Statement of
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the
Maryland General Assembly Senate
Government, Labor and Elections
Committee

Hearing on Maryland HB 45:
"Labor and Employment – Mandatory Meetings on Religious or Political Matters"
Legislative Position: Unfavorable (UNF) February
18, 2026

Restricting Workplace Speech About Unions:
The Downside of State-Federal Conflict and Competition and
Infringing on First Amendment Rights in the Workplace

Chair Beidle, Vice Chair Hayes and Committee Members, it is an honor to be here.

I am a law partner at Morgan Lewis & Bockius LLP (1111 Pennsylvania Avenue NW, Washington DC 20004), and I previously served as Chairman, Acting Chairman and a Board Member on the National Labor Relations Board ("NLRB" or "Board").[1] I am also a Senior Fellow at the University of Pennsylvania's Wharton Business School in the Wharton Center for Human Resources, and I am a Maryland resident in Legislative District 16. I was asked to testify by the Maryland Retailers Alliance, but I am expressing my own views.[2]

I respectfully oppose HB 45. My focus relates to the bill's penalties and restrictions on mandatory workplace meetings if an employer "communicates" any "opinion" about "the decision to join or support a . . . labor organization."[3] These aspects of HB 45 – though they may be well-intentioned – will produce three negative consequences.

First, the workplace meeting provisions in HB 45 – by restricting non-coercive employer speech about union issues – will inhibit the ability of employees to receive multiple viewpoints. The resulting state and federal competition will also impose enormous costs on employees, employers *and* unions by creating multiple-track litigation involving the Maryland Commissioner of Labor and Industry, the Maryland court system, federal labor law proceedings conducted by the National Labor Relations Board ("NLRB"), and appeals in the federal courts.

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[1] I was appointed to the NLRB by President Obama and most of my tenure as a Board Member occurred during the Obama administration, commencing in August 2013. My last year at the Board, ending in December 2017, occurred during the Trump administration.

[2] My views should not be attributed to Morgan Lewis & Bockius LLP or its clients, The Wharton School, the University of Pennsylvania, or any other persons or entities.

[3] SB 417, § 1, proposed Labor & Employment ("L&E") § 3-718(C) (restricting any mandatory "employersponsored meeting during which the employer communicates the opinion of the employer regarding . . .
political matters"); proposed L&E § 3-718(A)(2)(iv) (defining "Political matters" as "matters relating to . . . the decision to join or support a . . . labor organization").

Second, if the workplace meeting provisions in HB 45 are enacted, I predict that inevitable court challenges will result in findings that the legislation is preempted by federal labor law – specifically, the National Labor Relations Act ("NLRA").

Third, I also predict that the courts will invalidate HB 45, if it becomes law, because its content- and speaker-based speech restrictions violate the First Amendment.

A. <u>Summary of House bill 45</u>

SB 417 would create a new Section 3-718 within the Labor and Employment Article in the Maryland Code, making it unlawful for any employers who "discharge, discipline, or otherwise penalize or threaten to discharge, discipline, or otherwise penalize" any employee or who "fail or refuse to hire an applicant for employment," which occurs:

> . . . because the employee declines to attend, participate in, or listen to *communications from the employer, or the employer's agent, representative, or designee, in an employer-sponsored meeting during which the employer communicates the opinion of the employer regarding* religious or *political matters*; or
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> . . . as a result of the applicant's refusal to attend or participate in *an employer-sponsored meeting during which the employer communicates the opinion of the employer regarding* religious matters or *political matters*.[4]

Significantly, SB 417 gives the phrase "political matters" a unique definition, which includes "matters relating to (i) elections for political office, (ii) political parties, (iii) proposals to change . . . legislation; . . . regulations; or . . . public policy; or (iv) the decision to join or support a political party or potential civic, community, fraternal, or labor organization."[5]

The procedural and damages provisions in HB 45 are complex. Alleged violations would be addressed in written complaints filed with the Commissioner of Labor and Industry within 180 days after any alleged violation. After an "investigation" and potential "mediation," the consequences of violations can result in (i) civil penalties up to $10,000 for an initial violation, (ii) civil penalties up to $25,000 for a subsequent violation, (iii) "cease and desist" orders, (iv) and "any other relief that the Commissioner determines is appropriate, including . . . injunctive relief; compensatory damages; [and] affirmative relief" such as"reinstatement," "back pay and interest amounts owed," "restoration of employee benefits, pension or retirement accrual, and other terms and conditions of employment for which the employee would have been eligible," and/or "reasonable attorney's fees and other costs." The bill further provides that the Commissioner may petition "any Circuit Court for any County seeking enforcement of an order" based on alleged violations. Finally, the bill would require all employers to post a "poster or notice" also given to "each new employee on hiring," describing the "rights established" under the bill, and the Commission must consider "failure to comply with the notice requirement" to be "an aggravating factor" when formulating remedies.

