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Mr. Joseph Brennan  
President and Chief Executive Officer  
Connecticut Business & Industry Association  
350 Church Street  
Hartford, CT 06103

RE: Evaluation of Connecticut Senate Bill 440 (LCP No. 5741):  
"An Act Protecting Employee Freedom of Speech and Conscience"

Dear Mr. Brennan:

This letter provides an evaluation of Connecticut Senate Bill 440 (LCP No. 5741), which is captioned "An Act Protecting Employee Freedom of Speech and Conscience." We have been asked to address whether this legislation is preempted by federal law – specifically, the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 et seq., which is enforced by a federal agency, the National Labor Relations Board ("NLRB" or "Board").

I had the privilege of serving as Chairman of the NLRB and, before being designated Chairman, I served on the NLRB as Acting Chairman and as a Board Member. I served on the NLRB from August 2013 to December 2017, following more than 30 years as a labor and employment lawyer in private practice. After my NLRB term ended in December 2017, I returned to private practice as a labor and employment partner at Morgan Lewis & Bockius LLP. I am also a Senior Fellow at the University of Pennsylvania's Wharton School.

Based on my evaluation of Senate Bill 440, I believe the legislation directly conflicts with the NLRA, and – if Senate Bill 440 were enacted – I believe the legislation would likely be declared invalid and unenforceable because it is preempted by the NLRA, and the legislation may also be deemed an unconstitutional restriction on free speech and the free exercise of religion under the First Amendment. Enactment of Senate Bill 440 would almost certainly be subject to legal challenge – based on the legislation's prohibition against various types of employer speech protected by the NLRA and the First Amendment. This legislation and related litigation would impose significant burdens, expense and uncertainty on Connecticut employers, employees and unions. These costs would disadvantage parties in Connecticut who uniquely would be subject to the restrictions contained in Senate Bill 440.

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The remainder of this letter briefly summarizes Senate Bill 440, and this letter then describes the reasons that I believe this legislation would be found invalid based on its conflict with the NLRA (which would preempt the legislation). The letter briefly addresses equally serious problems arising under the First Amendment, followed by the discussion of certain other issues.

#### **A. Summary of Senate Bill 440**

Senate Bill 440 would change Section 31-51q of the Connecticut General Statutes (which protects employees from discipline or discharge based on their exercise of rights guaranteed by the U.S. Constitution or the Constitution of the State of Connecticut) by adding a new prohibition, which would make it unlawful for any employer “who subjects or threatens to subject” any employee to discipline or discharge on account of the following:

such employee's refusal to (A) attend an employer-sponsored meeting with the employer or its agent, representative or designee, the primary purpose of which is to communicate the employer's opinion concerning religious or political matters, or (B) listen to speech or view communications, the primary purpose of which is to communicate the employer's opinion concerning religious or political matters.

Sen. Bill 440, § 1(b) (emphasis added). Significantly, the legislation gives the phrase “political matters” a unique definition, which means “matters relating to elections for political office, political parties, legislation, regulation and the decision to join or support any political party or political, civic, community, fraternal or labor organization.” *Id.*, § 1(a)(1) (emphasis added). The phrase “religious matters” is defined as “matters relating to religious affiliation and practice and the decision to join or support any religious organization or association.” *Id.*, § 1(a)(2). The legislation imposes remedies that include “damages” caused by any prohibited discipline or discharge, plus “punitive damages” and a recovery of attorneys’ fees.<sup>1</sup>

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<sup>1</sup> Senate Bill 440 sets forth certain exceptions that permit employers (1) to communicate “any information that the employer is required by law to communicate, but only to the extent of such legal requirement”; (2) to communicate “any information that is necessary for such employees to perform their job duties”; (3) to meet with employees and engage in communications “that are part of coursework, any symposia or an academic program” where the employer is “an institution of higher education”; (4) to have “casual conversations” with employees “provided participation in such conversations is not required”; and (5) to communicate or meet with individuals who are “the employer's managerial and supervisory employees.” *Id.* § 1(c). These exceptions do not diminish or affect my assessment that the legislation is likely to be found invalid, unenforceable, preempted and unconstitutional under federal law and the First Amendment.

## **B. Federal Preemption and the National Labor Relations Act**

To preserve the protection and careful balancing of interests reflected in the NLRA,<sup>2</sup> the U.S. Supreme Court, other courts and the NLRB have consistently applied a doctrine of federal preemption which invalidates state and local laws that conflict with the NLRA or intrude on areas involving employer-employee relations that Congress intended to be unregulated. Thus, in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), the Supreme Court stated:

When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.<sup>3</sup>

When particular conduct is neither “protected” or prohibited by the NLRA, state laws will also be considered preempted and invalid when they restrict or penalize actions “that Congress meant to leave . . . unregulated and to be controlled by the free play of economic forces.” *Lodge 76, International Ass’n of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 144 (1976) (citation omitted; emphasis added).

