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PAUL M. SECUNDA

Addressing Political Captive Audience Workplace Meetings in the Post-*Citizens United* Environment

INTRODUCTION

*Citizens United*¹ has wrought widespread changes in the election law landscape. Yet, a lesser-known consequence of this watershed case might have a significant impact in the workplace: it may permit employers to hold political captive audience workplace meetings with their employees. Under *Citizens United*'s robust conception of corporate political speech, employers may now be able to compel their employees to listen to their political views at such meetings on pain of termination.

To eliminate this danger while remaining consistent with the First Amendment framework for election law post-*Citizens United*, this Essay urges Congress to consider language similar to that enacted by the Oregon Worker Freedom Act (S.B. 519), which became effective January 1, 2010.² S.B. 519 prohibits termination of employees for refusing to attend mandatory political, labor, or religious meetings held by their employers. Enacting a federal law like the Oregon bill, which would protect employees from being terminated, disciplined, or otherwise disadvantaged for choosing not to be subjected to indoctrination meetings, would effectively address this problem and would constitute permissible employment standards legislation.

It would also not run afoul of the First Amendment speech rights of employers under *Citizens United*. Employers would still be able to communicate

1. *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

2. S.B. 519 is now codified at OR. REV. STAT. §§ 659.780, 659.785 (2009).

their views about political candidates and parties to their employees as the First Amendment now contemplates, but they would not be able to force them to listen to such speeches at the risk of losing their jobs or other benefits of employment.

I. ELECTION LAW PRE-CITIZENS UNITED

Prior to *Citizens United*, the 1971 Federal Election Campaign Act (FECA), as amended in 1976,³ provided that corporations were permitted unlimited communication with and solicitation of shareholders and executive and administrative personnel (the corporation's "restricted class"). Rank-and-file employees, on the other hand, could be solicited for corporate Political Action Committees (PACs) only twice a year (originally pegged to primary and general election seasons), only by mail sent to their home addresses, and only through an accounting system that made it impossible for management to know which employees did or did not contribute. Partisan political communication to rank-and-file employees, moreover, was completely prohibited.⁴

Now, post-*Citizens United*, express advocacy outside a corporation's restricted class is no longer restricted.⁵ Justice Kennedy, writing for the Court, held: "We return to the principle . . . that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."⁶ Most commentary has focused on what this might mean for corporate and union campaign contributions during future federal elections. But when *Citizens United* invalidated 2 U.S.C. § 441b(b)(2)(A),⁷ it

3. 2 U.S.C. §§ 431-442 (2006).

4. See 2 U.S.C. § 441b(b)(2)(A) (2006).

5. *Citizens United*, 130 S. Ct. 876.

6. *Id.* at 913.

7. Prior to the decision, such communications were limited to "stockholders and executive or administrative personnel and their families." 2 U.S.C. § 441b(b)(2)(A) (2006). The full text of the statute provides:

For purposes of this section . . . , the term "contribution or expenditure" . . . includes any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section or for any applicable electioneering communication, *but shall not include . . . communications by a*

also permitted corporations to freely use their treasury funds to advocate for candidates and political parties to their rank-and-file employees.

In the absence of the FECA prohibition, no other federal law exists that prevents corporations from requiring, on pain of termination, that employees attend one-sided partisan speeches, rallies, videos, or other events that advocate the election of specific candidates or parties. Nor is there any law that prohibits corporations from requiring that supervisors engage their subordinates in express advocacy conversations during work time and requiring that employees participate in such conversations. Although federal law does still prevent employers from issuing explicit or implicit threats against employees who vote for the “wrong” candidate, short of that, nothing prohibits employers from requiring employees to participate in one-sided political propaganda events.⁸ There is no requirement that opposing candidates be offered equal time, or even that employees themselves be permitted to ask questions or voice their own opinions.

II. USE OF CAPTIVE AUDIENCE MEETINGS FOR POLITICAL SPEECH

Already, American employers are increasingly using the captive audience technique to force their employees to learn about the employer’s political and religious views. During these sessions, employees may be forced, at the risk of losing their jobs, to listen to their employer’s perspective on the latest political and religious issues of the day.⁹

corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject . . .

Id. (emphasis added).

