

Testimony of Daniel Livingston, Livingston, Adler, Pulda, Meiklejohn &  
Kelly, March 14, 2007

**In Support of Raised Bill No. 7326**

Senator McDonald, Representative Lawlor, and members of the  
Judiciary Committee.

I address you today as an attorney and as a long-time activist who works  
with many labor, community, civil rights, and advocacy groups. I am here  
to testify in favor of Raised Bill 7326: ***AN ACT CONCERNING CAPTIVE  
AUDIENCE MEETINGS***. Before I start, I just want to note that I've  
attached some suggested language changes which are intended to clarify  
but not substantively change the bill. Also, I will not take the time to  
speak about all the other bills on the Committee's busy docket, but I do  
want to express my general support for R.B. No. 7328 An Act Concerning  
Enforcement Of The Charitable Purposes Of Nonprofit Hospitals and R.B.  
No. 7363 An Act Concerning Public Oversight Of Hospitals And Hospital  
Societies Or Corporations Receiving Substantial Medicaid Funding.

Now let me turn to the Raised Bill 7326.

As you know, this bill is part of a national effort to bring the rights of  
working people into the 21<sup>st</sup> century. Or at least the 20<sup>th</sup>! We hope you  
will act to prevent employers from forcing workers on pain of discharge to  
listen to political, religious, and social propaganda that has nothing to do  
with work. Until the bill passes, working people throughout this state will  
continue to be denied fundamental democratic rights simply because they  
work for a living.

Why? Because today -- well into the 21<sup>st</sup> century -- state law still treats  
some people as property of other people. No, this did not end when our  
nation's shameful history of slavery ended in 1865. State law still deems  
working people to be the property of their employers during the work day.  
In fact, if you want to learn about the rights of employees in many  
esteemed legal treatises don't look up Employer/Employee. Look up  
Master/Servant. You might say that notion is fundamentally inhumane,  
fundamentally undemocratic, even fundamentally un-American. And you'd  
be right. However, that notion of the employment relationship, where the  
boss owns the employee during work time, still plays far too big a role in  
our modern society. RB 7326 recognizes the democratic principle that one

can give a fair day's work for a fair day's pay without becoming the political or social property of one's employer.

No one doubts that a boss should be able to call an employee in to discuss the employee's work. But because the boss is considered the master, and the employee the servant, under current law the boss can order the employee into his office and force him or her to listen to almost anything. An employer can order an employee to sit and listen to 5 straight hours of Nazi propaganda, and as long as it's on work time, the employee can be fired if he or she refuses to listen, fired if he or she even tries to respond. Often employers use this power to fight employees' rights to join a labor union, but the point is, under state law employers may use this power for any political or religious purpose at all, and the employer can get away with it, and the employee can be fired if he or she resists.

Large employers are particularly aware of this power. In fact, we know that the United States Chamber of Commerce, and National Association of Manufacturers, and a number of other large business organizations urged members to use their positions of power to "educate" employees on the need to vote for George W. Bush in 2004. We know that similar efforts were made by some national evangelical groups. It is very difficult to get employees who have been subject to this kind of treatment to come to the General Assembly to testify, since they don't have unions to back them. This committee needs to be their voice. Employers should not be able to force employees to listen to their political propaganda, Republican or Democrat, but that is what 16<sup>th</sup> Century notions of the Master/Servant relationship allows employers to do unless the committee acts to change that.

In many ways, the bill follows a well worn trail. By the mid 20<sup>th</sup> century, our society at last said an employer may not abuse his master/servant authority to subject his employees to sexual advances, or racial harassment. Yet our law would allow an employer to use that same authority to call a company-wide mandatory meeting to force employees to listen to Hitler's Mein Kemp, or even the latest political philosophy of Osama Bin Laden. This bill doesn't do away with this 16th century thinking – the so called "master/servant" law will not disappear. But it does make things better, much better and it's one important step towards establishing the principle that in Connecticut, working people are nobody's property, even during the work day.

I want to say a word about the misconception that has been pushed by groups opposing this legislation that it somehow conflicts with the National Labor Relations Act. I've attached to this testimony as well a legal memorandum authored by myself and a series of lawyers around the country which shows that impression is wrong. I'll just quickly make two points here.

First, the National Labor Relations Act says nothing about Captive Audience Meetings. Its key section 7 grants workers the right to organize, and one of its lesser known provisions 8(c), says it's not an unfair labor practice for an employer to speak against the union. But nowhere in the Act does it grant or even mention the employer's power to *compel* workers to listen. That comes from state law, and can be changed by state law.

