member of the Army Reserves, an accountant, and a Wisconsin state representative. In Wisconsin, we've passed historic labor reforms, cut taxes, expanded school choice, and continue to work to right-size and properly focus government. Throughout our history, the states have led the way.

States are able to quickly adapt based on the experiments other states conduct. Geography, demographics, natural resources, and other factors position local and state elected officials better than federal elected officials to develop public policy.

Unfortunately, federal elected officials and, even worse, unelected federal bureaucrats heap scores of regulations on states, businesses, and individuals. According to the U.S. Chamber of Commerce, since 1976 federal agencies have issued more than 180,000 new regulations, making it nearly impossible to even define the breadth and scope of the federal government's reach into our personal and professional lives.

Federal Regs Keep Me From Representing My Constituents

Let me explain my concerns about federal overreach in legislating at the state level. I ran for office to solve problems, but over my six years in office I've been continually reminded that states lack many of the tools necessary to create innovative solutions in response to significant problems.

Medicaid is a perfect example. In 2012, the Supreme Court handed down a landmark decision that affirmed limits on federal power to coerce states into action. Their ruling quashed the federal Medicaid blackmail scheme, which would have forced states to accept expansion of the program or risk losing existing funds.

That was a significant ruling, but problems persist. Medicaid is a federally mandated but state-run program in which the federal government matches a share of expenditures in return for the ability to dictate state program parameters. The federal government retains the ability to decide the model of care for each state, as opposed to allowing states to create a system that matches their local needs.

Because of the perverse financial relationship between states and the federal government, states have very limited flexibility to experiment with innovative health-care delivery models, which could raise the standard of care and save scarce taxpayer resources. Some have gone so far as to describe the relationship as coercive, whereby the federal government uses the threat of withholding federal funds to coerce states into its plan.

Even worse, some have described the federal government's conduct as commandeering, such as when it dictates specific commands to state agencies, essentially commandeering a state agency for federal purposes.

Recently, I participated in a conference call with the Centers for Medicare and Medicaid Services (CMS), the federal authority that approves all Medicaid deviations. A CMS official dashed my hopes by saying individual state legislators do not have the power to seek exceptions to Medicaid laws or rules, and that only a state executive branch can request waivers.

This leaves the fastest-growing portion of all 50 states' budgets outside the purview of the legislative bodies that most closely and directly represent the people. The frustration is compounded when the growth of Medicaid expenditures cannibalize nearly all of the growth in state revenue, diverting state lawmakers' power to reduce tax burdens or increase resources for priorities such as education.

Stop Blackmailing Us

The federal government collects billions of dollars from taxpayers in every state, yet in order for those same state taxpayers to become or remain eligible to receive their own money back, state governments must agree to and comply with Washington's terms and conditions. These are often arbitrary, ridiculous, and completely unrelated to the underlying rules and regulations.

When one of my soldiers returns home from a deployment, I maintain the tradition of taking that soldier out for a beer. However, occasionally that soldier is less than 21 years old, so not able to legally have a beer in the United States. I'd guess most Americans would agree a soldier who has been entrusted by his country with weapons of war to protect our nation's security deserves to legally have a beer when he or she returns home to American soil (especially if that soldier is from a proud beer-producing state like Wisconsin).

Washington's 'solutions' usually come with strings attached that only create more problems.

If Wisconsin's representatives agreed with me and decided to pass a law to allow our combat veterans younger than 21 the freedom to enjoy a beer, our state would face significant financial retribution from the federal government. In fact, if Wisconsin lowers the drinking age, the state could annually lose at least $53 million in federal highway funds for each year the state is out of compliance. That's blackmail, and it's wrong.

States residents and therefore governments in states like California and Wisconsin have dramatically different ideas on government's role in health care. Americans across all political affiliation should unite and encourage our elected officials in Washington DC to divest power to states and individuals.

Fortunately, leaders like House Speaker Paul Ryan have advocated for this approach, and 2017 may be the year we see a return to the principles of federalism. Many, if not most, Americans are skeptical of Washington. We, as states, should not be looking to or

relying upon the federal government for solutions, because Washington's "solutions" usually come with strings attached that only create more problems.