The above standards, in my view, would prompt a reviewing court or the NLRB to declare that Connecticut Senate Bill 440 conflicts with the NLRA and is preempted. Senate Bill 440 would render unlawful any “employer-sponsored meeting” where employees are required to attend, which has a “primary purpose” to communicate “the employer’s opinion concerning religious or political matters,” and with the phrase “political matters” defined as matters relating to . . . the decision to join or support any . . . labor organization.” Sen. Bill 440, § 1(a)(1) (emphasis added).

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<sup>2</sup> It is well-established that the NLRA protects and reflects a careful balancing of interests among employees, employers and unions. *See, e.g., Republic Aviation v. NLRB*, 324 U.S. 793, 797-98 (1945) (referring to “working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments”); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 229 (1963) (referring to the “delicate task” of “weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing . . . the intended consequences upon employee rights against the business ends to be served by the employer’s conduct”); *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 678-79 (1981) (“Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business”).

<sup>3</sup> *Id.* at 244 (emphasis added).

This prohibition – aimed at what are commonly called “captive-audience speeches” (meetings held during work time where employees are required to attend) – is directly contrary to the NLRA which would render Senate Bill 440 preempted based on the Supreme Court standards articulated in *Garmon, supra*. Alternatively, even if such captive-audience speeches failed to involve a right affirmatively protected by the NLRA, such speeches involve actions that Congress meant to leave “unregulated” by the states. The conflict between Senate Bill 440 and the NLRA is apparent from the following considerations:

- Section 8(c) of the NLRA affirmatively protects the right of employers to engage in the types of captive-audience meetings that are prohibited by Senate 440. Section 8(c) states “[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.” 29 U.S.C. § 158(c) (emphasis added).
- In *Chamber of Commerce v. Brown*, 554 U.S. 60, 68 (2008), the U.S. Supreme Court interpreted Section 8(c) and observed that, in addition to “implement[ing] the First Amendment” for employers, Section 8(c) “manifested a ‘congressional intent to encourage free debate on issues dividing labor and management’” and reflected a “policy judgment” that favored “uninhibited, robust, and wide-open debate in labor disputes,” stressing that “freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB.” *Id.* at 67-68 (emphasis added; citation omitted).
- Significantly, in *Chamber of Commerce v. Brown*, the U.S. Supreme Court invalidated a California statute that restricted the ability of employers (who received California state funds) to oppose union organizing efforts. 554 U.S. at 65. The Supreme Court held that the California statute’s policy judgment – prohibiting “partisan employer speech” that opposed union organizing – was renounced by Congress in NLRA Section 8(c), which affirmatively protects such employer speech. *Id.* at 68-69. Connecticut’s Senate Bill 440 represents a similar effort to prevent employers from engaging in “partisan” speech regarding union organizing activity.
- Other NLRB and Supreme Court cases have specifically dealt with – and upheld – the legality of captive-audience meetings like those that would be invalidated by Senate Bill 440. In the NLRA’s early history, the Board ruled that employers were required to remain neutral about union organizing activity, but in 1941, the Supreme Court rejected this view and found that nothing in the NLRA prohibited an employer “from expressing its view on labor policies or problems” unless the employer’s speech “in connection with other circumstances [amounted] to coercion within the meaning of the Act.”<sup>4</sup> Nonetheless, the Board continued to find that mandatory employer-sponsored meetings about union-related issues were

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<sup>4</sup> *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469, 477 (1941).

unlawful.<sup>5</sup> Ultimately, Congress responded by enacting Section 8(c), and the Board has consistently upheld employer-sponsored meetings regarding union-related issues, provided that such meetings are held at least 24 hours prior to any election. *Peerless Plywood*, 107 NLRB 427, 429-30 (1953). *See also Livingston Shirt Corp.*, 107 NLRB 400, 406-409 (1953) (employer may lawfully address union issues at a meeting held on the company's premises and on company time without giving the union the same opportunity).

- By 1959, when Congress made further amendments to the NLRA (as part of the Labor-Management Reporting and Disclosure Act), the right of employers to communicate their opinions about union-related issues was well-established, and John F. Kennedy (who was then a Senator and Chair of the Conference Committee that reconciled competing versions of the legislation passed by the House and Senate, respectively) emphasized the need to have sufficient time for campaigning as a "safeguard against rushing employees into an election where they [would be] unfamiliar with the issues,"<sup>6</sup> and he said there should be at least a 30-day pre-election period "in which both parties can present their viewpoints."<sup>7</sup>

On April 26, 2018, a formal opinion by then-existing Connecticut Attorney General George Jepsen expressed a view that similar legislation – House Bill 5473 (An Act Concerning Captive Audience Meetings) – was preempted by the NLRA.<sup>8</sup> I agree with Attorney General Jepsen's conclusion, which would apply with equal force to Connecticut Senate Bill 440.