Second, the Act leaves to the states, not the federal government, the job of providing the minimum labor standards that protect working people. Under the Act, an employer could try to bargain a contract that provides 2 cents an hour, and a don't ask don't tell policy for gays and lesbians in the workplace. As the Supreme Court has said in the *Metropolitan Life Insurance* case, "[s]tates possess broad authority under their police powers to regulate the employment relationship to protect workers within the State \*\*\* Child labor laws, minimum and other wage laws, laws affecting occupational health and safety . . . are only a few examples \*\* [T]here is no suggestion in the legislative history of the Act that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards\*\*\* 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."

Nothing in our bill interferes with the purposes of the National Labor Relations Act, whether that be to allow workers freedom to organize, the parties free to bargain, or even the employer the freedom to speak against the union. Our bill only provides workers the modicum of human dignity that all adult Americans possess, and says you don't check that dignity when you enter the workplace.

Let me say a final word about the opposition to this bill which cloaks itself as concern about preemption. Two years ago, after this bill passed by a 2 to 1 vote in the Senate, we were asked by key leaders in the House to meet with the opponents of this bill and seek a compromise. After they failed to agree to a number of language changes, one of us said "Correct

me if I'm wrong, but no change we suggest is going to work, because your people like having this power, and they don't want to give it up." Nobody corrected us. They like having the power.

And that's the opponent's bottom line. "We like the power to force you to listen to whatever we want, whenever we want, and to fire you if you don't do it." "We like owning you on work time, we like the power." Well that was the same bottom line that George III had with the American colonists, that the slave owners had with the slaves, that the male defenders of the status quo had when women demanded the right to vote, that segregationists tried to use to keep black children in segregated schools and Rosa Parks in the back of the bus. "We like the power." This is America, in the 21<sup>st</sup> century. This kind of power over another human being is fundamentally inhumane, undemocratic, and yes un-American. I urge this committee to say "you may like your power, but we like our democracy." Vote for RB 7326.

## **Preemption Analysis – Worker Freedom Act [Known in Connecticut As “An Act Concerning Captive Audiences]**

You have asked whether the Worker Freedom Act may be preempted by federal labor law. As fully explained below, federal labor law does not bar the State from enacting this legislation prohibiting employers from requiring their employees to listen to speech unrelated to job performance on pain of termination or other disciplinary action.

### I. Basic Principles of Preemption

As the Supreme Court has recognized, “The NLRA contains no express pre-emption provision.” *Building & Construction Trades Council v. Associated Builders and Contractors of Massachusetts/Rhodes 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).

Guided by these principles, the Supreme Court has developed two lines of preemption precedent. Under *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), and its progeny, the NLRA preempts state regulation of the use of “economic weapons” (*i.e.* strikes, lockouts, picketing, etc.) that Congress intended to be left unregulated. The *Machinists* preemption doctrine recognizes that “Congress intended to give parties . . . the right to make use of ‘economic weapons,’ not explicitly set forth in the act, free of governmental

interference.” *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 110-11 (1989) (*Golden State II*), quoting *Machinists*, 427 U.S. at 154.

Under the *Garmon* preemption doctrine, which flows from *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), the NLRA also preempts state regulation of “activity that the NLRA protects, prohibits, or arguably protects or prohibits.” *Golden State Transit v. City of Los Angeles*, 475 U.S. 608, 613-14 (1986) (*Golden State I*). Specifically, *Garmon* preemption forbids state and local regulation of activities that are “protected by §7 of the [NLRA] or constitute an unfair labor practice under § 8.” *Garmon*, 359 U.S. at 244. *Garmon* preemption is “intended to preclude state interference with the National Labor Relation Board’s interpretation and active enforcement of the integrated scheme of regulation established by the NLRA.” *Golden State I*, 475 U.S. at 613 (internal quotation marks omitted).

SB 2446 does not fall within either of those two categories of preempted laws and, consequently, it will not be preempted by the NLRA.

## II. The State’s Authority to Establish Minimum Working Conditions Permits It to Enact The Worker Freedom Act

The United States 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 [Labor-Management 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 Worker Freedom Act is minimum conditions legislation. It applies to all workers in the State and protects all workers from mandatory meetings where they are subject to indoctrination by their employer on issues unrelated to job performance. It is clear, for 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) (upholding Virgin Islands’ unjust discharge law against preemption challenge). It is also clear that a state can pass a law barring discharge of employees for a limited set of improper reasons. *See, e.g.* 775 ILCS 5/1-101 et seq. (Illinois Human Rights Act). The Worker Freedom Act falls into the latter category. It bars employer from disciplining or discharging employees for refusing to listen to speech unrelated to their job performance.