We are at a crossroads and a time for choosing. It's time to return power to the states. Let's let our states, the real stars, lead us into the battle for a better America. If not now, when?

Dale Kooyenga is a state representative and Army Reserve member from Wisconsin.
Photo DVIDSHUB

DUEY STROEBEL

STATE SENATOR • 20TH DISTRICT

Testimony on AB 879

February 15, 2018

Chairman Vorpagel and members of the Assembly Committee on Federalism and Interstate Relations, thank you for having a public hearing on AB 879. AB 879 would create a framework and biennial report on potentially coercive requirements from the federal government.

In the 2012 U.S. Supreme Court case NFIB v. Sebelius, the Court elaborated upon and reinforced the principal that the federal government does not have the right to place coercive requirements on states because they are receiving some quantity of federal dollars. Regardless of which party is in power in Washington, the tendency of the federal government to pressure states to act in accordance with the political will of Washington is universal and timeless. The unfortunate result is coercive and onerous requirements have been built up, unexamined for decades in federal law.

AB 879 defines coercive as meeting one of two criteria:

1) the federal condition requires the expenditure of nonfederal state or local funds, including maintenance of effort and similar requirements.

2) the federal condition relates to matters of state or local policy other than the manner in which federal, state, or local funds must be spent.

The bill exempts grants for which the state applies and therefore truly voluntarily take on any requirements. This is intended to deal with examples like research grants applied for by the UW System.

AB 879 orders the Legislative Fiscal Bureau and Legislative Council to create a biennial report. All expenditures of federal funds greater than $5 million per biennium will need to be identified by Fiscal Bureau and compiled, along with a general description of the conditions, for review by Legislative Council. Legislative Council then reviews this information and identifies which federal requirements on the appropriations may meet the definition of coercive under the Constitution. The Attorney General is then authorized, at his or her discretion, to sue the federal government on any of the issues outlined in the report.

The report is due 90 days after the completion of the biennial budget. Acknowledging the first report will require the most work, AB 879 gives LFB and Legislative Council all of 2018 to complete the first report on the '17-'19 state budget. Whether one is concerned about overreach in Obama era regulations or Trump era rules on local cooperation with federal immigration priorities, AB 879 helps protect the sovereignty of Wisconsin and keeps decision making power in Madison, not Washington D.C. Thank you.

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February 15, 2018

Dear Chairman Vorpagel and members of the Committee,

Thank you for the opportunity to testify today regarding Assembly Bill 879.

We all agree, at least in theory that we live under some form of federalism. The form of federalism that existed through most of our history – from the founding and through Reconstruction and up to the mid-twentieth century – can be described as "competitive federalism." It recognized the national and state governments as sovereigns with each assigned their own responsibilities. Where authority was given to the federal government, it reigned supreme. But federal authority was not thought to be plenary. All governmental authority not given to the national government remained in the states. And the authority of both the national and state governments was circumscribed by the rights of the people.

This careful delineation and limitation on the respective spheres of national and state authority was not designed to serve either the national or state governments. It was intended to protect the people. The national and state governments would act as a check against the abuse of power by the other. The freedom of the states to serve as laboratories of democracy combined with their obligation to function in a national system results in a system where each serves as a check on the other. It should be noted that the purpose of this system was not merely "state's rights." To be sure, states have rights vis-à-vis the federal government but, as I just noted, there are areas in which federal power supersedes the authority of the states. It is also the case – particularly since the Reconstruction era amendments – that all states must respect the rights of all citizens of the United States.

Today, many propound a different form of federalism often referred to as "cooperative federalism." While cooperation has connotations of power sharing and compromise, cooperative federalism turns out to be just the opposite. It sees the states as junior partners helping the federal government wield what is more or less plenary authority. To the extent that states are given freedom to choose or implement policy, this freedom must be exercised in accordance with federal direction. States are permitted to do only what the federal government will permit. Policy and priorities on a wide range of policies are not made in Sacramento or Tallahassee or Madison. They are set in Washington.