Section 441b(a) initially establishes that “[i]t is unlawful for any . . . corporation . . . to make a contribution or expenditure in connection with any election to any political office, . . . or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section.” 2 U.S.C. § 441b(a) (2006).

8. See 18 U.S.C. § 594 (2006). Of course, this prohibition against threats for voting for the “wrong” candidate is without much force because, given the secret ballot, the employer is unlikely to know for whom an employee actually votes.
9. See David Schmitz, Op-Ed., *Employers Should Keep Nonwork Opinions to Themselves*, SEATTLE TIMES (Mar. 9, 2009), http://seattletimes.nwsourc.com/html/opinion/2008832761_opinb1oschmitz.html (citing testimony from Washington State House and Senate Hearings that documents a significant number of such workplace captive audience political and religious meetings); see also Mich. House Fiscal Agency, *Legislative Analysis: Worker Freedom Act*, MICH. LEGISLATURE, 1 (June 24, 2009), <http://www.legislature.mi.gov/documents/2009-2010/billanalysis/House/pdf/2009-HLA-4467-3.pdf> (“According to testimony during the last legislative session on an identical bill, workers say that employers have forced them to listen to their views on gay

For instance, during the presidential election of 2004, some alleged that the United States Chamber of Commerce and the National Association of Manufacturers sought to have employers use their workplaces to hold meetings with their employees to “educate” them on partisan political issues.¹⁰ Employees were urged to act in their employer’s best interest by not voting for unacceptable candidates and specifically, to vote for George W. Bush for president.¹¹

More recently, in *Wal-Mart Stores, Inc.*,¹² the FEC split 3-3 on whether Wal-Mart violated then-FEC law during store manager and department supervisor meetings that utilized corporate resources for express political advocacy directed at rank-and-file employees. Specifically, the complaint alleged that Wal-Mart conducted mandatory meetings with its store managers and supervisors at which the corporation expressed opposition to the pending Employee Free Choice Act and stated that voting for then-Senator Obama and other Democrats would result in its passage.¹³

As one commentator observed, attempts by employers to influence the political activities of their employees may be extremely effective because “[p]eople need their jobs, and many will sacrifice their rights as citizens to continue to provide for themselves and their families. Consequently, an employer that tries to use its financial muscle to control employees’ political behavior will often succeed.”¹⁴ Even before *Citizens United*, a need existed to protect employees against political intimidation and pressure from their employers.¹⁵ After *Citizens United*, this type of meeting will be lawful as a legal campaign expenditure.

marriage, the war in Iraq, or other issues unrelated to job performance, or to participate in prayer breakfasts or other religious exercises.”).

10. See J. COMM. JUDICIARY, CONN. GEN. ASSEMB., 2007 REG. SESS., JOINT FAVORABLE REPORT ON H.B. 7326: AN ACT CONCERNING CAPTIVE AUDIENCE MEETINGS, <http://www.cga.ct.gov/2007/JFR/H/2007HB-07326-RooJUD-JFR.htm> (reported by Jared W. Kupiec) (statement of Daniel Livingston, Livingston, Adler, Pulda, Meiklejohn & Kelly PC) (“We know that the United State Chamber of Commerce and the National Association of Manufacturers, among many other large business organizations and national evangelical groups, urged members to use their positions of power to ‘educate’ employees on the need to vote for George W. Bush in 2004.”).
11. J. COMM. JUDICIARY, CONN. GEN. ASSEMB., *supra* note 10.
12. *Wal-Mart Stores, Inc.*, MUR Nos. 6051 & 6052 (Fed. Election Comm’n Apr. 30, 2009).
13. Complaint, *Wal-Mart Stores, Inc.*, MUR No. 6051 (Fed. Election Comm’n Aug. 8, 2008); Complaint, *Wal-Mart Stores, Inc.*, MUR No. 6052 (Fed. Election Comm’n Aug. 6, 2008).
14. See Lewis Maltby, Op-Ed., *Office Politics: Civic Speech Shouldn’t Get Employees Fired*, LEGAL TIMES, Aug. 29, 2005, http://www.workrights.org/issue_lifestyle/ldlegaltimes.pdf.
15. See sources cited *supra* notes 9-10.

