Testimony on Senate Bill 64 ("captive-audience" bill)

Submitted by Scott Shepard, Policy Director

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Good afternoon. My name is Scott Shepard. I am the Policy & Research Director for the Yankee Institute for Public Policy, Connecticut's free-market think tank. I submit this note in opposition to **Senate Bill 64**, the "captive-audience" bill.

This bill likely violates the First Amendment of the United States Constitution, and is almost surely pre-empted by the Federal Labor Relations Act. The latter conclusion was reached by, among others, the Attorney General of the State of Connecticut in an advisory letter of April 26, 2018.[1]

There, *inter alia*, the Attorney General explained that, with regard to the "captive-audience" bill filed in the last session, "[f]ollowing the enactment of §8(c)" of the National Labor Relations Act ("NLRA"), which remains in force, "the [National Labor Relations] Board ["NLRB"] acknowledged that Congress intended both employers and unions to be free to influence employees through noncoercive speech on the issue of organizing." It noted that a recent (2008) Supreme Court decision made clear that § 8(c) "'expressly preclud[es] regulation of speech about unionization 'so long as the communications do not contain a threat of reprisal or force or promise of benefit.'"[2]

This leaves little ground for doubt. This legislation is pre-empted by the NLRA. As a result, the NLRB will be free to challenge it immediately upon its enactment.[3] Even should it fail to act, employers affected by the legislation would be free to sue on their own.[4]

This bill also likely violates the First Amendment to the United States Constitution. The free-speech clause of that Amendment has been interpreted by the United States Supreme Court to forbid most state restrictions on speech unless the restrictions are neutral as to speakers and subjects, and only restrict the time, manner, and/or place in which any speakers may speak

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[1] George Jepsen, Attorney General of the State of Connecticut to Hnr. Leonard A. Fasano, Senate Republican President Pro Tempore, Letter (April 26, 2018), *available at* https://portal.ct.gov/-/media/AG/Opinions/2018/2018-02_Captive_Audience.pdf.

[2] *Id.* (citing Chamber of Commerce v. Brown, 554 U.S. 60, 68 (2008)).

[3] *See, e.g.,* Order, National Labor Relations Board v. Arizona, CV 11-00913-PHX-FJM (D. Ariz. Oct. 12, 2011), *available at* https://law.justia.com/cases/federal/district-courts/arizona/azdce/2:2011cv00913/611238/18/.

[4] *Id.* at 5, 7.

("t.m.p. restrictions").[5] Even carefully drawn and neutral t.m.p. restrictions will only be upheld where they are narrowly tailored to serve the public's interest in safety and convenience.[6]

This bill does not contemplate neutral restrictions. Its prohibitions work only against employers, no other parties (including even unions in the explicit context of labor organization). And they are not narrowly tailored restrictions of the time, manner or place in which discussions might be held, for well-explained government cause, but are rather blanket prohibitions.

The prohibitions, therefore, are straightforward violations of employers' First Amendment rights. As another United State Supreme Court case long-ago explained, employers do not lose their First Amendment rights by paying their employees. Even in the narrow context of labor-related communications,

> an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the [NLRB]. Thus, 8 (c) (29 U.S.C. 158 (c)) *merely implements the First Amendment* by requiring that the expression of "any views, argument, or opinion" shall not be "evidence of an unfair labor practice," so long as such expression contains "no threat of reprisal or force or promise of benefit" in violation of 8 (a) (1). Section 8 (a) (1), in turn, prohibits interference, restraint or coercion of employees in the exercise of *their* right to self-organization.[7]

In other words, employer speech that does not threaten employees is protected by the First Amendment. State law that attempts to strip state citizens of constitutional speech rights are subject to facial challenge (*i.e.*, before enforcement is ever attempted),[8] to injunctive relief during the challenge, and to being stricken even if they have only a *chilling effect* on protected speech.[9]

Here, the effect is not a chilling of protected speech, but an outright ban on it. Enactment of this bill will have no effect on Connecticut law. It will merely open up the state of Connecticut to the payment of the attorneys' fees of whomever is the first plaintiff to challenge it.[10]

Because the legislature clearly should not enact legislation that the state itself has recognized as pre-empted under federal law, that likely violates the United States Constitution, and that will

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[5] *See* Cox v. New Hampshire, 312 U.S. 569, 575-76 (1941).

[6] *See id.*; Frisby v. Schultz 487 U.S. 474, 488 (1988).

[7] NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969) (emphasis added).

[8] *See, e.g.,* Bauer v. Shepard, 620 F.3d 704, 708 (7th Cir. 2010); Saint Paul Area Chamber of Commerce v. Gaertner, 439 F.3d 481 (8th Cir. 2006); California Pro-Life Council, Inc. v. Getman, 328 F.3d 1088 (9th Cir. 2003).

[9] *See supra* note 8 and Gibson v. Florida Legis. Investigation Comm., 372 U.S. 539 (1963).

[10] *See* 43 U.S.C. §§ 1983, 1988; Blanchard v. Bergeron, 489 U.S. 87, 89 n. 1 (1989). ("Notwithstanding that 42 U.S.C. § 1988(b) provides that the district court "may" award reasonable fees to a prevailing party "in its discretion," the Supreme Court has ruled that attorneys' fees must be awarded thereunder to a successful plaintiff "unless special circumstances would render such an award unjust.") The case for attorneys' fees would be especially strong in a case such as this one, in which the state has been clearly warned of the illegality of its actions, including by the highest legal authority of the state.

therefore subject the state to defense costs and to the attorneys' fees of the party that challenges, all to no ultimate purpose, Yankee Institute opposes this bill.