Several aspects of this legislation are very clear:

- Although the bill is framed as only prohibiting *adverse consequences* for employees who *refuse to* "attend, participate in, or listen to communications" during "an

[4] SB 417, § 1, proposed L&E §§ 3-718(C)(1), (2) (emphasis added). [5] *Id.*, § 1, proposed L&E § 3-718(A)(2) (emphasis added).

employersponsored meeting" that involve the "opinion of the employer" about union matters (i.e., "the decision to join or support a labor organization"), the predictable consequence of the bill would be (i) to prevent or eliminate workplace meetings where employers express any "opinion" about union issues, and/or (ii) to single out – for severe penalties
– only those meetings where employers communicate an "opinion" about union matters.

- Although the bill states that employers can conduct "voluntary" workplace meetings regarding union matters, the enormous variety of *mandatory* workplace meetings – which address all kinds of important subjects including safety, business requirements, schedules, job duties, compensation, benefits, discipline, and employee questions– will prevent this exception from having wide application. And – as the price for communicating any opinion about unions – the bill creates a right for employees to engage in a mass exodus with no limits on how long employees will be gone, when they must return, where they should go instead of attending the meeting, and what happens if they return late or don't return at all. In most cases, the most practical employer option is to communicate nothing about unions. Indeed, SB 417 imposes the same severe penalties if employers in workplace meetings state express *support* for union representation.

- HB 45 will result in time-consuming and expensive administrative investigations and court litigation – involving employees, unions and employers – that will be necessary to resolve many challenging questions such as:

  – what constitutes a "*meeting*" and what qualifies as an "*employer-sponsored*" meeting versus countless other one-on-one and group discussions that always occur in the workplace;

  – what qualifies as an "*opinion of the employer*" versus the lawful expressing of *personal opinions*, or *facts* about particular unions, or *examples* where unions have either benefited employees or caused workplace conflict, costs, uncertainty and instability;

  – what must occur for attendance or participation to be "*voluntary*";

  – when would "injunctive relief" be ordered by Maryland state courts based on Commissioner petitions by the Commissioner;

  – what *monetary penalties* are (and are not) warranted in specific situations (which, under SB 417, range up to $10,000 for an "initial violation," and up to $25,000 for a "subsequent violation"):

  – what amounts of "*back pay*" are (and are not) warranted, which would require evidence and documentation regarding interim earnings, whether claimants exercised diligence in seeking reemployment elsewhere, and related issues;

  – what is necessary to support awards of "*compensatory damages*" (i.e., monetary awards addressing matters other than back pay);

  – what considerations do (and do not) constitute "*aggravating*" factors affecting damages (including questions regarding whether and when the employer complied with HB 45's required notice-posting; and

– what issues will be relitigated when Commissioner orders become the subject of *enforcement actions* filed in the Maryland Circuit Courts, and appeals to the Maryland Appellate Court and, potentially, the Maryland Supreme Court.[5]

B. Reasons that HB 45's Restrictions on Workplace Meetings Should Not Be Enacted

Three considerations warrant an unfavorable report on HB 45. The first involves the downside of preventing employees from receiving multiple viewpoints regarding union issues, and substantial costs, delays and confusion that will result from creating competition and new "multiple-track" legal proceedings involving the Maryland Commissioner of Labor and Industry, *and* the Maryland court system, in addition to the NLRB, *and* the federal courts. The second and third considerations involve court challenges that will cause the workplace speech restrictions to be invalidated based on (i) court findings that the bill is preempted by the federal National Labor Relations Act ("NLRA"); and (ii) court findings that the speech restrictions infringe on employer First Amendment free speech rights.

1. SB 417 Will Inhibit the Free Exchange of Union-Related Information, and Create Multiple-Track Litigation Causing Hardship for Employees, Employers and Unions

The workplace meeting provisions in HB 45 – by restricting non-coercive employer speech about union issues – will inhibit the ability of employees to receive multiple viewpoints regarding union issues. Under federal law, employees have the right to decide for themselves – usually by voting in NLRB secret ballot elections – whether employees will have union representation.