In addition to political speeches, more companies are hiring ministers to serve their workers. Evangelical Christian organizations are increasingly offering ministry services for employers to provide to their employees during work hours.¹⁶ Prayer breakfasts, faith-based training and education, and requests for information about employees' religious affiliations are becoming a larger part of the American workplace.¹⁷ Although voluntary religious participation in the private workplace may not be objectionable,¹⁸ power disparities in the employment relationship suggest that some of this employee religious participation may not be a matter of free choice.¹⁹

III. LESSONS FROM LABOR LAW

The use of captive audience meetings in private-sector union campaigns provides some insight into how *Citizens United* might lead to an increase in the number of mandatory political and religious meetings held by employers. Private-sector employers in the United States routinely hold mandatory workplace meetings during union organization campaigns to express anti-union views to their employees.²⁰ Such captive audience speech occurs when employers require supervisors to convey management's anti-union opinions to

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16. See, e.g., Patrick T. Reardon, *A 'Blessing'—or an Intrusion?*, CHI. TRIB., Apr. 2, 2002, at C1; Karla Ward, *Chaplains at Work*, LEXINGTON HERALD-LEADER, Aug. 8, 2005, at C1.
 17. See, e.g., Neela Banerjee, *At Bosses' Invitation, Chaplains Come into Workplace and onto Payroll*, N.Y. TIMES, Dec. 4, 2006, at A16 ("From car parts makers to fast food chains to financial service companies, corporations across the country are bringing chaplains into the workplace. At most companies, the chaplaincy resembles the military model, which calls for chaplains to serve the religiously diverse community before them, not to evangelize.").
 18. Limits do exist on the ability of employers to proselytize in the workplace under Title VII and parallel state anti-discrimination law. See 42 U.S.C. § 2000e-2(a) (2006) (prohibiting religious discrimination in the workplace). Nevertheless, cases illustrate that this protection may not always apply. See *Meltebeke v. Bureau of Labor & Indus.*, 903 P.2d 351, 363 (Or. 1995) (holding that an employer must know that religious proselytizing created an intimidating, hostile, or offensive working environment before a court will find liability under Oregon anti-discrimination law).
 19. See *Milwaukee Deputy Sheriffs' Ass'n v. Clarke*, 588 F.3d 523, 529 (7th Cir. 2009) (finding a First Amendment violation "where an authority figure invited a Christian organization that engaged in religious proselytizing to speak on numerous occasions at mandatory government employee meetings").
 20. One recent study found that ninety-two percent of four hundred studied union campaigns included workplace captive audience meetings. KATE BRONFENBRENNER, *UNEASY TERRAIN: THE IMPACT OF CAPITAL MOBILITY ON WORKERS, WAGES, AND UNION ORGANIZING* 73 (2000), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1002&context=reports>.

their subordinates or when employers require employees to listen to the employer's anti-union message at mandatory meetings during work time.

In conversations with supervisors, employees risk being fired for insubordination if they refuse to listen to partisan advocacy; in the case of larger group meetings, employees may be terminated for refusing to attend anti-union assemblies. Indeed, employees can be lawfully terminated for merely asking questions of their employers during such a meeting or for leaving such meetings without permission.²¹ One former chairman of the National Labor Relations Board characterized this power of an employer to monopolize its workplace for anti-union speeches as "an extremely devastating technique in organizational campaigns."²² It is perhaps no surprise, then, that a recent study indicated that employees were subject to nearly *eleven* captive audience meetings during an average union campaign.²³

Under both the First Amendment and the National Labor Relations Act (NLRA),²⁴ these captive audience techniques are considered lawful. The Supreme Court has long interpreted the NLRA as permitting employers to hold captive audience meetings with their employees on labor-oriented issues.²⁵