In short, Connecticut Senate Bill 440 would render unlawful any "employer-sponsored meeting" that employees are required to attend where the employer's "primary purpose" is to communicate the employer's "opinion" about a possible employee "decision to join or support [a] . . . labor organization." *Id.*, § 1(a)(1), 1(b). This directly conflicts with NLRA Section 8(c), which protects every employer's right to state its "opinion" about whether employees should join or support a labor organization. Accordingly, should Senate Bill 440 be enacted, I believe the legislation would be challenged, and the courts or the NLRB will ultimately invalidate the legislation on the basis that it conflicts with and is preempted by the NLRA.

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<sup>5</sup> *See, e.g., Clark Bros. Co.*, 70 NLRB 802, 804-05 (1946).

<sup>6</sup> 105 Cong. Rec. 5361 (1959), *reprinted in* 2 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act 1024 (hereinafter "LMRDA Hist.").

<sup>7</sup> 105 Cong. Rec. 5770 (1959), *reprinted in* 2 LMRDA Hist. 1085 (statement of Sen. Kennedy) (emphasis added).

<sup>8</sup> *See* letter from Attorney General George Jepsen to The Honorable Leonard A. Fasano, dated April 26, 2018 (available at [https://portal.ct.gov/-/media/AG/Opinions/2018/2018-02\\_Captive\\_Audience.pdf](https://portal.ct.gov/-/media/AG/Opinions/2018/2018-02_Captive_Audience.pdf)).

### **C. Constitutional Issues**

The restrictions on employer speech imposed by Senate Bill 440 also raise serious constitutional concerns under the First Amendment, which (in combination with the Due Process Clause of the Fourteenth Amendment) prohibits the federal and state governments from prohibiting the free exercise of religion or abridging the “freedom of speech . . . or the right of the people to peaceably to assemble. . . .”

More than 70 years ago, the Supreme Court recognized that employers had a “First Amendment right . . . to engage in noncoercive speech about unionization.” *Chamber of Commerce v. Brown*, 554 U.S. at 67, citing *Thomas v. Collins*, 323 U.S. 516, 537-38 (1945). To the same effect, NLRA Section 8(c) has been held to “merely implement[] the First Amendment.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). There is no question – and the Supreme Court has repeatedly held – that corporations have the same First Amendment rights to engage in free speech as do other citizens.<sup>9</sup>

On its face, Senate Bill 440 would prohibit employers from having an employer-sponsored meeting, where employee attendance is mandatory, having a “primary purpose” of addressing “religious or political matters,” and where the term “political” is defined broadly enough to encompass an employee’s decision to become a member of a labor organization. In addition to being preempted based on its conflict with the NLRA, Senate Bill 440 also raises significant First Amendment concerns, which creates a significant risk that the legislation would also be invalidated based on the U.S. Constitution.

### **D. Other Issues**

Supporters of Senate Bill 440 have raised a variety of arguments, most of which (1) recast the legislation as focusing on “local” concerns, or (2) portray employees as unwilling listeners whose interests should override the free speech rights of employers to communicate with employees on the employer’s premises. However, the undeniable purpose and effect of Senate Bill 440 is to directly regulate workplace conduct involving the competing interests of employees, employers and unions in relation to union representation. For more than 80 years, balancing these interests has been the “difficult and delicate responsibility”<sup>10</sup> vested exclusively in the National Labor Relations Board, subject to review in the federal courts.

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<sup>9</sup> See, e.g., *First Nat’l Bank of Boston v. Bellotti*, 435 U. S. 765 (1978); *Time, Inc. v. Firestone*, 424 U. S. 448 (1976); *Doran v. Salem Inn, Inc.*, 422 U. S. 922 (1975); *Southeastern Promotions, Ltd. v. Conrad*, 420 U. S. 546 (1975); *Cox Broadcasting Corp. v. Cohn*, 420 U. S. 469 (1975); *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964).

