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Testimony in Support of S.B. 163:
An Act Protecting Employee Freedom of Speech and Conscience

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I submit this written testimony in support of S.B. 163, An Act Protecting Employee Freedom of Speech and Conscience.

I am the General Counsel of the American Federation of Labor & Congress of Industrial Organizations (AFL-CIO) and have held that position since 2012. Prior to that, I served as a Member of the National Labor Relations Board from 2010 to 2012. I have also taught labor law at Yale Law School, Georgetown Law School, the University of Chicago Law School, and the University of California at Los Angeles Law School. I have practiced and taught in the areas of labor and employment law for 40 years.

In this testimony, I do not address the obvious merits of S.B. 163, a bill that would prevent employers from using their economic authority over employees to invade the most central aspects of their freedom of conscience. Instead, I address two possible objections to S.B. 163 – that it interferes with employers' right to freedom of speech and that it is preempted by federal labor law.

S.B. 163 extends existing Connecticut law's protection of employee freedom of speech to protect freedom of conscience. The bill is intended to protect individuals' fundamental right of freedom of thought against efforts by employers to misuse their authority over employees by requiring employees to listen to speech concerning core matters of individual conscience unrelated to their jobs. As Justice William O. Douglas recognized in Public Utilities Commission v. Pollak, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting), it is "a form of coercion to make people listen." And although those words appear in a dissent, a majority of the United States Supreme Court has subsequently recognized that "no one has a right to press even 'good' ideas on an unwilling recipient." Rowan v. United States Postal Office Dept., 397 U.S. 728, 738 (1970). In fact, the Court has stated that "[t]he unwilling listener's interest in avoiding unwanted communications has been repeatedly identified in our cases" as a proper basis for narrowly tailored government regulation. Hill v. Colorado, 530 U.S. 703, 716 (2000).

A. **S.B. 163 is Consistent with the First Amendment**

In considering possible First Amendment objections to the bill, it is critical to recognize the narrow category of conduct it proscribes. The bill in no way prevents employers or anyone else from discussing religion, politics or any other subject. The only thing the bill prohibits is threatening to discharge or disciple or actually discharging or disciplining employees who do not wish to listen to such speech. See Section 1(b).

The First Amendment does not protect such economic compulsion. As the United States Supreme Court has stated, "It is . . . important . . . to recognize the significant difference between state restrictions on a speaker's right to address a willing audience and those that protect listeners from unwanted communication." Hill v. Colorado, 530 U.S. 530 U.S. 703, 715-16 (2000). Here, as in Hill, "[t]he statute deals only with the latter." Id. Surely, no one would seriously argue that the First Amendment gives an employer the right to order employees to leave their work or even come in from home in order to be told why they should be Catholics instead of Protestants or Democrats instead of Republicans and the right to fire any employee who declines to attend such a meeting. But that is all the bill would prohibit.
The United States Supreme Court has made clear that the First Amendment permits regulation of

such "captive audiences." "The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech." Frisby v. Schultz, 487 U.S. 474, 487 (1988) (resident inside home). See also Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986) (children in school); Lehman v. Shaker Heights, 418 U.S. 298, 305-08 (1974) (Douglas, J., concurring) (passengers on a bus). This is because "[w]hile [a person] clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it." Id. at 307. The Court has held that the First Amendment permits "protection of the unwilling listener." In Erznoznik v. Jacksonville, 422 U.S. 205, 209 (1975), the Court explained:

[W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. . . . Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home . . . or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.

In fact, the Court has expressly recognized that "States can choose to protect [this right to be let alone] in certain situations." Hill, 530 U.S. at 717 n. 24. See also Frisby, 487 U.S. at 484 ("the State may legislate to protect" unwilling listener).

Employees ordered to attend a meeting or listen to speech on pain of discharge are clearly a "captive audience" as that term is used in the Supreme Court's First Amendment jurisprudence. The Court has "repeatedly recognized the interests of unwilling listeners in situations where 'the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.'" Hill, 530 U.S. at 718 (quoting Erznoznik, 422 U.S. at 209). Surely it is "impractical" for employees to give up their jobs in order to avoid unwanted communication.