### III. The State’s Authority to Regulate Property and Contract Relations Permits it to Enact The Worker Freedom Act

Federal labor law regulates relationships between employers, employees and unions. However, the NLRB and federal courts have long recognized that federal labor law operates against the background of state regulation of property rights and contract relations. “[T]he history of the labor pre-emption doctrine in this Court does not support an approach which sweeps away state-court jurisdiction over conduct traditionally subject to state regulation.” *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 188 (1978). The NLRB and federal courts have held that federal labor law accommodates such state

regulation even when it alters employers' or unions' opportunities to campaign for or against unionization.

For example, trespass is governed by state law. The trespass law of most states permits an employer to bar union organizers from their property and the NLRB and United States Supreme Court have held that such an exercise of rights under state law ordinarily does not violate federal labor law. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). However, in some states, such as California, state law permits union organizers and other speakers to go onto certain types of private property that is otherwise held open to the public, *see, e.g., In re Lane*, 71 Cal.2d 872, 457 P.2d 561 (1969), and the Board and federal courts of appeal have held that in those states an employer cannot exclude union organizers when it has no right to do so under state law. *See Glendale Associates v. NLRB*, 347 F.3d 1145, 1151 (9th Cir. 2003) (“this Court, along with other Circuits and the Board, have found *Lechmere* to be inapplicable to cases where an employer excluded nonemployee union representatives in the absence of a state property right to do so”). In other words, the courts and the Board have recognized that “[a]n employer’s state property right controls where an employer may ban nonemployee union representatives” and “an employer need not be accorded any greater property interest than it actually possesses.” *Id.* at 1152. Indeed, the Supreme Court has also recognized that “[t]he right of employers to exclude union organizers from their private property emanates from state common law, and while this right is not superseded by the NLRA, nothing in the NLRA expressly protects it.” *Thunder Basin Cola Co. v. Reich*, 510 U.S. 200, 217 n. 21 (1994). Thus, an employer can, consistent with federal labor law, use its state law property rights to its advantage in an organizing campaign, but a state is not barred from altering such rights.

Enactment of The Worker Freedom Act would do precisely what the courts and Board have recognized is within the traditional prerogatives of the states in these cases. State law currently permits employers to condition employment on their employees consenting to listen to speech unrelated to job performance, including pro- and anti-union speech. The Board has held that federal law does not bar this exercise of state law rights by employers just as it has held that it does not bar their exercise of their state law right to exclude union organizers from their property. But the states remain free to alter their law in this area just as they can and have altered the law of trespass.

IV. Federal Labor Law Does Not Give Employers a Right to Compel Employees to Listen to Speech Unrelated to Job Performance

Federal labor law does not prohibit so-called captive audience meetings where employers require employees to assemble and listen to the employer speak against unionization,<sup>1</sup> but neither does it vest in employers a right to so compel employees. The law provides that “[t]he expressing of any views, arguments, 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 subchapter, if such expression contains no threat of reprisal or force or promise of benefit.” 29 U.S.C. § 158(c) (section 8(c)). This provision was intended to make clear that employer speech *alone* was not an unfair labor practice. But The Worker Freedom Act does not regulate employer speech at all. If The Worker Freedom Act were enacted, employers would remain entirely free to speak against or in favor of unionization. The

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<sup>1</sup>See, e.g., *Litton Sys., Inc.*, 173 NLRB 1024, 1030 (1968) (holding that employees have “no [federal] statutorily protected right to leave a meeting which the employees were required by management to attend on company time and property to listen to management’s non-coercive antiunion speech”).

Act regulates employer power, not speech. Employers would only be barred from requiring their employees to listen to such speech on pain of termination or discipline.

This fact distinguishes the Worker Freedom Act from the New York law held preempted by *Healthcare Ass'n of New York State, Inc. v. Pataki*, 471 F.3d 87 (2<sup>nd</sup> Cir.) 2006. The act regulated employer speech paid for by state money “to encourage or discourage union organization, or to encourage or discourage an employee from participating in a union organizing drive”. *Id.*, at 90, n2. Thus it was the speech not the employers’ power to compel attendance that was regulated. The New York Act was not intended as a broad minimum standards bill, but as an exercise of the State’s spending power, and thus it sought directly (and unsuccessfully) to influence an employer’s free speech rights under the NLRA. The Workers Freedom Act leaves employer NLRA rights unaffected, and effects only those employer powers conferred by state rather than federal law.

