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Mr. Chris DiPentima
President and Chief Executive Officer
Connecticut Business & Industry Association
350 Church Street
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RE: Federal Preemption and Connecticut Senate Bill 163 (PA 22-24), "An Act Protecting Employee Freedom of Speech and Conscience"

Dear Mr. DiPentima:

This letter addresses whether Connecticut Senate Bill 163 (PA 22-24) – captioned "An Act Protecting Employee Freedom of Speech and Conscience" – is preempted by federal law or raises other concerns about its validity. Senate Bill 163 would, among other things, prohibit employers from having employees attend mandatory meetings involving the employer's opinion concerning union issues (these are often called "captive-audience meetings"). Senate Bill 163 would be preempted if it is contrary to federal law or intrudes into an area that Congress intended to be addressed exclusively by federal law. I believe Senate Bill 163 runs headlong into both problems, in addition to raising serious First Amendment concerns about infringement on freedom of speech and religion.

Most labor law issues in the United States are governed by the National Labor Relations Act ("NLRA"), which is enforced by a federal agency, the National Labor Relations Board ("NLRB" or "Board"). I had the privilege of serving on the NLRB from August 2013 to December 2017. Most recently, I was Chairman of the NLRB, and I also served as a Board Member and Acting Chairman. Separate from my service on the NLRB, I have been a labor and employment lawyer in private practice for more than 35 years, and I am also a Senior Fellow at the University of Pennsylvania's Wharton School.

This is not the first time the Connecticut legislature has considered the enactment of restrictions on workplace speech. Three years ago, in 2019, the Connecticut legislature was considering similar legislation (Senate Bill 440, LCP 5741), and I expressed a view that the legislation was preempted and raised serious First Amendment concerns. Last month, however, one potential change surfaced on the federal level: on April 7, 2022, the NLRB General Counsel (who functions like a prosecuting attorney) issued a memo stating that she intends to argue that the NLRB should adopt a new interpretation of federal law by finding that captive-audience meetings violate the NLRA. I disagree with the interpretation that the NLRB General Counsel intends to argue, which is contrary to existing NLRB and court decisions. However, I believe that the General Counsel's memo also demonstrates that Senate Bill 163 should be considered preempted by federal law.

The remainder of this letter briefly summarizes Senate Bill 163, and this letter describes the reasons that I believe this legislation would be found invalid based on the doctrine of federal preemption. This letter also briefly describes significant constitutional concerns that the legislation creates under the First Amendment, among other things.

A. Summary of Senate Bill 163

Connecticut Senate Bill 163 would change Section 31-51q of the Connecticut General Statutes which currently protects employees from discipline or discharge based on their exercise of rights guaranteed by the U.S. Constitution or the Constitution of the State of Connecticut. Senate Bill 163 would add a new prohibition making it unlawful for any employer "who subjects or threatens to subject" any employee to discipline or discharge on account of the following:

> such employee's refusal to (A) 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 religious or political matters, or (B) listen to speech or view communications, the primary purpose of which is to communicate the employer's opinion concerning religious or political matters. . . .

Sen. Bill 163, § 1, amending Conn. Gen. Stat. §31-51a(b) (emphasis added). Significantly, the legislation gives the phrase "political matters" a unique definition, which means "matters relating to elections for political office, political parties, proposals to change legislation, proposals to change regulation and the decision to join or support any political party or political, civic, community, fraternal or labor organization." *Id.*, § 1, amending Conn. Gen. Stat. §31-51a(a)(1) (emphasis added). The phrase "religious matters" is defined as "matters relating to religious affiliation and practice and the decision to join or support any religious organization or association." *Id.*, § 1, amending Conn. Gen. Stat. §31-51a(a)(2). The legislation imposes remedies that include "the full amount of gross loss of wages or compensation" caused by any prohibited discipline or discharge, plus "costs and such reasonable attorney's fees as may be allowed by the court." *Id.*, § 1, amending Conn. Gen. Stat. §31-51a(b).[1]

[1] Senate Bill 163 sets forth certain exceptions that permit employers (1) to communicate "any information that the employer is required by law to communicate, but only to the extent of such legal requirement"; (2) to communicate "any information that is necessary for such employees to perform their job duties"; (3) to meet with employees and engage in communications "that are part of coursework, any symposia or an academic program" where the employer is "an institution of higher education"; (4) to have "casual conversations" with employees "provided participation in such conversations is not required"; and (5) to communicate or meet with individuals who are "the employer's managerial and supervisory employees." Id. §1, amending Conn. Gen. Stat. §31-51a(c).