When the government regulates speech to protect such a captive audience, the Court has considered whether the regulation is "narrowly tailored to protect only unwilling recipients of the communications." Frisby, 487 U.S. at 484. This is clearly the case here where the bill protects only unwilling recipients and leaves employers completely free to communicate with willing recipients of their communications. The proposed bill would create a protection similar to that upheld in Rowan, protecting only those individuals who affirmatively choose not to be exposed to unwanted speech. In Rowan, the Court upheld a federal statute that required mailers to remove an individual's name from its mailing list and stop all mailings to that individual upon the individual's request. In Rowan, mailers remained free to send mail to individuals until they requested otherwise. Similarly, if the proposed bill is adopted, employers will remain free to communicate with employees on all subjects until an employee refuses to listen. After the request to be left alone in Rowan, the mailer was barred from ignoring the request and continuing to communicate with the unwilling recipient. Similarly, if the proposed bill is adopted, after an employee refuses to listen, the employer will be barred from coercing attendance by threatening to or actually firing or otherwise disciplining the employee. Only unwilling listeners are protected and, thus, any limit on speech is narrowly tailored to its proper purpose.

Finally, the First Amendment clearly permits regulation of conduct that is separable from speech. It is a bedrock First Amendment principle that "expression may be limited when it merges into

conduct." R.A.V. v. St. Paul, 505 U.S. 377, 414 (1992) (White, J., concurring). Firing an employee for declining to attend a meeting concerning religion or politics is conduct, not speech. The First Amendment protects neither that conduct nor a threat to engage in such conduct.

S.B. 163 is consistent with the First Amendment.

B. **S.B. 163 is Not Preempted by Federal Labor Law**

Opponents may also argue that the bill is preempted by federal labor law (specifically, the National Labor Relations Act or NLRA, 29 U.S.C.§§ 141 et seq.). As fully explained below, however, federal labor law does not bar states from enacting legislation prohibiting employers from requiring their employees to listen to speech unrelated to job performance on pain of termination or other disciplinary action.

1. Basic Principles of Preemption

As the United States Supreme Court has recognized, "The NLRA contains no express pre-emption provision." Building & Construction Trades Council v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc., 507 U.S. 218, 224 (1993). Moreover, "'Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.'" Id. (quoting Maryland v. Louisiana, 451 U.S. 725, 746 (1981)). Finally, "the Court has recognized that it 'cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the States." Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 757 (1985) (quoting Motor Coach Employees v. Lockridge, 403 U.S. 274, 289 (1971)).

The proposed bill falls into several well-recognized exceptions to federal labor law preemption.

2. The State's Authority to Establish Minimum Working Conditions Permits It to Enact the Proposed Bill

The Supreme Court has made clear that "[s]tates possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." Metropolitan Life Ins., 471 U.S. at 756 (quoting DeCanas v. Bica, 424 U.S. 351, 356 (1976)). "Child labor laws, minimum and other wage laws, laws affecting occupational health and safety . . . are only a few examples." Id. "[T]here is no suggestion in the legislative history of the [National Labor Relations] Act that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards." Id. "Federal law in this sense is interstitial, supplementing state law where compatible, and supplanting it only when it prevents the accomplishment of the purposes of the federal Act." Id. In other words, the Court has long recognized that states can establish minimum working conditions without interfering with federal labor law.

The proposed bill is permissible minimum conditions legislation. The bill applies to all workers in the State and protects all workers from being disciplined for declining to attend meetings where they are subject to indoctrination on issues unrelated to job performance. A state can pass a law preventing an employer from forcing employees to work under conditions that threaten their

physical safety ("laws affecting occupational health and safety"). Similarly, a state can pass a law preventing an employer from forcing employees to attend a meeting that threatens their psychological safety – i.e., their freedom of conscience. It is clear, to cite another example, that a state can pass a law barring discharge of employees without just cause. See, e.g., Mont. Code Ann. 39-2-901 (Wrongful Termination from Employment Act); St. Thomas-St. John Hotel v. Govern. U.S. Virgin Islands, 218 F.3d 232 (3d Cir. 2000) (holding Virgin Islands' unjust discharge law not preempted). It is also clear that a state can pass a law barring discharge of employees for a limited set of improper reasons, for example, on the basis of race. The proposed legislation falls into the latter category. It bars employers from disciplining or discharging employees for an improper reason -- refusing to listen to speech unrelated to their job performance.

The bill is thus permissible minimum conditions legislation and is not preempted by federal labor law.

