Eric G. Moskowitz, Assistant General Counsel
Abby Propis Simms, Deputy Assistant General Counsel
Laura Bandini, Senior Attorney
1099 14th Street, N.W., Suite 8600
Washington, DC 20570
Tel: (202) 273-2931/Fax: (202) 273-1799
eric.moskowitz@nlrb.gov

Attorneys for Plaintiff National Labor Relations Board

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

NATIONAL LABOR RELATIONS BOARD, Plaintiff, v. STATE OF ARIZONA, Defendant.	Case No. 2:11-cv-00913 **PLAINTIFF'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

The NLRB respectfully files this reply in support of its Motion for Summary Judgment.

1. The State can not avail itself of any presumption against federal preemption (State Resp. at 3) because, as the Board has explained (Opp. at 4), Article 2 § 37 of the Arizona Constitution "regulates in an area where there has been a history of significant federal presence." *Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003) (quoting *United States v. Locke*, 529 U.S. 89, 108 (2000)); *see also Wachovia Bank v. Burke*, 414 F.3d 305, 314 (2d Cir. 2005).

2. After decades of settled Supreme Court precedent barring state regulation of private sector employees' choice of union representation, the State

argues that this is a "novel" issue because it involves the Board's jurisdiction to resolve representation disputes under Section 9 (29 U.S.C. § 159), and not conduct arguably protected under Section 7 or prohibited by Section 8 of the NLRA (29 U.S.C. §§ 157, 158). State Resp. at 2-3. The State fails to mention the Supreme Court precedent cited by the Board clearly holding that it is beyond a state's power to adjudicate a private sector representation dispute that is within the Board's jurisdiction. *See* NLRB MSJ at 9, NLRB Opp. at 3-4 (citing *Bethlehem Steel Co. v. New York State Labor Relations Bd*., 330 U.S. 767 (1947); *LaCrosse Tel. Corp. v. Wisconsin Employment Relations Bd*., 336 U.S. 18 (1949)). Rather, the State implies what the Intervenor -Defendants assert outright (Resp. at 7): those old cases have no force because they pre-date *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

Yet those seminal cases were explicitly relied on after *Garmon,* in *Sears Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 191 nn. 16, 18 (1978), and outside the NLRA context, as recently as 2002. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 66 (2002). Defendants also ignore other recent cases cited by the Board recognizing that NLRA preemption bars state regulation of employee representation disputes that might frustrate the Board's exercise of its primary jurisdiction. *See* NLRB MSJ at 9, n. 10; NLRB Opp. at 7-9 (citing cases). *See also Michigan Community Serv. Inc. v. NLRB*, 309 F.3d 348, 361 (6th Cir. 2002) (relying on *Garmon* preemption to uphold the Board's refusal

to extend comity to the results of representation elections conducted by a state agency after the Board had asserted jurisdiction over similar employers).

Defendant-Intervenors also seek to distinguish *Bethlehem Steel* and *LaCrosse* by arguing that they involved the application of state legal standards that were different from those of the NLRB. Intervenor-Defendants Resp. at 7. However, in those cases, the Supreme Court made clear that its concern is not simply that federal and state laws might conflict, but also that the existence of a second state forum would undermine the Board's exclusive jurisdiction.[1] This preemption principle has been reiterated by the Supreme Court in subsequent cases. *See* NLRB MSJ at 9-10 (citing *Amalgamated Ass'n of Street Elec. Ry. and Motor Coach Employees of Am. v. Lockridge*, 403 U.S. 274 (1971); *Garner v. Teamsters Chauffeurs and Helpers Local Union*, 346 U.S. 485 (1953); *Wisconsin Dep't of Indus. v. Gould Inc.*, 475 U.S. 282, 286 (1986), and *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S 180, (1978)). *Cf. Arizona v. United States*, No. 11-182, slip op. at 15 (U.S. June 25 2012) ("The

[1] *See Bethlehem Steel*, 330 U.S. at 776 ("If the two boards attempt to exercise a concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily denies the discretion of the other. The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict. . . . We do not believe [the Board's jurisdiction over representation cases] leaves room for the operation of the state authority asserted."); *LaCrosse*, 336 U.S. at 26 ("the true measure of conflict between the state and federal scheme of regulation may not be found only in the collision between the formal orders that the two boards may issue. . . . A certification by a state board under a different or conflicting theory of representation may therefore be as readily disruptive of the practice under the federal act as if the orders of the two boards made a head-on collision").