B. Federal Preemption and the National Labor Relations Act

To preserve the protection and careful balancing of interests reflected in the NLRA,[2] the U.S. Supreme Court, other courts and the NLRB have applied a doctrine of federal preemption which invalidates state and local laws that conflict with the NLRA or intrude on areas involving employer-employee relations that Congress intended to be regulated only by the NLRA. Thus, in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), the Supreme Court stated:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.[3]

When particular conduct is neither protected or prohibited by the NLRA, state laws will still be considered preempted and invalid when they restrict or penalize actions "that Congress meant to leave . . . unregulated and to be controlled by the free play of economic forces." *Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Commission ("Machinists")*, 427 U.S. 132, 144 (1976) (citation omitted; emphasis added).

If these standards are applied to Connecticut Senate Bill 163, I believe this would produce a finding that Senate Bill 163 is preempted by the NLRA. Senate Bill 163 would render unlawful any "employer-sponsored meeting" that employees are required to attend, which has a "primary purpose" to communicate "the employer's opinion concerning . . . political matters," and the phrase "political matters" is defined as "matters relating to . . . the

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[2] The NLRA protects and reflects a careful balancing of interests among employees, employers and unions. *See, e.g.*, *Republic Aviation v. NLRB*, 324 U.S. 793, 797-98 (1945) (referring to "working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments"); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 229 (1963) (referring to the "delicate task" of "weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing . . . the intended consequences upon employee rights against the business ends to be served by the employer's conduct"); *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 678-79 (1981) ("Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business").

[3] *Id.* at 244 (emphasis added).

decision to join or support any . . . labor organization." Sen. Bill 163, § 1, amending Conn. Gen. Stat. §§31-51a(a)(1), (b) (emphasis added).

Regarding Connecticut Senate Bill 163, a finding of federal preemption would be supported by three different rationales:

- First, as explained below, Senate Bill 163 would prohibit what are commonly called "captive-audience speeches" (meetings regarding union-related issues that are held during work time where employees are required to attend). This prohibition would be directly contrary to what the NLRA protects.

- Second, the April 7, 2022 memo issued by the NLRB General Counsel indicates that she intends to argue that the NLRB should adopt a new interpretation of federal law by finding that captive-audience meetings violate the NLRA.[4]

- Third, even if mandatory captive-audience speeches were not protected or prohibited by the NLRA, Connecticut Senate Bill 163's prohibition – involving employer-sponsored meetings, speech, communications and opinions regarding decisions to join or support a union – intrudes on areas that Congress meant to leave "unregulated" by the states.

The conflict between Senate Bill 163 and the NLRA is apparent from multiple considerations:

- The focus of Senate Bill 163 – involving meetings, speech, communications and opinions about employee decisions to join or support a union – directly affects and relates to core employee rights afforded by the NLRA. The employee rights protected by the NLRA are described in NLRA Section 7, which mentions two sets of rights, among other things: (1) the right "to form, join, or assist labor organizations," and (2) and the right "to refrain from any or all of such activities. . . ." 29 U.S.C. §157 (emphasis added).

- Senate Bill 163 also directly affects and relates to the rights of employers to have meetings, speech, communications and opinions about union issues, and these employer rights are affirmatively protected by the NLRA. These rights are addressed in NLRA Section 8(c), which states "[t]he 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." 29 U.S.C. § 158(c) (emphasis added).

[4] GC Memo 22-04, "The Right to Refrain from Captive Audience and other Mandatory Meetings," April 7, 2022 (available at https://apps.nlrb.gov/link/document.aspx/09031d458372316b) (hereinafter "General Counsel's memo").

- In *Chamber of Commerce v. Brown*, 554 U.S. 60, 68 (2008), the U.S. Supreme Court interpreted Section 8(c) and observed that, in addition to "implement[ing] the First Amendment" for employers, Section 8(c) "manifested a 'congressional intent to encourage free debate on issues dividing labor and management'" and reflected a "policy judgment" that favored "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." *Id*. at 67-68 (emphasis added; citation omitted).

- The U.S. Supreme Court in *Chamber of Commerce v. Brown* invalidated a state statute (adopted in California) restricting the ability of employers who received California state funds to oppose union organizing efforts. 554 U.S. at 65. The Supreme Court held that the California statute's policy judgment – prohibiting "partisan employer speech" that opposed union organizing – had been rejected by the U.S. Congress in NLRA Section 8(c), which affirmatively protects such employer speech. *Id.* at 68-69. Connecticut Senate Bill 163 represents a similar effort to prevent employers from engaging in employer "speech" (including meetings, communications and opinions) regarding union organizing activity.