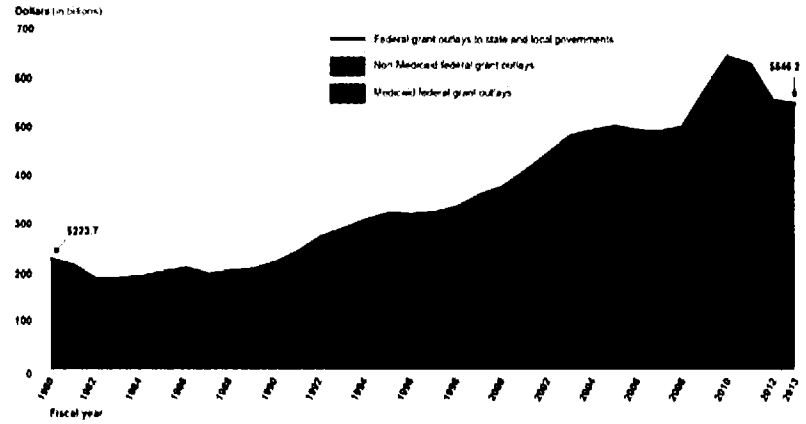
The methods employed by this faux federalism are all too familiar. An overly expansive reading of Congress' commerce power has given the federal government something akin to a national police power. Accountability for the exercise of that power has been eroded by the absence of any meaningful limitation on Congressional delegation of authority to administrative agencies. Vague and malleable guarantees of "non-discrimination" or "environmental protection" can be used to shape state policy in accordance with the preferences of the national government. **In addition to unfunded mandates, the federal government seeks to shape state policy through conditional grants and the threat of federal regulatory schemes that can be avoided only by the adoption of compatible state restrictions.**

It is the latter tool that we are here to consider. Starting in the post-war era, the federal government began transferring to state governments increasing amounts of federal revenue. **Federal spending**

programs now account for about a third of all state spending, spread across hundreds of programs. But the money is not free. Not only does it come from the taxpayers of the various states, it comes with strings attached. These conditions do not simply specify the manner in which this federal largesse is to be used, but may extend to dictate other aspects of state policy. Do you want federal highway dollars? Well, then you better set the speed limit or drinking age where Washington wants it. Those conditions apply not just to what states do with the federal grant money, but also to what they do with their own money and even to state policies that are entirely secondary to the grant purpose, in areas which the federal government is still specifically prohibited from regulating.

Conditional federal grant programs inflate state budgets well beyond what states would be willing or able to sustain with their own tax revenue. **With federal "assistance," states are able systematically to spend more than 30 percent above what they generate in taxes.** It is no coincidence that this state fiscal surplus accounts for virtually the entire federal deficit. **According to OMB's historical tables, assistance to the states averaged about 3.0 percent of GDP between 1982 and 2012. During the same period, the federal deficit has averaged 3.4 percent of GDP**. This does not mean that spending has remained constant – far from it. The economy has grown enormously since the early 1980s, and so have federal outlays to the states, as Figure 1 shows.

Figure 1: Total Federal Outlays for Grants to State and Local Governments and Medicaid, in 2013 Constant Dollars, Fiscal Years 1960-2013



Source: GAO analysis of OMB data.

This not only ratchets up spending. It distorts it. **The federal government rarely pays for everything.** Maintenance of efforts and matching requirements remake state budgets. State employees who are paid with money from Washington know who their real bosses are and act accordingly. As noted earlier, the supposedly free money must be purchased by the adoption of policies that a state might not otherwise adopt.

Conditional grants essentially allow the federal government to expand its power while escaping accountability for the results. Congress raises huge deficits in order to purchase control over state governments, by inflating their budgets to the point of utter dependency. That's how Congress buys the obedience of state officials, regardless of party, and regardless how much their constituents might prefer a state alternative to the federal program. The scheme also offers a way for uncompetitive, big-government states to eliminate the competitive advantage of small-government states. State legislators, regardless of party, find it virtually impossible to turn down the federal offer to return to them the money already taken from their constituents – under the coercive threat of transferring the money to other states. This explains why virtually the entire growth in the American public sector since the 1950s has occurred at the state and local level – not, surprisingly, the federal level.