<sup>10</sup> *NLRB v. Ins. Agents’ Int’l Union*, 361 U.S. 477, 499 (1960), quoting *NLRB v. Truck Drivers Local 449*, 353 U.S. 87, 96 (1957). In *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963), the Court stated: “we must recognize the Board’s special function of applying the general provisions of the Act to the complexities of industrial life” (citation omitted). See also *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 496-97 (1985); *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1978); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

The above arguments also rest on a mistaken premise that the State of Connecticut can properly “protect” employees from being exposed to employer sentiments in the workplace regarding union, political or religious issues. Again, the U.S. Supreme Court has held that the NLRA reflects a “policy judgment” that there should be “uninhibited, robust, and wide-open debate in labor disputes.”<sup>11</sup> In this area as well, the NLRB has exclusive responsibility, subject to review by the federal courts, to determine whether employees have been unlawfully subjected to unlawful restraint or coercion either by an employer or by a union.<sup>12</sup>

Nor can the State of Connecticut presume that all employees favor union representation, or that all employers disfavor union representation. The NLRA protects the right of employees to support and to oppose union representation.<sup>13</sup> And there are many instances when employers grant voluntary recognition to unions.<sup>14</sup> The legal principles governing these issues are complex. For example, in addition to prohibiting an employer’s unlawful refusal to recognize and bargain with a union that has employee majority support in an appropriate bargaining unit,<sup>15</sup> the NLRA also prohibits an employer

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<sup>11</sup> *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008).

<sup>12</sup> See NLRA Sec. 8(a)(1), 29 U.S.C. § 158(a)(1) (making it unlawful for an employer to interfere with, restrain or coerce employees in the exercise of protected rights); NLRA Sec. 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(B) (making it unlawful for a union to restrain or coerce employees in the exercise of protected rights).

<sup>13</sup> See NLRA Sec. 7, 29 U.S.C. § 157 (protecting the right of employees to bargaining “through representatives of their own choosing” and “to refrain from any or all of such activities”). This is another area where Senate Bill 440 directly conflicts with federal law. Senate Bill 440 only references “the decision to join or support any . . . labor organization” without mentioning potential employee opposition to union representation. This differs from NLRA Sec. 7 (quoted above), which affords protection to employees who favor unions and to employees who would choose to “refrain” from union representation.

<sup>14</sup> See, e.g., *Americold Logistics, LLC*, 362 NLRB 493 (2015) (addressing employer’s lawful voluntary recognition of a union and period of bargaining during which the union’s representative status is immune from challenge). It is also common in the construction industry for many employers to voluntarily recognize unions and to enter into voluntary collective bargaining agreements, which are permitted in the construction industry under Section 8(f) of the NLRA, 29 U.S.C. § 158(f), without any showing of employee support. See, e.g., *John Deklewa & Sons, Inc.*, 282 NLRB 1375, 1378 (1987), *enforced sub nom. Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), *cert. denied*, 488 U.S. 889 (1988).

<sup>15</sup> Section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5), makes it unlawful for an employer to refuse to bargain collectively with a union that has been designated or selected as the representative by a majority of employees. See also NLRA Sec. 9(a), 29 U.S.C. § 159(a) (“Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment”).

from granting union recognition when the union has not made a valid claim of employee majority support.<sup>16</sup>

As a final matter, it is important to remember that the NLRB – the agency entrusted with exclusive responsibility to decide these issues – has carefully considered and rejected the argument that employees should be protected from the discussion of union representation in meetings held on the employer’s premises. Thus, in *Livingston Shirt Corp.*, 107 NLRB 400 (1953), the Board reasoned:

It is conceded by everyone that Congress intended that both employers and unions should be free to attempt by speech or otherwise to influence and persuade employees in their ultimate choice, so long as the persuasion is not violative of the express provisions of the Act; and we find nothing in the statute which even hints at any congressional intent to restrict an employer in the use of his own premises for the purpose of airing his views. On the contrary, an employer's premises are the natural forum for him just as the union hall is the inviolable forum for the union to assemble and address employees.<sup>17</sup>

### **Conclusion**

For the reasons stated above, I believe that Senate Bill 440 directly conflicts with the NLRA, and – to the extent Senate Bill 440 were enacted – the legislation would likely be declared invalid and unenforceable because it is preempted by the NLRA, and the legislation may also be deemed an unconstitutional restriction on free speech and the free exercise of religion based on the First Amendment.

Please let me know if it would be helpful to provide additional information or assistance in this matter.

Very truly yours,



Philip A. Miscimarra

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<sup>16</sup> Section 8(a)(2) of the NLRA, 29 U.S.C. § 158(a)(2), makes it unlawful for an employer to grant financial or other support to a union, which includes recognition when the union has not made a valid claim of employee majority support in an appropriate bargaining unit. As noted in note 14 above, however, Section 8(f) of the NLRA permits construction industry employers and unions to enter into voluntary agreements without any showing of employee majority support.

<sup>17</sup> *Id.* at 406 (emphasis added).