FIRST AMENDMENT COALITION

Ginny LaRoe, Advocacy Director
glaroe@firstamendmentcoalition.org
David Loy, Legal Director
dloy@firstamendmentcoalition.org

September 5, 2024

VIA EMAIL

The Honorable Gavin Newsom
Governor, State of California
1021 O Street, Suite 9000
Sacramento, CA 95814

Re: Request for veto — SB 399

Dear Governor Newsom:

The First Amendment Coalition is a nonprofit, nonpartisan public interest organization dedicated to defending freedom of speech, freedom of the press, and the people's right to know. We write to respectfully request a veto of SB 399 because it would violate the First Amendment by imposing a content-based burden on the protected speech of employers, who are covered by the First Amendment regardless of corporate form or for-profit status. *303 Creative LLC v. Elenis*, 600 U.S. 570, 600 (2023); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776, 784 (1978).

However laudable the bill's goals may be, they cannot be achieved through unconstitutional means. Existing law already protects employees from discrimination or retaliation based on politics or religion, *e.g.*, Labor Code §§ 1101–02, and the bill would sweep far more broadly than necessary to serve its ostensible purposes, making it likely a court would strike it down as unconstitutional.

In relevant part, SB 399 provides that with certain exceptions, an employer

> shall not 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.

SB 399, Cal. Leg., 2023–2024 Reg. Sess. (Cal. 2024).

"Political matters" means any "matters relating to elections for political office, political parties, legislation, regulation, and the decision to join or support any political party or political or labor organization." *Id.*

"Religious matters" means any "matters relating to religious affiliation and practice and the decision to join or support any religious organization or association." *Id.*

Under the First Amendment, the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content," and any such restriction is "presumptively unconstitutional." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (quoting *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972)). By burdening the right of employers to speak to employees about "political" or "religious" matters but not, for example, matters relating to art, sports, or health, the bill would impose a content-based restriction on speech. SB 399 is content based "on its face" because it "defin[es] regulated speech by particular subject matter." *Id*. It remains content based regardless of any "innocuous justification" or "benign motive" the government might have for enacting it. *Id.* at 165–66.

"Content-based restrictions on speech are subject to strict scrutiny and may only be upheld if they are the least restrictive means available to further a compelling government interest." *Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018) (citation and internal quotation marks omitted). "The least-restrictive-means standard is exceptionally demanding." *Holt v. Hobb*s, 574 U.S. 352, 364 (2015) (quoting *Burwell v. Hobby Lobby Stores*, *Inc.*, 573 U.S. 682, 728 (2014)). "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 813 (2000) (citation omitted). "Even if a state intends to advance a compelling government interest, we will not permit speech-restrictive measures when the state may remedy the problem by implementing or enforcing laws that do not infringe on speech." *IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1125 (9th Cir. 2020) (citations omitted).

To the extent the state may have a compelling interest in protecting employees from coercion, retaliation, or discrimination based on politics or religion, existing laws already prohibit such conduct and provide a less restrictive means to serve the state's interest.

Labor Code sections 1101 and 1102 protect employees against political coercion or influence, with "political" defined broadly to include "the espousal of a candidate *or a cause*, and some degree of action to promote the acceptance thereof by other persons." *Gay L. Students Ass'n v. Pac. Tel. & Tel. Co.*, 24 Cal. 3d 458, 487 (1979) (quoting *Mallard v. Boring*, 182 Cal. App. 2d 390, 395 (1960)). To the extent the bill includes speech about a "labor organization" as a "political matter," federal law already protects labor-related speech and union activity. 29 U.S.C. § 158(a)(1), (3). As to religious matters, Title VII at the federal level and the Fair Employment and Housing Act at the state level already prohibit discrimination based on religion as well as retaliation for asserting one's rights against such discrimination. 42 U.S.C. § 2000e-2(a)(1); Gov't Code § 12940(a).

Because the state has "several less speech-restrictive alternatives" to serve its interests in preventing coercion, discrimination, or retaliation against employees based on politics or religion, SB 399 would violate the First Amendment if it is adopted. *See Meinecke v. City of Seattle*, 99 F.4th 514, 525 (9th Cir. 2024).

The bill also sweeps far more broadly than necessary to prevent coercion, discrimination, or retaliation. By covering any matter "relating" to politics or religion, it would improperly burden innocuous speech such as encouraging employees to exercise their right to vote or to respect each other's political or religious beliefs. *Cf. Minn. Voters All. v. Mansky*, 585 U.S. 1, 17 (2018) (striking down ban on "political insignia" in polling pace that would cover "button or T-shirt merely imploring others to 'Vote!'"); *ACLU of Nev. v. Heller*, 378 F.3d 979, 981 (9th Cir. 2004) (striking down statute that required "any material or information relating to an election, candidate or any question on a ballot" to include "names and addresses of the publications' financial sponsors"). The broad sweep of terms such as "political" and "religious" also raises significant vagueness concerns. *See Mansky*, 585 U.S. at 16–17 (holding that "unmoored use of the term 'political'" rendered speech restriction unconstitutionally vague).

Indeed, a functionally similar law in Florida was recently enjoined on First Amendment grounds. *Honeyfund.com Inc. v. Governor*, 94 F.4th 1272, 1275 (11th Cir. 2024) (prohibiting enforcement of law that prohibited employers from requiring employees to attend trainings on diversity, equity, and inclusion that espoused specified beliefs about "race, color, sex, or national origin"). The court rejected the argument that the law could be justified on the ground that it allegedly protected "unwilling employees" or a "captive audience" from hearing speech to which they object. *Id.* at 1281–82, 1281 n.5.

If Florida cannot enforce a law against training employees on diversity, equity, and inclusion, then it is likely California could not enforce SB 399. For all of these reasons, we have serious concerns that SB 399 would be unconstitutional if enacted into law.

Thank you for your consideration of these concerns.

Very truly yours,

FIRST AMENDMENT COALITION

Ginny LaRoe
Advocacy Director

FIRST AMENDMENT COALITION

David Loy
Legal Director

cc : The Honorable Aisha Wahab, California State Senate
Mary Hernandez, Office of the Governor