- Many other NLRB and Supreme Court cases have addressed – and upheld – the legality of captive-audience meetings like those that would be invalidated by Senate Bill 163. For a short period after the NLRA was adopted in 1935, the NLRB required employer neutrality about union organizing, but the Supreme Court rejected this view in 1941, and found that nothing in the NLRA prohibited an employer "from expressing its view on labor policies or problems" unless the employer's speech "in connection with other circumstances [amounted] to coercion within the meaning of the Act."[5] After the NLRB continued to find that mandatory employer-sponsored meetings about union-related issues were unlawful,[6] the U.S. Congress responded by enacting NLRA Section 8(c), and the NLRB has consistently upheld employer-sponsored meetings regarding union-related issues, provided that such meetings are held at least 24 hours prior to any election. *Peerless Plywood*, 107 NLRB 427, 429-30 (1953). *See also Livingston Shirt Corp.*, 107 NLRB 400, 406-409 (1953) (finding that employers may lawfully address union issues at a meeting held on the company's premises and on company time without giving unions the same opportunity).

- By 1959, when Congress made further amendments to the NLRA (as part of the Labor-Management Reporting and Disclosure Act), the right of employers to communicate their opinions about union-related issues was well-established, and John F. Kennedy (who was then a Senator and Chair of the Conference Committee that reconciled competing versions of the legislation passed by the House and Senate, respectively) emphasized the need to have sufficient time for campaigning

[5] *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469, 477 (1941).

[6] *See, e.g., Clark Bros. Co.*, 70 NLRB 802, 804-05 (1946).

> as a "safeguard against rushing employees into an election where they [would be] unfamiliar with the issues,"[7] and he said there should be at least a 30-day pre-election period "in which both parties can present their viewpoints."[8]

It is very clear that Connecticut Senate Bill 163 involves and affects important employee rights that are "protected" by NLRA Section 7 (including the rights "to form, join, or assist" unions and the right to "refrain" from such activities), and it involves and affects important employer rights that are "protected" by NLRA Section 8(c) (including the rights to express and disseminate "views," "argument" and "opinion" regarding union issues).[9] For these reasons, I believe Senate Bill 163 would be found to be preempted by the NLRA on the basis that it "purports to regulate" activities that are "protected" by the NLRA. *Garmon*, 359 U.S. at 244 (emphasis added).

Alternatively, the NLRB General Counsel's memo issued on April 7, 2022 – which states she intends to argue that the NLRB should adopt a new interpretation of federal law – contends that captive-audience meetings violate the NLRA.[10] I disagree with the interpretation that the NLRB General Counsel intends to argue, which is contrary to existing law and many decided cases. However, even if the General Counsel's interpretation were adopted by the NLRB and reviewing courts, this would still establish that Senate Bill 163 should be considered preempted by federal law on the basis that Senate Bill 163 "purports to regulate" activities that "constitute an unfair labor practice" under the NLRA. *Garmon*, 359 U.S. at 244 (emphasis added).

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[7] 105 Cong. Rec. 5361 (1959), *reprinted in* 2 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act 1024 (hereinafter "LMRDA Hist.").

[8] 105 Cong. Rec. 5770 (1959), *reprinted in* 2 LMRDA Hist. 1085 (statement of Sen. Kennedy) (emphasis added).

[9] Again, Connecticut Senate Bill 163 would render unlawful any "employer-sponsored meeting" that employees are required to attend where the employer's "primary purpose" is to communicate the employer's "opinion" – or where the employer otherwise requires an employee to consider the employer's "speech," "communications" or "opinion" – about a possible employee "decision to join or support [a] . . . labor organization." *Id*. §1, amending Conn. Gen. Stat. §§31-51a(a)(1), (b).

[10] *See* note 4 above. The General Counsel's memo acknowledged that the NLRB "years ago" concluded "that an employer does not violate the Act by compelling its employees to attend meetings in which it makes speeches urging them to reject union representation," although the General Counsel expressed her opinion that this had been decided "incorrectly." General Counsel's memo, p. 2, *citing Babcock & Wilcox Co.,* 77 NLRB 577 (1948). Based on this view, the NLRB General Counsel stated that she "will ask the Board to reconsider current precedent on mandatory meetings" and she will argue that the Board should find it is unlawful to mandate employee attendance at "captive-audience meetings" in which employees listen to "employer speech concerning the exercise of their Section 7 rights." *Id.*, pp. 2-3.