In *Steward Machinery* and more modern cases such as *South Dakota v. Dole*, the Supreme Court has blessed these arrangements over Tenth Amendment and Article II challenge on the unrealistic expectation that the states can always say "no." But, in the recent *Sebelius* case, it held that Congress could not make a state's entire Medicaid funding contingent on its agreement to expand the program in the ways mandated by the Affordable Care Act. It made clear that "the financial inducement offered by Congress" may not be "so coercive as to pass the point at which 'pressure turns into compulsion.' In so doing, the Court expressly recognized that the purpose of federalism was the protection of liberty and not state governments, noting that the federal system "rests on what might, at first, seem a counterintuitive insight that 'freedom is enhanced by the creation of two governments, not one.'" This was a revolutionary development expected by almost no one.

It is unclear what the contours of *Sebelius* will turn out to be. Congress will not necessarily condition the continuation of existing – as opposed to new – funding on compliance with a new condition. Most federal programs do not constitute nearly as much of a state's budget as Medicaid. Thus, the ACA provisions invalidated what may have been coercive in a way that few others will be. Indeed, the Court characterized the ACA provisions in question as a "gun to the head" and over the line where "persuasion gives way to coercion." But the Court expressly declined to fix the location of the line, leaving it to future cases. As a result, this potentially useful aspect of *Sebelius* is yet to be explored.

The bill before you today is similar to model legislation that my organization drafted. **What it mandates is transparency. Most residents of Wisconsin do not understand the extent to which their state budget has been eaten by Washington.** When politicians lament the lack of money for the university or other state priorities, they don't mention – and our citizens do not understand – the extent to which lawmakers' hands have been tied by chasing federal priorities. They do not understand the extent to which we may have made a Faustian bargain – selling our sovereignty for federal dollars.

But we can't begin to deal with that until we understand what has happened. **And a good first step is to know what policies are being made in Washington and being imposed on us through the extension of an offer we can't refuse.** Public debate will be advanced if the citizens of our state know how much federal money is conditioned on the adoption of policies that do not relate to the manner in which the money must be spent.

As the courts explore the meaning of *Sebelius*, there may be areas where the constitutionality of these conditions should be challenged. Understanding where we are and considering whether the federal government has exceeded its constitutional bounds is not a complete answer to the loss of competitive federalism, but it is a good beginning.

Richard M. Esenberg
President/General Counsel

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PREPARED TESTIMONY OF SOLICITOR GENERAL MISHA TSEYTLIN

Testimony on AB 879
Assembly Committee on Federalism and Interstate Relations
February 15, 2018

Chairman Vorpagel, Vice Chair Schraa and Committee Members,

Thank you for the opportunity to testify in support of AB 879, which will assist the Wisconsin Department of Justice and its Office of the Solicitor General in protecting the State and people of Wisconsin from unconstitutional overreach by the Federal Government.

A primary reason that Attorney General Brad D. Schimel strongly supported the Legislature's creation of the Office of the Solicitor General, Wis. Stat. § 165.055(3), is to help battle against unconstitutional federal overreach. Over the last two years, the lawyers in the Solicitor General's Office have worked hard to fulfill that purpose. To take just a couple of examples, the Office played a leading role in obtaining the historic stay of the so-called Clean Power Plan from the United States Supreme Court, a stay that saved Wisconsin consumers from having their electricity rates sky-rocket. *AG Brad Schimel Applauds SCOTUS Clean Power Plan Stay*, Wisconsin DOJ, https://www.doj.state.wi.us/news-releases/ag-brad-schimel-applauds-scotus-clean-power-plan-stay (Feb. 9, 2016). That stay was the first time that the Supreme Court has blocked a federal regulation while litigation over that regulation was still pending in a lower court. The Office also led a bipartisan, multistate coalition—with States ranging from Vermont to Arkansas—successfully challenging a Federal Communications Commission order that removed from the States their statutory authority to decide which companies would be eligible to provide free broadband services to low-income consumers. *AG Schimel Declares Victory in Challenge to "Designation Rule" in FCC's "Lifeline Reform Program,"* Wisconsin DOJ, https://www.doj.state.wi.us/news-releases/ag-schimel-declares-victory-challenge-"designation-rule"-fcc's-"lifeline-reform (Mar. 30, 2017).