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21. See *NLRB v. Prescott Indus. Prod. Co.*, 500 F.2d 6, 10-11 (8th Cir. 1974) (refusing to enforce an NLRB decision holding that disallowing employee questioning during a captive audience meeting constituted an unfair labor practice); *Litton Sys., Inc.*, 173 N.L.R.B. 1024, 1030 (1968) (indicating that an employee has no statutorily protected right to leave a mandatory anti-union captive audience meeting); *Hicks Ponder Co.*, 168 N.L.R.B. 806, 815 (1967) (upholding an employer's right to eject vocal pro-union workers who speak out once captive audience meetings have begun).
 22. See William B. Gould IV, *Independent Adjudication, Political Process, and the State of Labor-Management Relations: The Role of the National Labor Relations Board*, 82 *IND. L.J.* 461, 484 (2007).
 23. BRONFENBRENNER, *supra* note 20, at 73.
 24. 29 U.S.C. §§ 151-169 (2006).
 25. See *NLRB v. United Steelworkers of Am.*, 357 U.S. 357, 364 (1958) (implicitly finding employer captive audience meetings permissible in stating that unions are not "entitled to use a medium of communication simply because the employer is using it"); *Livingston Shirt Co.*, 107 N.L.R.B. 400, 411 (1953); see also Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 *COLUM. L. REV.* 1527, 1536-37 (2002) ("The [NLRA] not only protects employers' right [sic] to express their opposition to unionization; it also recognizes their right to compel employees to listen to them in 'captive audience' meetings, while excluding union representatives from the workplace altogether.") (citations omitted).

IV. POSSIBLE LEGAL RESPONSE TO POLITICAL CAPTIVE AUDIENCE MEETINGS

Recently, employee interest groups have sought at the state level to prohibit employers from holding captive audience meetings concerning political or religious speech. Just this January, the state of Oregon adopted the Worker Freedom Act (S.B. 519).²⁶ S.B. 519 was enacted to address the employer practice of holding mandatory meetings at work, lecturing employees on political or religious matters outside the scope of their employment, and threatening employees with penalties or job loss if they wished to leave such meetings.

Under S.B. 519, if an employer fires or penalizes an employee for declining to attend such a meeting, the employee may bring an action against the employer for reinstatement, back pay, and other forms of relief.²⁷ The bill's effect is limited, however. It does not restrict an employer's right to offer meetings or other communications on political or religious matters, as long as "attendance or participation is strictly voluntary," and it does not limit an employer's right to conduct electioneering in the workplace unless employment is conditioned upon attendance at the meeting.²⁸

Although this law is currently being challenged in federal court by the Chamber of Commerce on First Amendment and NLRA preemption grounds,²⁹ the law rests on solid First Amendment foundations, and, of course, a federal enactment would not be subjected to NLRA preemption.

Therefore, Congress should enact "Federal Worker Freedom Act" provisions, like those promulgated by Oregon, to prohibit employers from engaging in this sort of mandatory political indoctrination of their employees. Indeed, any bill responding to *Citizens United* should uphold the principle that employees cannot be forced, as a condition of employment, to listen to partisan political speech or to participate in partisan political conversations.

The need for this type of legislative response is based on the longstanding recognition that employers' speech carries a different weight than that of any other participant in political debates, and that the law must be particularly careful to guard employee-voters against the undue influence of their

26. S.B. 519 is now codified at OR. REV. STAT. §§ 659.780, 659.785 (2009).

27. OR. REV. STAT. § 659.785(2) (2009).

28. OR. REV. STAT. § 659.785(4) (2009).

29. See Complaint, *Associated Or. Indus. v. Avakian*, No. 3:09-cv-01494 (D. Or. Dec. 22, 2009).

employers.³⁰ For instance, in the government employment context, the Hatch Act³¹ and its state law analogues restrict public employees' political activities. Under the Hatch Act Reform Amendments of 1993,³² although federal employees can now more actively participate in political campaigns, they are still not permitted to run for public office or engage in political activity during work. One of the reasons for these laws is the inherent potential for coercion in employer-employee relationships that cannot simply be undone by prohibiting explicit or implicit threats or discrimination. But more importantly, both the Hatch Act and my proposed "Federal Worker Freedom Act" recognize that it is in the best interest of all involved to keep political discussions and partisanship out of the public and private workplace.

V. THE LAWFULNESS OF THE PROPOSED FEDERAL WORKER FREEDOM LEGISLATION

Because Federal Worker Freedom Act legislation would not focus on employer *speech*, but merely the *conduct* of compelling employees to listen to employer speech on pain of termination, it qualifies as a regulation of conduct rather than as an impermissible content-based regulation on speech.³³ Moreover, federal courts have long recognized that the government may protect a listener's interest in avoiding unwanted communication.³⁴ Even if a court were to construe captive audience meetings as employer "speech," the restrictions would be permissible as "time, place, or manner" regulations.³⁵

30. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) ("[A]ny balancing of those [employer and employee] rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.").

