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The Honorable Leonard A. Fasano
Senate Republican President Pro Tempore
State of Connecticut
Senate
Legislative Office Building, Suite 3400
300 Capitol Avenue
Hartford, CT 06106-1591

Dear Senator Fasano:

You have asked for a formal opinion on whether House Bill 5473, *An Act Concerning Captive Audience Meetings* (HB 5473), is preempted by federal law. Specifically, you ask whether the provisions of HB 5473 that would prohibit employers from requiring employees to attend employer-sponsored meetings if the primary purpose of the meeting is to communicate the employer's opinion concerning the decision to join or support a labor organization are preempted by the National Labor Relations Act (NLRA). We conclude that a court, if faced with the issue, would likely hold that such a provision is preempted.

Background

HB 5473 provides that, with certain enumerated exceptions not relevant to this discussion,

> no employer, or agent, representative or designee of such employer shall require an employee to 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 political*** or religious ***matters***, except that an employer or its agent, representative or designee may communicate to an employee any information concerning political or religious matters that the employer is required by law to communicate, but only to the extent of such legal requirement.

HB 5473, § (1)(b) (emphasis added). "Political matters" are defined as "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)(3) (emphasis added). "Employer" is defined as "a person engaged in a business who has more than one employee, including the state and any political subdivision of the state." *Id.*, § (1)(a)(1).

HB 5473 further prohibits an employer from taking adverse employment actions because an employee has reported a violation of the law, *id.*, § (1)(c), and provides a cause of action for an employee who has been discharged, disciplined or penalized in violation of the law, *id.*, § (1)(d).

Discussion

The U.S. Supreme Court has long held that Congress, through the enactment of the NLRA, has preempted state law in two ways. First, "*Garmon* preemption" precludes "state interference with the National Labor Relations Board's interpretation and active enforcement of the integrated scheme of regulation established by the NLRA." *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 613 (1986) (quotation marks omitted); *see San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). *Garmon* preemption prohibits states from regulating activity that "the NLRA protects, prohibits, or arguably protects or prohibits." *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 286 (1986). Second, "*Machinists* preemption" precludes states from regulating conduct that Congress intended to remain unregulated and left to "the free play of economic forces." *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976) (quotation marks omitted); *accord Chamber of Commerce v. Brown*, 554 U.S. 60, 65 (2008). HB 5473 implicates both the *Garmon* and *Machinists* preemption doctrines.

Under existing case law, HB 5473's prohibition on mandatory meetings for communicating an employer's opinion on the decision to join or support a labor organization would constitute the regulation of an activity that the NLRA protects or at least arguably protects. In the early administration of the NLRA, the National Labor Relations Board (Board) took the position that employers must remain neutral in union organizing campaigns so as not to interfere with employees' right to organize. *See Brown*, 554 U.S. at 66-67 (citing *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469, 477 (1941)). As a response to what Congress perceived as the Board's overly restrictive regulation of employer speech, the Taft-Hartley Act amended the NLRA in 1947 to make clear, among

other things, that noncoercive employer speech about unionization could not be a basis for an unfair labor practice. *Id.* at 67. Section 8(c) of the NLRA provides:

> The 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 subchapter [of the NLRA], if such expression contains no threat of reprisal or force or promise of benefit.

28 U.S.C. § 8(c). Following the enactment of § 8(c), the Board acknowledged that Congress intended both employers and unions to be free to influence employees through noncoercive speech on the issue of organizing. *See, e.g., Livingston Shirt Corp.*, 107 NLRB 400, 406-07 (1953) (employer may make noncoercive speech to employees on its premises during work hours without offering union similar opportunity).