3. The State's Authority to Regulate Activity Touching Upon Deeply Rooted Local Concerns Permits it to Enact the Proposed Bill

States are permitted to adopt regulations, even when they affect labor relations, when they address matters "deeply rooted in local feeling and responsibility." Farmer v. Carpenters Local 24, 430 U.S. 290, 298 (1977). This is because in these areas there is "an overriding state interest" in the regulations. Id. The state regulations that have been upheld on this ground typically protect personal dignity and private property. Thus, courts have held that state laws barring violence, trespass, defamation, and intentional infliction of emotional distress are not preempted because they address deeply rooted local concerns. Sears, 436 U.S. 180 (trespass); Automobile Workers v. Russell, 356 U.S. 634 (1958) (mass picketing and threats of violence); Linn v. Plant Guard Workers, 383 U.S. 53, 62 (1966) (defamation); Farmer, 430 U.S. 290 (emotional distress). Surely the state has as much if not more of "'an overriding state interest'" in protecting its residents' freedom of thought as it does "in protecting its residents from malicious libels." Linn, 383 U.S. at 61. "The State," the Supreme Court has recognized, "has a substantial interest in protecting its citizens from th[is] kind of abuse." Id. at 302.

The State has a similar deeply rooted interest in protecting personal dignity and freedom of thought by barring employers from forcing employees to listen to speech concerning core matters of individual conscience unrelated to their job performance. Yale law professor Charles Black wrote eloquently:

Few shafts could strike with more on-target insult at the very manhood of humanity than its degradation into a collectivized object of speech, powerless to escape and powerless to answer. . . . What is perfectly clear is that the claim to freedom from unwanted speech rests on grounds of high policy and on convictions of human dignity closely similar to if not identical with those classically brought forward in support of freedom of speech in the usual sense.
Charles L. Black, Jr., "He Cannot But Hear: The Plight of the Captive Auditor," 53 Colum. L. Rev. 960, 967 (1953).

The compulsion involved in employers' conditioning employment on listening to such speech places the legislation squarely within the categories of laws intended to protect personal dignity

and liberty that have been deemed deeply rooted in local feeling and responsibility. Cf. Russell v. Kinney Contractors, Inc., 342 Ill.App.3d 666, 795 N.E.2d 340 (5th Dist. 2003); Radcliffe v. Rainbow Construction Co., 254 F.3d 772, 784-85 (9th Cir. 2001) (both holding tort action for false imprisonment arising out of labor dispute deeply rooted in local feeling and responsibility and thus not preempted).

The deeply rooted nature of the state interest in protecting citizens from this form of coercion is demonstrated by long-standing and pervasive state regulation in this area. Since the Progressive Era, states have adopted laws preventing employers from exercising undue influence on their employees' exercise of the franchise. See, e.g., Okla. Rev. Laws § 3139 (1910), reprinted in U.S. Bureau of Labor Statistics Bulletin No. 148, at. 2, at 1707 (1914) (providing that it was a misdemeanor for any corporation to influence or attempt to influence "by bribe, favor, promise, inducement, threat, intimidation, importuning or beseeching" the vote of any employee). A compilation of statutes from a majority of states "protect[ing] employees against being influenced, controlled, or coerced by their employers in the exercise of the suffrage" appears in Note, "Pay While Voting," 47 Colum. L. Rev. 135, 136 n. 9 (1947). A more recent survey of state regulation in this area appears in Carroll, "Protecting Private Employees' Freedom of Political Speech," 18 Harv. J. on Leg'n. 35, 58-62 (1981). Similarly, "federal and cognate state civil rights laws forbid non-confessional employers from subjecting employees to religious proselytization or requiring them to attend devotional services." Finkin, "Captive Audition," 15 Emp. Rts. & Emp. Pol'y J. at 370. See, e.g., Milwaukee County Sheriffs' Ass'n v. Clarke, 588 F.3d 523 (7th Cir. 2009) (public employer's requirement that employees attend meeting and listen to religious speaker violated the First Amendment).

The deeply rooted nature of the state interest here is also demonstrated by the almost universal prohibition of such compulsion to listen in the laws of other nations. See Finkin, "Captive Audition," 15 Emp. Rts. & Emp. Pol'y J. at 66-69.

The proposed bill protects this deeply rooted state interest and, therefore, would not be preempted.

For each of these reasons, the proposed bill is not preempted by federal labor law.

Conclusion

Neither the First Amendment nor federal labor law stands as an obstacle to the adoption of this important legislation.

Respectfully submitted,

/s/ Craig Becker
Craig Becker