31. 5 U.S.C. §§ 1501-08, 7321-26 (2006).

32. Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94, 107 Stat. 1001.

33. *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (holding that a hate crimes statute did not violate free speech rights because "the statute . . . is aimed at conduct unprotected by the First Amendment").

34. *Hill v. Colorado*, 530 U.S. 703, 716-17 (2000); *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 738 (1970) ("[N]o one has a right to press even 'good' ideas on an unwilling recipient."); *Thomas v. Collins*, 323 U.S. 516, 537-38 (1945) (finding that employers may have the right to persuade their employees, but "[w]hen to this persuasion other things are added which bring about coercion, or give it that character, the limit of the [employer's First Amendment] right has been passed").

35. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

Moreover, these restrictions are appropriately content neutral,³⁶ and such a law would also be valid under the Court's captive audience doctrines.³⁷

Congress is also well within its power to protect workers from being harassed and intimidated by employers at work through political captive audience meetings as a minimal working condition. Congress should be able to enact laws that prohibit employers from firing workers who refuse to attend captive audience meetings about the employer's political views on candidates or parties. Indeed, such minimum conditions have been enacted in numerous other areas of labor and employment law, including antidiscrimination law, wage and hour law, and occupational safety and health law under Congress's Commerce Clause Power.³⁸ All such laws have been consistently upheld.³⁹

Moreover, the federal government already provides criminal sanctions against anyone who

intimidates, threatens, [or] coerces . . . any other person for the purpose of interfering with the right of such other person to vote or to vote as he many choose, or of causing such other person to vote for, or not to vote for, any candidate . . . , at any election held solely or in part for the purpose of electing such candidate, [and] shall be fined under this title or imprisoned not more than one year, or both.⁴⁰

A few states have also legislated in the political election context against allowing employers to discharge employees or to subject them to other forms of coercive pressure as a way to influence their votes in political elections. For instance, employees have private rights of action under state law if they are discharged or subjected to coercive pressures to influence them in the political election context.⁴¹

36. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 649 (1994); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

37. *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) ("The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech."); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 307 (1974) (Douglas, J., concurring); *Rowan*, 397 U.S. at 737.

38. *See Metro. Life Ins., Co. v. Massachusetts*, 471 U.S. 724, 755 (1985).

39. *See, e.g., Maryland v. Wirtz*, 392 U.S. 183, 196-97 (1968) (holding that the Fair Labor Standards Act can be applied to the states under the Commerce Clause).

40. 18 U.S.C. § 594 (2006).

41. *See, e.g., CAL. LAB. CODE* §§ 1101-1103 (West 2003); *COLO. REV. STAT. ANN.* § 1-13-719 (West 2009); *CONN. GEN. STAT. ANN.* §§ 2-3a, 9-365 (West 2009); *MISS. CODE ANN.* § 79-1-9 (2001).

Yet, these federal and state statutes prohibiting retaliation for voting against an employer's preferred candidate are not sufficient to address the effects of coerced employee attendance at partisan political events. Congress should use the Oregon model to prohibit employers from taking advantage of the impact of *Citizens United*.

CONCLUSION

The key to the constitutionality of this proposed "Federal Worker Freedom Act" is that it would not regulate employer political *speech* in any manner. Instead, it would merely regulate employer *conduct* that compels employees to listen to employer political speech and intimidates them into participating in partisan political events. Congress's interest here, in protecting the employment of its citizens and the freedom of conscience of its voters, is not related to the suppression of anyone's expression. Indeed, Congress has a compelling interest in enacting that protection in light of the effect of *Citizens United*, which will allow virtually unlimited campaigning in the workplace by employers, under highly coercive circumstances. Congress's historical sensitivity to employer intimidation of employees, both express and implicit, should therefore inform its response to this landmark decision.

Paul M. Secunda is an Associate Professor of Law, Marquette University Law School. The author would like to thank Gordon Lafer, David Rosenfeld, and Ben Sachs for their invaluable contributions to this Essay. All errors or omissions are the author's alone.

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