One of the country's most passionate union and employee advocates – former President John F. Kennedy – spent six years in the U.S. House of Representatives, and seven years in the U.S. Senate. During his freshman year in the House, President Kennedy supported the right of "*employers*" to have "the *same rights of freedom of expression*" that were protected by the First Amendment.[6] And as a Senator, President Kennedy emphasized the importance of union election campaigns where "*both parties* can present their viewpoints,"[7] which he described as a necessary "*safeguard* against *rushing employees into an election where they are unfamiliar with the issues*."[8]

[5] On its face, SB 417 appears to contemplate substantial Commissioner investigations and related actions including: (i) state courts proceedings in which the Commissioner may seek "injunctive relief," (ii) whether particular meetings actually involved expressing an "opinion of the employer" regarding an employee's

[6] H.R. Rep. 80-245, 80th Cong., 1st Sess. at 113-114 (1947), *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947 ("Legis. Hist.") 404-405 (1947) (Supplemental Minority Report by Hon. John F. Kennedy) (emphasis added).

[7] 105 Cong. Rec. 5770 (1959) (emphasis added), *reprinted in* 2 NLRB, Legislative History of the LaborManagement Reporting and Disclosure Act ("LMRDA Hist.") 1085 (statement of Sen. Kennedy).

[8] 105 Cong. Rec. 5361 (1959) (emphasis added), *reprinted in* 2 LMRDA Hist. 1024 (statement of Sen. Kennedy) (advocating NLRB secret ballot elections, with at least 30 days between petition-filing and the election, as a "safeguard against rushing employees into an election where they are unfamiliar with the issues").

The U.S. Supreme Court has likewise emphasized the importance of free speech regarding union issues. In *Chamber of Commerce v. Brown*,[9] the Court held that, in the NLRA, Congress

"decision to join or support" a union, (iii) what monetary penalties are warranted for any claimed violation (ranging up to $10,000 for an "initial violation," and up to $25,000 for a "subsequent violation"), (iv) what evidence is needed to support awards of "back pay" (which typically require documentation regarding interim earnings, whether claimants exercised diligence in seeking reemployment elsewhere, and related issues), (v) findings needed to support awards of "compensatory damages" (i.e., monetary awards addressing matters other than back pay), (vi) the evaluation of circumstances that can reasonably be deemed "aggravating" factors (including or separate from notice issues) affecting damages, and (vii) and order enforcement proceedings in Maryland Circuit Courts, among other things.

intended "to encourage free debate on issues dividing labor and management" based on a "policy judgment, which suffuses the NLRA as a whole, 'favoring uninhibited, robust, and wide-open debate in labor disputes,' stressing that 'freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB.'"[10] And in *NLRB v. Gissel Packing Co.*,[11] the Court stated that "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'"[12]

The importance of free speech regarding union issues – emphasized by former President Kennedy, Congress and the Supreme Court – is directly contrary to the meeting restrictions in HB 45 And the predictable impact of HB 45 would be to prevent employees from obtaining information from employers who are most knowledgeable about the business where employees work.

Additionally, the workplace speech restrictions in HB 45 will create conflicts between Maryland law and federal law, and confusing "multiple-track" litigation involving the Maryland Commissioner of Labor and Industry, *and* the Maryland court system, *and* federal labor law proceedings conducted by the National Labor Relations Board ("NLRB"), *and* appeals in the federal courts.

Although HB 45 is intended to create more "rights" for employees, the "rights" created by SA 417 are unlikely to materialize, or they will be outweighed by greater costs and burdensome delays resulting having union-related workplace issues being treated differently by Maryland law, federal labor law, the Maryland Commissioner of Labor and Industry, and in state and federal courts.

2. <u>SB 417 is Preempted by Federal Labor Law</u>

A second consideration that warrants an unfavorable report on HB 45 involves court challenges that result in findings that the legislation is preempted by federal labor law – specifically, the National Labor Relations Act.

The U.S. Supreme Court has held that, when a State purports to regulate activities that are "*protected*" by the NLRA or constitute an "unfair labor practice" *violating* the NLRA, "due

[9] 554 U.S. 60 (2008).

[10] *Id*. at 67-68 (emphasis added; citations omitted).

[11] 395 U.S. 575 (1969).

