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AMERICA'S UNIONS

Testimony in Support of LD 1756:
An Act to Protect Employee Freedom of Speech

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On behalf of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), I submit this written testimony in support of Legislative Document 1756 ("LD 1756"), An Act to Protect Employee Freedom of Speech.

I am General Counsel of the AFL-CIO, and prior to my appointment, I served as an Associate General Counsel at the AFL-CIO for over 12 years and, prior to that, as an attorney at a union-side law firm in Chicago. I also clerked for Judge Diane P. Wood on the United States Court of Appeals for the Seventh Circuit and was a Skadden Fellow at the Chicago Lawyers' Committee for Civil Rights Under the Law. I have practiced in the areas of labor and employment law for over 16 years.

In this testimony, I will address two legal objections that opponents have advanced – (1) LD 1756 is an unconstitutional restriction on employer speech; and (2) the National Labor Relations Act, 29 U.S.C.§§ 141 et seq. ("NLRA") preempts states from regulating speech in the workplace. I will defer to proponents' testimonies with respect to the obvious merits of this proposed bill which bans employers from forcing employees to listen to an employer's religious and political ideology in the workplace.

I. LD 1756 Does Not Conflict with an Employer's First Amendment Rights

First and foremost, LD 1756 does not restrict employer speech. Under this bill, employers may still speak with their employees on religious and political matters as defined therein. The bill regulates *conduct* (not speech) by prohibiting an employer from discharging, disciplining or otherwise penalizing or threatening an employee who declines to attend or participate in an employee-sponsored meeting or declines to listen to an employer-communication that communicates the employer's opinion on religious or political matters unrelated to their work. *See* §600-B.2. This regulation of conduct or the threat to engage in such conduct is permissible under the First Amendment.[1]

Additionally, employers have no legitimate free speech claim to hold captive audience meetings at the workplace because such captive audience meetings unlawfully interfere with employees' constitutionally-based freedom not to be coerced into ideological listening. 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

[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).

intrusive when the 'captive' audience cannot avoid the objectionable speech."[2] Thus, the option of averting the eyes or closing the ears is simply not practically available.[3]

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 v. Colorado*, 530 U.S. 703, 717 n. 24. *See also Frisby v. Schultz*, 487 U.S. 474, 484 ("the State may legislate to protect" unwilling listener). The First Circuit has also found that the government has *leeway* to address the problem of captive audience. *See Newton v. LePage*, 700 F.3d 595, 603 (1st Cir. 2012) (where the Courts found that the government has some leeway to take into consideration the problem of the captive audience and complaints [] received for those who viewed the art work while visiting government offices for other reasons). *See Close v. Lederle*, 424 F.2d 988 (1st Cir.1970) (no First Amendment violation from the removal by the University of Massachusetts of certain offensive but not obscene art work from a corridor frequented by students).

Accordingly, this legislature is well within its authority to pass LD 1756 as it limits employer conduct (not speech) and protects employees' liberty interest in being free from coerced listening to an employer's political and religious speech, on pain of discipline or discharge.

II. LD 1756 Is Not Preempted by Federal Labor Law

Opponents may argue that this bill is preempted by the NLRA because it bans workplace captive audience meetings discussing the merits of union representation. This, however, is not the case as federal labor law does not prohibit states from adopting laws that protect workers' constitutional freedom not to listen to employer's religious and political speech.

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[2] *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."

[3] *See Smolla and Nimmer on Freedom of Speech* §§ 5.025.02- 5.035.03

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 power is preeminent over 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.'" *Id*. (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)). By enacting the NLRA, Congress sought to create a national, uniform body of labor law and policy. "The purpose of the Act was to obtain 'uniform application' of its substantive rules and to avoid the 'diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.'" *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971) (quoting *Garner v. Teamsters Union*, 346 U.S. 485, 490 (1953)). Furthermore, 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)).

Accordingly, LD 1756 falls within the following well-recognized exception to federal labor law preemption:

i. Maine Has Authority to Establish Minimum Working Conditions

States and local governments are generally free to legislate to set minimum employment standards. These can include minimum or living wage laws, maximum hours legislation, minimum insurance requirements, and workplace safety norms (subject to the requirements of the federal Occupational Safety and Health Act). Because such laws guarantee that *all* workers (either across the entire state or municipality or among those workers employed in a particular sector) receive certain benefits, they give workers something for which they might otherwise have to negotiate in collective bargaining "for free," without them having to make any concessions at the bargaining table.

Employers sometimes argue that such protective laws are preempted under the so-called *Machinists* doctrine, which holds that the federal National Labor Relations Act intended that negotiations between unions and employers be subject to the "free play of economic forces."[4] Under this doctrine, laws that would seek to increase or decrease a union or employer's leverage, for example, in a strike, are typically preempted by the NLRA. The employers' argument tends to be that minimum standards laws are impermissibly meant to benefit unions.

The Supreme Court has rejected this type of argument twice. First, the Court held that a Massachusetts law requiring all employer health-insurance plans to include minimum mental-health coverage was not preempted.[5] Second, the Court held that a Maine plant-closing law that required employers to provide laid-off employees with a one-time severance payment was also

[4] *Lodge 76, Intern. Ass'n of Machinists v. Wisconsin Empl. Rel. Commn*., 427 U.S. 132 (1976)
[5] *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985)

permissible.[6] The Court reasoned that such laws affect union and non-union employees equally, do not encourage or discourage collective bargaining, have only "the most indirect effect on the right to self-organization," are not "designed to encourage or discourage employees in the promotion of their rights collectively," and do not "even inadvertently affect these interests implicated in the NLRA."[7]

Likewise, the proposed bill is permissible minimum conditions legislation as it applies to all Maine workers and protects them from being disciplined for declining to attend meetings where they are subject to indoctrination on issues unrelated to job performance.

III. Conclusion

For the foregoing reasons, the proposed bill is constitutional and not preempted by federal labor law. Therefore, Maine should adopt this legislation and join the growing list of states that have affirmatively protected employees' rights from being disciplined or discharged for refusing to listen to employer's religious or political ideology.

Respectfully submitted,

/s/ Matthew Ginsburg
Matthew Ginsburg

[6] *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987)
[7] *Metropolitan Life*, 471 U.S. at 755