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AMERICA'S UNIONS

M E M O R A N D U M

TO: California Labor Federation, AFL-CIO
FROM: Matt Ginsburg, General Counsel, AFL-CIO
RE: Legal Support of SB 399: California Worker Freedom from Employer Intimidation Act
DATE: September 11, 2024

On behalf of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the following explains why Senate Bill No. 399 ("SB 399"), California Worker Freedom from Employer Intimidation Act, is entirely lawful. This bill bars employers from forcing employees to listen to an employer's religious and political views, unrelated to the employees' job duties,, which is both constitutional and not preempted by the National Labor Relations Act, 29 U.S.C.§§ 151 et seq. ("NLRA").

I. SB 399 Does Not Limit Employers' First Amendment Rights

First and foremost, SB 399 does not restrict employer speech. Under the bill, employers are not prevented from speaking to employees in any way on any subject, including about religious and political matters. The bill regulates *conduct* (not speech) by prohibiting an employer from discharging, disciplining or otherwise penalizing or threatening an employee who declines to listen to an employer's opinion on religious or political matters unrelated to the employee's work. *See* §1137(c). This regulation of conduct or the threat to engage in such conduct is permissible under the First Amendment.[1]

Additionally, employers have no First Amendment right to force employees to listen or be terminated. 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

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[1] It is a well-established 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). "[R]estrictions on protected expression are distinct from restrictions on economic activity," and "the First Amendment does not prevent" the latter. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011).

home in order to be told why they should be Catholics instead of Protestants or Democrats instead of Republicans,[2] 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, "[R]estrictions have been upheld . . . when . . . 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).

Accordingly, the bill is well within the State's authority as it limits employer conduct, not speech, and protects captive audiences of employees from being forced to listen to an employer's political and religious views on pain of discipline or discharge.

II. SB 399 Is Not Preempted by Federal Labor Law

Opponents may argue that this bill is preempted by the NLRA because it bans captive audience meetings at which employers seek to persuade employees to join or not to join a union. That is not the case as federal labor law does not prohibit states from adopting laws that protect workers' freedom not to listen to employer's religious and political speech.

A. Doctrine of Federal Preemption

The doctrine of federal preemption is based on Article VI, clause 2 of the United States Constitution, known as the Supremacy Clause. When Congress acts, its actions preempt inconsistent laws of the states. However, "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Specifically, the Court has recognized that it "cannot declare pre-empted all local regulation that touches or concerns in any way the complex

[2] If opponents of the bill were correct that it is inconsistent with the First Amendment, then Title VII of the 1964 Civil Rights Act as construed by the EEOC to prevent employers from forcing employees to attend prayer meetings would also be unconstitutional. *See, e.g., EEOC v. Aurora Renovations and Developments, LLC d/b/a Aurora Pro Services*, No. 22-490 (M.D.N.C. June 27, 2022) (EEOC action against employer that required employees to attend prayer meetings). This is clearly not the case.

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)).

SB 399 falls within the following well-recognized exceptions to federal labor law preemption:

i. California Has Authority to Establish Minimum Working Conditions

States and local governments are generally free to set minimum employment standards. 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 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 more 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 a specific 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.

ii. *California has Authority to Regulate Activity Touching Upon Deeply Rooted Local Concerns*

States also have authority 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, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978) (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); *Farme*r, 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." *Farmer*, 430 U.S. 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. Radcliffe v. Rainbow Construction Co*., 254 F.3d 772, 784-85 (9th Cir. 2001) (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.

Conclusion

For the foregoing reasons, the bill is constitutional and not preempted by federal labor law. Therefore, California should adopt this legislation and join the growing list of states that have affirmatively protected employees' right to be free from discipline or discharge for refusing to listen to employers' religious or political advocacy unrelated to the employees' jobs.