Federal labor law does not prohibit or even arguably prohibit employers from requiring employees to listen to pro- or anti-union speech on pain of termination. Nor does federal law protect or even arguably protect such actions. *Garmon* preemption therefore does not bar adoption of The Worker Freedom Act.

V. The State’s Authority to Regulate Activity Touching Upon “Deeply Rooted Local Concerns” Permits it to Enact The Worker Freedom Act

Since the Worker Freedom Act is minimum standards legislation, it does not fit within either of the two lines of preemption (*Machinists* and *Garmon*), and thus is not preempted. However, it is worth noting that even the Worker Freedom Act were considered to fall within the *Garmon* zone of preemption, it would be protected from preemption because 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 grounds 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). “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 unrelated to their job performance. 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 protected). 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 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 influence, 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 Legisl. 35, 58-62 (1981).

The Worker Freedom Act protects this deeply rooted state interest and, therefore, would not be preempted even if it were (incorrectly) deemed to fall within the *Garmon* preemption zone.

VI. Federal Labor Law Does Not Bar Across-the-Board Regulation of this Form of Compulsion

The other branch of labor law preemption doctrine – *Machinist* preemption – deals with the use during labor disputes of “*economic weapons*” (*e.g.* strikes, lockouts, picketing) that Congress intended to leave free from regulation. *Machinists*, 427 U.S. at 154; *Golden State II*, 493 U.S. at 110-11 (emphasis added). Under the *Machinists* doctrine, both state and federal governments are precluded from interfering with the collective bargaining process by regulating

“conduct that was to remain a part of the self-help remedies left to the combatants in labor disputes.” *Belknap, Inc. v. Hale*, 463 U.S. 491, 499 (1983).<sup>2</sup>

But The Worker Freedom Act has nothing to do with “economic weapons” or the “collective bargaining process” in the sense that those terms are used in the *Machinists* cases. *Cf. Chao*, 325 F.3d at 363 (“No claim is made that the posting of employees’ *Beck* rights represents an economic weapon – certainly not one covered by *Machinists* preemption”).

Moreover, *Machinists* preemption clearly has no application here because it is a species of “field” preemption that forecloses regulation *by the NLRB* as well as the States, leaving conduct “to be controlled by the free play of economic forces.” *Machinists*, 427 U.S. at 147; *see also Golden State II*, 493 U.S. at 111 (“The *Machinists* rule creates a free zone from which all regulation, whether federal or State, is excluded.”). Yet the NLRB *does* regulate employer speech during organizing campaigns, by holding that certain employer speech – like threats to close a plant if the workers unionize, speech to massed assemblies of employees within 24 hours of an election, and speech during visits to employee homes – is inherently coercive.<sup>3</sup> If the *Machinists* field preemption doctrine applied to The Worker Freedom Act it would also sweep

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<sup>2</sup>*See also Machinists*, 427 U.S. at 135-36, 155 (state precluded from regulating union’s concerted refusal to work overtime during collective bargaining negotiations); *Insurance Agents’ Int’l Union*, 361 U.S. at 479, 490, 497, 500 (NLRB precluded from finding that union committed unfair labor practice by engaging in on-the-job slow-down and sit-in activities); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1334, 1339 (D.C. Cir. 1996) (federal government’s executive branch could not penalize employers for hiring permanent replacements during strikes); *Cannon v. Edgar*, 33 F.3d 880, 885-86 (7th Cir. 1994) (state could not require union and employer to negotiate to establish pool of replacement workers to be used during labor disputes).

<sup>3</sup>*See, e.g., Rosewood Mfg. Co.*, 263 NLRB 420 (1982), *supplemented by* 278 NLRB 792 (1986) (threats of plant closure); *Peerless Plywood Co.*, 107 NLRB 427, 428-30 (1953) (addressing massed assemblies of employees within 24 hours of election); *Peoria Plastic Co.*, 117 NLRB 545, 546-48 (1957) (visits to employee homes).

away this entire body of jurisprudence composed of decades of NLRB precedent. It is therefore clear that *Machinist* preemption does not bar enactment of The Worker Freedom Act.

VII. Conclusion

The teachings of *Metropolitan Life* bear repeating:

[T]here is no suggestion in the legislative history of the Act that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards\*\*\* 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.

*Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). Nothing in the Worker Freedom Act interferes with the purposes of the National Labor Relations Act, whether that be to allow workers freedom to organize, the parties free to bargain, or even the employer the freedom to speak against the union. The Worker Freedom Act only provides workers the modicum of human dignity that all adult Americans possess, and says you don't check that dignity when you enter the workplace. This is precisely the responsibility of state government in our federal system, and is in no way precluded by federal labor law.