Court has recognized that a 'conflict in technique can be fully as disruptive to the system Congress enacted as conflict in overt policy'.") (quoting *Lockridge*, 403 U.S. at 287).[2]

Congress codified a complex scheme in Section 9 of the NLRA (29 U.S.C. § 159) for implementing employees' NLRA Section 7 right to accept or reject union representation. Where employees exercise their Section 7 right to express their representational choice in a secret ballot election conducted by the Board pursuant to Section 9, the rights that flow from the Board's certification of the results of that election are enforced through the unfair labor practice procedures set forth in Section 10 (29 U.S.C. § 160). Board adjudication of complaints alleging violations of Section 8 of the Act (29 U.S.C. § 158), is the means that Congress selected for securing federal court review of certifications issued under Section 9. NLRB Opp. at 7; NLRB MSJ at 5-7. In this respect, as the Supreme Court has long recognized, representation proceedings under Section 9 and unfair labor practice proceedings under Section 8, "are really one." *Pittsburgh Plate Glass v. NLRB*, 313 U.S. 146, 158 (1941), quoted in NLRB Opp. at 7-8. *Accord Magnesium Casting Co. v. NLRB*, 401 U.S. 137 (1971).

For all these reasons, Section 7's protections, Section 8's unfair labor practice provisions, Section 9's election procedures and Section 10's unfair labor

[2] We note, in any event, Intervenor-Defendants' apparent position that the Arizona courts should apply different standards than the NLRB. *See* NLRB Opp. to Defs. MSJ at 13-14 discussing Intervenor-Defendants Resp. at 8-12; *see also* Intervenor-Defendants Resp. at 9, 10, 13.

practice procedures are inextricably part of the same "complex and interrelated federal scheme of law, remedy, and administration" that is generally protected by NLRA preemption. *Wisconsin Dep't of Indus. v. Gould Inc.*, 475 U.S. at 286.

3. There is no merit to Defendants' reliance upon the local interest exception to *Garmon* preemption. Under *Garmon*, if the state can demonstrate "the importance of the asserted cause of action to the state as a protection of its citizens," it will be balanced against the "harm to the regulatory scheme established by Congress." NLRB Opp. at 10-11 (quoting *Local 926, Int'l Op. Eng'rs v. Jones*, 460 U.S. 669, 676 (1983)). However, the "critical inquiry" in applying the balancing test is "whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been . . . presented to the Labor Board." NLRB Opp. at 11-12 (quoting *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S at 197).

Article 2 § 37 authorizes persons to bring to State courts as of right exactly the same secret ballot guarantee issues that Congress tasked the Board to decide in order that election issues might be resolved promptly and finally, subject to federal court review. *Compare Farmer v. United Bhd. of Carpenters and Joiners of Am., Local 25*, 430 U.S. 290, 305 (1977) (lawsuit for intentional infliction of emotional distress not preempted in part because the state court would determine whether the union engaged in intentional outrageous conduct causing emotional distress, not the NLRA issue of whether the union's statements were discriminatory); *Linn v. United Plant Guard Workers*, 383 U.S. 53, 63–64 (1966) (lawsuit for defamation

in course of union campaign not preempted in part because the court would determine whether the statements were defamatory while the NLRB would consider only whether statements were so misleading or coercive as to warrant setting aside the election).[3]