Finally, even if mandatory captive-audience meetings were neither protected nor prohibited by the NLRA, Connecticut Senate Bill 163's prohibition – involving employer-sponsored meetings, speech, communications and opinions regarding decisions to join or support a union – would intrude on areas that Congress meant to leave "unregulated" by the states. *Machinists*, 427 U.S. at 144 (emphasis added). Senate Bill 163 involves and affects information that employees can receive and evaluate when deciding whether and how to exercise their right to join and support a union, which includes the right to refrain from having union representation. As noted above, all of these rights are protected by the NLRA, and the U.S. Congress intended that employers, employees and unions could engage in the "freewheeling use of the written and spoken word" regarding these issues. *Chamber of Commerce v. Brown*, 554 U.S. at 67-68. Accordingly, for more than 86 years, this area has been exclusively regulated by the NLRB, whose decisions are subject to review by the federal courts of appeals and the U.S. Supreme Court.

C. Constitutional Issues

The restrictions on employer speech imposed by Senate Bill 163 also raise serious constitutional concerns under the First Amendment, which (in combination with the Due Process Clause of the Fourteenth Amendment) prohibits the federal and state governments from prohibiting the free exercise of religion or abridging the "freedom of speech . . . or the right of the people to peaceably to assemble. . . ."

More than 70 years ago, the Supreme Court also recognized that employers have a "First Amendment right . . . to engage in noncoercive speech about unionization." *Chamber of Commerce v. Brown*, 554 U.S. at 67, *citing Thomas v. Collins*, 323 U.S. 516, 537-38 (1945). NLRA Section 8(c) has therefore been held to "merely implement[] the First Amendment." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). This is consistent with the well-established principle that corporations have the First Amendment right to engage in free speech just like other citizens.[11]

Senate Bill 163 would prohibit employers from having employees attend mandatory meetings that have a "primary purpose" of addressing "religious or political matters," and the legislation defines the term "political" as encompassing an employee's decision to join or support a labor organization. In addition to being preempted because it involves and affects core employee and employer rights that are protected by the NLRA, Senate Bill 163 raises significant First Amendment concerns under the U.S. Constitution involving infringement on freedom of speech and religion.

[11] *See, e.g., First Nat'l Bank of Boston v. Bellotti*, 435 U. S. 765 (1978); *Time, Inc. v. Firestone*, 424 U. S. 448 (1976); *Doran v. Salem Inn, Inc.*, 422 U. S. 922 (1975); *Southeastern Promotions, Ltd. v. Conrad*, 420 U. S. 546 (1975); *Cox Broadcasting Corp. v. Cohn*, 420 U. S. 469 (1975); *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964).

D. Other Issues

Even if Senate Bill 163 is considered to focus on local concerns or is deemed necessary to protect employees from being unwilling listeners to employer speech about union issues (including employer-sponsored meetings, communications and opinions), Senate Bill 163 has the purpose and effect of regulating workplace conduct involving the competing interests of employees, employers and unions in relation to union representation. However, this is exactly what the U.S. Congress reserved exclusively for the National Labor Relations Board, which was given the "difficult and delicate responsibility"[12] of balancing these competing interests, subject to review in the federal courts.

As indicated above, the U.S. Supreme Court has likewise held that that the National Labor Relations Act reflects a "policy judgment" by Congress that there should be "uninhibited, robust, and wide-open debate in labor disputes."[13] In this area as well, the NLRB has exclusive responsibility, subject to review by the federal courts of appeals and the U.S. Supreme Court, to resolve all disputes over whether employees have been unlawfully subjected to unlawful restraint or coercion – either by an employer or by a union – regarding the exercise of protected rights regarding unions.[14]

It is possible that Senate Bill 163 reflects a policy judgment by the Connecticut legislature and other Connecticut state officials that union membership should be encouraged by preventing employees from getting information that might convince them not to join or support a labor organization. This policy judgment would be contrary to the balance created by the NLRA, which protects the right of employees to support and join a union, and the right to refrain from any and all such activities.[15] Also, to the extent that Senate Bill 163 assumes that all employers oppose union representation, this is contradicted by decades of experience under the NLRA which shows that many employers have

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[12] *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 499 (1960), *quoting NLRB v. Truck Drivers Local 449*, 353 U.S. 87, 96 (1957). In *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963), the Court stated: "we must recognize the Board's special function of applying the general provisions of the Act to the complexities of industrial life" (citation omitted). *See also NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 496-97 (1985); *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1978); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

[13] *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008).