[12] *Id*. at 618.

regard for the federal enactment requires that state jurisdiction must yield."[13] The Court reasoned: "When an activity is arguably subject to . . . the [NLRA's protection or prohibitions], the States . . . must defer to the exclusive competence of the National Labor Relations Board. . . ."[14]

Additionally, even when particular conduct is not protected or prohibited by the NLRA, the Supreme Court has held that state laws are preempted of they restrict or penalize actions "that Congress *meant to leave . . . unregulated and to be controlled by the free play of economic forces*."[15]

Both of these standards support a finding that the workplace speech restrictions in HB 45 are preempted by the NLRA for several reasons:

- If workplace meetings involve an employer's communication of *coercive* threats or improper promises related to union issues, this violates NLRA Section 8(a)(1), which makes it *unlawful* for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" by the NLRA.[17]

- If workplace meetings involve *noncoercive* employer opinions regarding unions issues, the NLRA explicitly *protects* these employer statements in Section 8(c), which states: "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 Act*, if such expression contains no threat of reprisal or force or promise of benefit.[18]

- In 1948, based on the enactment of NLRA Section 8(c) in 1947, the NLRB held that expressing employer opinions about union issues during mandatory workplace meetings is *affirmatively protected* by NLRA Section 8(c).[19] Conversely, in November 2024, a divided NLRB held that expressing employer opinions about union issues during mandatory workplace meetings violates NLRA Section 8(a)(1).[16]

Regardless of which NLRB interpretation is correct,[17] the speech restrictions in HB 45 are preempted by the NLRA, based on the Supreme Court holding that the States cannot regulate activities that are *either* "protected" *or* prohibited (*i.e.*, an "unfair labor practice") by the NLRA.[18]

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[13] *San Diego Building Trades Council v. Garmon ("Garmon")*, 359 U.S. 236, 244 (1959) (emphasis added).

[14] *Id*. at 245 (emphasis added).

[15] *Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Commission ("Machinists")*, 427 U.S. 132, 144 (1976) (citation omitted; emphasis added).

[16] *Amazon.com Services LLC*, 373 NLRB No. 136 (Nov. 13, 2024), *appeal pending*, No. 24-13819 (11th Cir.).

[17] The Board's *Amazon* ruling – which has been appealed to the Court of Appeals for the Eleventh Circuit – is contradicted by the plain language in NLRA Section 8(d) and Section 8(d)'s extensive legislative history and numerous Supreme Court and courts of appeals decisions, summarized in my testimony before the U.S. House of Representatives, Committee on Education and the Workforce, Subcommittee on Health, Employment, Labor and Pensions, Hearing on Protecting Employees' Rights: Ensuring Fair Elections at the NLRB, at 4-12 (May 23, 2023) (available here).

[18] *Garmon*, 359 U.S. at 244. SB 417's workplace speech restrictions would likewise be preempted based on *Machinists*, 427 U.S. at 144, where the Supreme Court held state laws are preempted if they restrict or penalize actions "that Congress *meant to leave . . . unregulated and to be controlled by the free play of economic forces*." [23] 802 F. Supp. 3d 1227 (E.D. Cal. 2025), *appeal pending*, No. 25-6874 (9th Cir.).

Indeed, in *California Chamber of Commerce v. Bonta*,[23] the District Court for the Eastern District of California issued an injunction against a California law – which imposed workplace meeting restrictions that were nearly the same as HB 45[24] – and the Court concluded it was likely that the California law was preempted by the NLRA.[25]

[17] 29 U.S.C. § 158(a)(1).

[18] *Id*. § 158(c) (emphasis added).

[19] *Babcock & Wilcox Co.*, 77 NLRB 577, 578 (1948) (finding that the "compulsory audience" aspect of mandatory meetings that employees are "compelled . . . to attend" is "no longer . . . a basis for finding unfair labor practices" because of "the language of Section 8(c) of the amended [NLRA] and its legislative history"). Section 8(c) was added to the NLRA as part of 1947 amendments that repudiated an earlier NLRB decision in *Clark Bros. Co.*, 70 NLRB 802, 805 (1946), *enforced*, 163 F.2d 373 (2d Cir. 1947) (where the Board found that it violated the NLRA to express an employer's opinion regarding union issues in mandatory meetings). The Board overruled *Babcock & Wilcox* in *Amazon.com Services LLC*, 373 NLRB No. 136 (Nov. 13, 2024), *appeal pending*, No. 24-13819 (11th Cir.).

3. SB 417's Workplace Speech Restrictions Violate the First Amendment

The third consideration that warrants that warrants an unfavorable report on HB 45 involves court challenges resulting in findings that HB 45's workplace meeting provisions are unconstitutional infringements on employer First Amendment free speech rights.