Enactment of AB 879 would be helpful to the efforts of the Wisconsin Department of Justice and its Office of the Solicitor General in protecting the State of Wisconsin from federal overreach. It is axiomatic that under the United States Constitution, the Federal Government has only limited, enumerated powers. As the Supreme

Court has concluded in cases such as *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), Congress' powers do *not* include the authority to commandeer the States into administering federal programs. Congress has, however, sought to evade this limitation by requiring States, as a condition of receiving federal funding, to administer federal programs. In *South Dakota v. Dole*, 483 U.S. 203 (1987), and then in *NFIB v. Sebelius*, 567 U.S. 519 (2012), the United States Supreme Court made clear that it is unconstitutional for the Federal Government to use its Spending Clause authority to coerce the States into doing its bidding. In *NFIB*, for example, the Supreme Court held that it was unconstitutional for Congress to take away a State's entire Medicaid budget simply for refusing to administer the Affordable Care Act's Medicaid expansion in its State.

AB 879 will assist the Wisconsin Department of Justice and its Office of the Solicitor General in identifying, evaluating, and, if necessary, bringing lawsuits against federal spending conditions. Federal funds make up more than a quarter of the budget of most States, including Wisconsin. *Federal Grants to State and Local Governments*, Congressional Budget Office, https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/03-05-13federalgrantsonecol.pdf (March 2013); *Which States Rely Most on Federal Aid?*, Tax Foundation, https://files.taxfoundation.org/legacy/docs/FedAidtoStates_hi-res.png. Given the volume and variety of such federal funding programs, it is infeasible for the Office of the Solicitor General to comprehensively evaluate all of these funding conditions to determine which ones should be challenged in court. It is my understanding that the Legislative Fiscal Bureau and Legislative Council are well-positioned to carry out this task.

AB 879 is worthy of this Committee's support without regard to partisan affiliation. Federal overreach crosses party lines, as the Federal Government aggregates power to itself at the expense of the States and the people. Having a catalogue of federal coercive spending measures impacting Wisconsin will help assist in identifying and challenging those measures, regardless of the party in power in Washington or Madison. Notably, a successful litigation challenge in court would often leave the State with *more* policy options. For example, after the Supreme Court's *NFIB* decision, each State now has the option of accepting (or not) the Medicaid expansion, without fear of losing its entire Medicaid budget.

Thank you, again, for allowing me to testify before you today. If you have any questions please contact Lane Ruhland, Director of Government Affairs at ruhlandle@doj.state.wi.us, or Misha Tseytlin, Solicitor General, at tseytlinm@doj.state.wi.us.

AMERICANS FOR PROSPERITY
WISCONSIN

TO: Members of the Assembly Committee on Federalism and Interstate Relations

FROM: Eric Bott, Americans for Prosperity State Director

DATE: February 15, 2018

RE: Support Assembly Bill 879, Coercive Federal Mandate Reporting

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Chairman Vorpagel, Vice-Chair Schraa, and Members of this Committee thank you for holding this hearing and for the opportunity to provide testimony. We also want to thank Representatives Kooyenga and Rohrkaste and Senators Stroebel and Craig for authoring this legislation.

On behalf of the more than 130,000 Americans for Prosperity activists in Wisconsin, I urge you to support Assembly Bill 879 which will identify coercive federal mandates and allow Wisconsin policy makers to make better informed decisions to protect the individual liberties of Wisconsinites.

Every year the Federal government hands down new mandates to states that result in costly expenses and excessive requirements for Wisconsin and its citizens. These coercive orders adversely impact Wisconsin's budgetary interests and often remain in effect for decades without review.

Assembly Bill 879 will shed light on the actual cost of accepting federal funds made available to Wisconsin when those funds come with strings attached. This bill undertakes a vital step forward in empowering the Legislature, Governor, and Attorney General with critical information that will allow them to make better decisions about whether to comply with, ignore, or challenge coercive federal mandates.

Americans for Prosperity actively supports the passage of Assembly Bill 879, and we look forward to working with you in the future. Thank you for your consideration.

Americans for Prosperity (AFP) exists to recruit, educate, and mobilize citizens in support of the policies and goals of a free society at the local, state, and federal level, helping every American live their dream – especially the least fortunate. AFP has more than 3.2 million activists across the nation, a local infrastructure that includes 36 state chapters, and has received financial support from more than 100,000 Americans in all 50 states. For more information, visit www.AmericansForProsperity.org.