[14] *See* NLRA Sec. 8(a)(1), 29 U.S.C. § 158(a)(1) (making it unlawful for an employer to interfere with, restrain or coerce employees in the exercise of protected rights); NLRA Sec. 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(B) (making it unlawful for a union to restrain or coerce employees in the exercise of protected rights).

[15] *See* NLRA Sec. 7, 29 U.S.C. § 157 (protecting the right of employees to bargaining "through representatives of their own choosing" and "to refrain from any or all of such activities"). This is another area where Senate Bill 163 directly conflicts with federal law. Senate Bill 163 only references "the decision to join or support any . . . labor organization" without mentioning potential employee opposition to union representation. This differs from NLRA Sec. 7 (quoted above), which affords protection to employees who favor unions and to employees who would choose to "refrain" from union representation.

voluntarily recognized unions.[16] However, the legal principles governing these types of issues are complicated, which is why the U.S. Congress and the courts created a uniform system of federal law that preempts state laws that purport to regulate these issues.[17]

For good reasons, the NLRB is the agency entrusted with exclusive responsibility to decide these issues, subject to review by the federal courts of appeals and the U.S. Supreme Court. Also, for nearly 70 years, the NLRB has rejected arguments that employees must be protected from the discussion of union representation in meetings held on the employer's premises. To this effect, in *Livingston Shirt Corp.*, 107 NLRB 400 (1953), the Board reasoned:

> It is conceded by everyone that Congress intended that both employers and unions should be free to attempt by speech or otherwise to influence and persuade employees in their ultimate choice, so long as the persuasion is not violative of the express provisions of the Act; and we find nothing in the statute which even hints at any congressional intent to restrict an employer in the use of his own premises for the purpose of airing his views. On the contrary, an employer's premises are the natural forum for him just as the union hall is the inviolable forum for the union to assemble and address employees.[18]

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[16] *See, e.g., Americold Logistics, LLC*, 362 NLRB 493 (2015) (addressing employer's lawful voluntary recognition of a union and period of bargaining during which the union's representative status is immune from challenge). It is also common in the construction industry for many employers to voluntarily recognize unions and to enter into voluntary collective bargaining agreements, which are permitted in the construction industry under Section 8(f) of the NLRA, 29 U.S.C. § 158(f), without any showing of employee support. *See, e.g., John Deklewa & Sons, Inc.*, 282 NLRB 1375, 1378 (1987), *enforced sub nom. Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), *cert. denied*, 488 U.S. 889 (1988).

[17] For example, Section 8(a)(5) the NLRA, 29 U.S.C. §158(a)(5), prohibits employers from unlawfully refusing to recognize and bargain with a union that has demonstrated that it has employee majority support in an appropriate bargaining unit and has prevailed in an NLRB-conducted election. *See also* NLRA Sec. 9(a), 29 U.S.C. § 159(a) ("Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment"). However, Section 8(a)(2) of the NLRA, 29 U.S.C. § 158(a)(2), makes it unlawful for an employer to extend recognition to a union, or to give the union financial or other support, when the union has not made a valid claim of employee majority support in an appropriate bargaining unit. As noted in note 16 above, these requirements are also subject to industry-specific rules – for example, Section 8(f) of the NLRA permits construction industry employers and unions to enter into voluntary agreements without any union showing that it has employee majority support among existing employees.

[18] *Id.* at 406 (emphasis added).

Conclusion

For the reasons stated above, I believe that Senate Bill 163 is preempted by the National Labor Relations Act. A finding of federal preemption would be warranted because Senate Bill 163 prohibits mandatory employer meetings (involving employer speech, communications and opinions regarding union issues) that are protected by federal law. A finding of federal preemption would also be warranted based on the recently announced views by the NLRB General Counsel, who has indicated she intends to argue that these types of mandatory employer meetings are prohibited by federal law. A finding of federal preemption would also be warranted because Senate Bill 163 intrudes on issues that the U.S. Congress intended to leave unregulated by the states. Finally, the legislation's restrictions on speech (including employer meetings, communications and opinions) raise serious First Amendment concerns that may warrant invalidating Senate Bill 163 as an unconstitutional infringement on freedom of speech and religion.

I remain available to answer questions and to provide additional information regarding the matters addressed above.

Very truly yours,

Philip A. Miscimarra