The Supreme Court has repeatedly held that employer speech about union issues has First Amendment protection. In *NLRB v. Virginia Electric & Power Co.*,[26] the Supreme Court recognized that employers have a First Amendment right to "take any side it may choose" regarding union issues. In *Thomas v. Collins*,[19] the Supreme Court stated that "employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty." In *Chamber of Commerce v. Brown*,[20] the Supreme Court indicated that NLRA Section 8(c), among other things, "implements the First Amendment."[21] And in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), the Supreme Court held that "an employer's free speech right *to communicate his views to his employees is firmly established* and *cannot be infringed. . . .*"[22]

The workplace speech restrictions in HB 45 violate the First Amendment because they discriminate based on content, viewpoint, and the type of speakers (employers), and the restrictions clearly are not narrowly tailored to advance a "compelling interest."[23]

[19] 323 U.S. 516, 537-38 (1945) (emphasis added; footnotes and citations omitted).

[20] 554 U.S. 60 (2008).

[21] *Id.* at 67.

[22] *Gissel*, 395 U.S. at 617 (emphasis added) (referring to NLRA Section 8(c)).

[23] Each of the deficits referenced in the text would render unconstitutional the speech restrictions imposed by SB 417. *See, e.g., Reed v. Town of Gilbert,* 576 U.S. 155, 169 (2015) (holding that "regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter"); *Turner Broadcasting Sys., Inc. v. FCC,* 512 U.S. 622, 658 (1995) ("[L]aws favoring some speakers over others

[24] The California speech restrictions, similar to Maryland SB 417, defined "political matters" as "matters relating to . . . the decision to join or support any . . . labor organization," and make it unlawful for an employer to "subject, or threaten to subject, an employee to *discharge, discrimination, retaliation, or any other adverse action* because the employee *declines to attend an employer-sponsored meeting or affirmatively declines to participate in, receive, or listen to any communications with the employer* or its agents or representatives, the purpose of which is to communicate *the employer's opinion about* religious or *political matters*." California Labor Code § 1137(c) (emphasis added).

[25] 802 F. Supp. 3d at 1248-1254.

[26] 314 U.S. 469, 477-79 (1941)

Here as well, it is relevant that the very similar California workplace speech restrictions were blocked by an injunction issued in *California Chamber of Commerce v. Bonta*,[32] where the court stated that it infringed on the First Amendment to "prohibit an employer from taking an adverse action against an employee . . . *based solely on the type of speech* in which an employer engaged. And more than that, the inquiry would focus on whether the speech was related to *certain* political or religious matters."[24]

Additionally, just last Friday, a Connecticut federal court issued a decision addressing similar workplace speech restrictions enacted by Connecticut, and the court expressed agreement with the California court's indication that these types of speech restrictions infringe on the First Amendment.[25]

C. Conclusion

Again, I appreciate the opportunity to appear today, and I look forward to answering any questions.

demand strict scrutiny when the legislature's speaker preference reflects a content preference"); *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 537 (1980) ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic."); *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 340 (2010) (restrictions on speech must be "narrowly tailored" to achieve a "compelling interest"); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2430 (2022) ("[L]earning how to tolerate speech … of all kinds is part of learning how to live in a pluralistic society," even if "some will take offense to certain forms of speech … they are sure to encounter in a society where those activities enjoy such robust constitutional protection."); *Tinker v. Des Moines*

[24] *Id*. at 1256.

[25] *Chamber of Commerce of the United States v. Bartolomeo*, __ F. Supp. 3d __, 2026 WL 412515 (D. Conn. Feb. 13, 2026). In *Bartolomeo*, the court found that no standing existed as to the Connecticut Business and Industry Association ("CBIA"), because a Department of Labor official stated that the Department would not enforce the workplace speech restrictions against the CBIA. 2026 WL 412515, at *6-*8. However, the *Bartolomeo* court indicated that it regarded the California court's reasoning in *Bonta* – finding that California's similar restrictions violated the First Amendment – was "both thorough and well-reasoned." *Id*. at *8 n.12.

Ind. Comm. Sch. Dist., 393 U.S. 503, 509 (1969) (government has no compelling interest in "avoid[ing] the discomfort and unpleasantness that always accompany an unpopular viewpoint"). [32] 802 F.Supp.3d 1227 (E.D. Cal. 2025), *appeal pending*, No. 25-6874 (9th Cir.).