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**Testimony of Daniel Livingston
Livingston, Adler, Pulda, Meiklejohn & Kelly, PC
In Support of SB 440, An Act Concerning
Employee Freedom of Speech and Conscience**

Senator Winfield, Representative Stafstrom, and members of the
Judiciary Committee.

As an attorney who works with many labor, community, faith, and civil rights groups, I am here testifying in favor of Senate Bill 440, An Act Concerning Employee Freedom of Speech and Conscience. I have also attached a memorandum refuting the claim that the Act, if passed, would be preempted by federal law.

Now let me turn to Senate Bill 440.

As you know, this bill is part of a national effort to bring the rights of working people into the 21st century. Or at least the 20th! 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 21st 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, although of course nothing today could compare to those horrors. Still, 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. SB 440 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 disputes 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 state 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, social, 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 position of power to "educate" employees on the need to vote for George W. Bush in 2004. And we know from the fine work of Professor Alexander Hertel-Fernandez, who is also testifying in support of SB 440, that this type of behavior has only continued, and indeed worsened, since the Supreme Court's decision in *Citizen's United* with still more large employers abusing the so-called Master/Servant relationship to compel employees to listen to their political, social, or religious views.

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, or religious or social propaganda, but that is what 16th Century notions of the Master/Servant relationship allows employers to do – unless this Committee acts to change that.

In many ways, the bill follows a well worn trail. By the mid 20th 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 State law presently permits 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 working people are nobody's property, even during the work day.

I want to address the misconception that has been pushed by groups opposing this legislation that it somehow conflicts with the National Labor Relations Act. As I mentioned, I've attached to this testimony a legal memorandum which shows that is simply wrong. I'll just quickly make two points here.

First, the National Labor Relations Act says nothing about compelled meetings with employees. 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 this bill interferes with the purposes of the National Labor Relations Act, whether that be to allow workers freedom to organize, the parties freedom to bargain, or even the employer the freedom to speak against the union. The bill only provides the type of minimum labor standards long supported by the Supreme Court, in this case providing workers the modicum of human dignity that all adult Americans possess, and says you don't check that dignity when you enter the door of the workplace.

Let me say a final word about the opposition to this bill cloaking itself as concern about preemption. We have been fighting for a bill protecting employee freedom of speech and conscience for nearly two decades. Fifteen years ago, after a similar version of this bill passed by a 2 to 1 vote in the Senate, we were asked by key leaders in the House to meet with and seek a compromise with the representatives of large employers who were opponents of the bill. After they failed to agree to a number of language changes designed to appease the concerns they raised, 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.

This is America, in the 21st 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.” Please vote for SB 440.

Thank you.

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