The Supreme Court has stated that § 8(c) both "implements the First Amendment," *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969), and reveals the "congressional intent to encourage free debate on issues dividing labor and management." *Linn v. United Plant Guard Workers*, 383 U.S. 53, 62 (1966). Moreover, it has characterized § 8(c) as "expressly preclud[ing] regulation of speech about unionization 'so long as the communications do not contain a threat of reprisal or force or promise of benefit.'" *Brown*, 554 U.S. at 68 (quoting *Gissel Packing*, 395 U.S. at 618). As the Second Circuit has observed, § 8(c) "not only protects constitutional speech rights, but also serves a labor law function of allowing employers to present an alternative view and information that a union would not present." *Healthcare Ass'n of New York State, Inc. v. Pataki*, 471 F.3d 87, 98 (2d Cir. 2006).

At least one federal court of appeals has concluded that "[f]ederal labor law allows employers to require their employees to attend meetings, on the employer's premises and during working time, in which the employer expresses his opposition to unionization." *Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee County*, 431 F.3d 277, 280 (7th Cir. 2005). We are not aware of, nor have we been presented with, any cases holding otherwise.[1]

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[1] Two lawsuits were initiated in federal court challenging legislation similar to HB 5473, but in neither did the court reach the merits of the NLRA preemption claims. *See Associated Oregon Indus. v. Avakian*, No. 3:09cv1494 (D. Or. May 6, 2010) (dismissed on standing and ripeness

Given the Supreme Court's characterization of Congress's "policy judgment, which suffuses the NLRA as a whole, as 'favoring uninhibited, robust, and wide-open debate in labor disputes,'" *Brown*, 554 U.S. at 68 (quoting *Old Dominion Branch No. 496 Nat. Ass'n of Letter Carriers AFL-CIO v. Austin*, 418 U.S. 264, 272-73 (1974)), the argument in favor of *Garmon* preemption is a strong one. In the absence of case law supporting the contrary view – that the NLRA does not protect or arguably protect an employer's right to require employee attendance at a meeting about union organizing – it is likely that a court would conclude that HB 5473 is preempted under *Garmon*.

Similarly, we conclude that HB 5473's prohibition would likely be preempted under *Machinists*. The Supreme Court's decision in *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008), is instructive. In that case, the Court held as preempted under *Machinists* a California statute that prohibited employers who received state funds from using those funds to promote or deter union organizing. It concluded that California was attempting to regulate an activity – employer speech about union organizing – that Congress had intended to leave "within 'a zone protected and reserved for market freedom.'" *Id.* at 66 (quoting *Building & Constr. Trades Council v. Associated Builders & Contractors.*, 507 U.S. 218, 227 (1993)). As discussed above, the Supreme Court has characterized Congress's intent as protecting from regulation an employer's communications about union organizing. *Id.* at 68. HB 5473's attempt to prohibit mandatory meetings for such communications appears to fall within the area Congress intended to be free of regulation, and therefore a court would likely find it preempted.[2]

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grounds); *Metropolitan Milwaukee Ass'n of Commerce v. Doyle*, No. 2:10cv760 (E.D. Wis. Nov. 11, 2010) (stipulated judgment).

[2] We acknowledge that former Attorney General Richard Blumenthal testified and offered a letter in support of prior similar legislation in 2007. *See* Letter to Hon. Edith Prague and Hon. Kevin Ryan dated March 14, 2007. In doing so, however, Attorney General Blumenthal principally relied on the presumption of constitutionality of statutes in concluding he would defend the legislation against a federal preemption challenge, and did not, as we do here, provide an assessment of what a court would likely decide under the *Garmon* and *Machinist* doctrines. Moreover, the views expressed did not have the benefit of the guidance from the Supreme Court's decision in *Brown*, which came a year later.

The scope of preemption under the NLRA leaves intact broad state law authority over many issues that touch upon the employer-employee relationship. *See Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 757 (1985). For example, states retain their police powers to legislate to protect worker safety or to provide a minimum wage. *Id.* at 756. But the exercise of traditional police powers is preempted when it traverses into those areas Congress has determined states should not be permitted to regulate. We conclude that HB 5347's prohibition, if enacted, would do just that, and a court would likely determine that it is preempted.

I trust this is responsive to your question.

Very truly yours,

GEORGE JEPSEN
ATTORNEY GENERAL