The State has no valid interest in duplicating protections for employees that have long been protected by Section 7 of the NLRA. Yet that is the interest that the State claims. Thus, the State's asserted local interest is "to protect the right of employees to make decisions regarding representation." (State Resp. at 3). Intervenor-Defendants similarly assert that the "State has a very strong interest in protecting the rights of its citizens to freely determine, free from coercion, which groups will represent them in the employment context." Resp. at 10. This is merely a restatement of rights actually protected by Section 7 of the NLRA (29 U.S.C. 157). That goal "may be laudable, but it assumes for the State . . . a role Congress reserved exclusively for the Board." *Gould*, 475 U.S. at 291.[4]

4. Similarly without merit is Intervenor-Defendants' argument (Resp. 3-4, 9) that there is a local interest in protecting employees' asserted first amendment right to seek state court adjudication of union representation issues

[3] Where the federal issue and the state cause of action arise in the same factual setting, but the controversies presented to the state and federal forums would not be the same, there is "little risk of interference with the regulatory jurisdiction of the Labor Board." *Sears*, 436 U.S. at 197.

[4] Contrary to the State's assertion, the State has provided no evidence that it has acted to regulate private sector employees' NLRA representation rights in the past. State Resp. at 3. The Arizona statutes cited provide no support for denying preemption in this case. *See* NLRB Opp. at 6.

that Congress assigned to the Board. *Bill Johnson's Rest. Inc. v. NLRB*, 461 U.S. 731 (1983), relied on by Intervenor-Defendants, actually undermines their argument. *Bill Johnson's* holds that the NLRB may not enjoin a well-founded state court lawsuit even if it is motivated by a desire to retaliate for conduct protected by Section 7. But federally preempted state lawsuits are not "well-founded" within the meaning of *Bill Johnson's*. *Id*. at 738 n. 5 ("We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption. . . . ."). Under *Bill Johnson's*, the Board can secure injunctions against state court lawsuits that are preempted or otherwise foreclosed as a matter of law. *Small v. Operative Plasterers' and Cement Masons' International Ass'n Local 200,* 611 F.3d 483, 492 n. 4 (9th Cir 2010); *Sheet Metal Workers' Intern. Ass'n, Local No. 355 v. NLRB*, 716 F.2d 1249, 1264 (9th Cir. 1983); *see also Hob Nob Hill Rest v. Hotel Employees and Rest. Employees Int'l Union*, 660 F.Supp. 1266, 1272-1273 (S.D.Cal. 1987).

In short, the real lesson of *Bill Johnson's* for this case is that where, as here, there are sharply conflicting claims of right—the result of the State's publicly rejecting the Board's preemption warning on January 27, 2011, and proclaiming the State's right to establish a parallel forum to litigate private-sector secret ballot issues-- a federal court judgment declaring Article 2 § 37 preempted would establish that litigation brought to enforce Article 2 § 37 is unfounded within the meaning of *Bill Johnson's*. Parties who thereafter act in disregard of that

judgment could be enjoined without delay, thereby minimizing the burdens that preempted litigation can cause to persons entitled to the benefits of federal law.

5. As a defense to federal preemption, the Defendants raise the Board's *discretionary* policy of affording comity on an *ad hoc* basis to certain union elections conducted by state agencies. (State Resp. at 3-4; Intervenor-Defendant Resp. at 7-8). These cases provide no support for the proposition that Article 2 § 37 is not preempted. To the contrary, the Board's comity decisions all illustrate that the jurisdiction Congress granted the Board over private-sector representation disputes overrides that of the states. Private parties in individual cases may urge the Board to respect the results of state procedures. However, whether those state proceedings will be accorded deference, and therefore binding upon NLRA-covered employees, unions or employers, is a matter that the Board decides applying federal law and policy and subject to federal court review. Such comity opinions accordingly do not undermine the Board's exclusive jurisdiction, nor suggest any valid local interest to balance against Congress' interest in "'avoiding the 'diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.'" *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971) (quoting *Garner v. Teamsters Chauffeurs and Helpers Local Union*, 346 U.S. 485, 490 (1953)).

Indeed, the case cited by the Intervenor-Defendants (Resp. at 7-8) illustrates why Article 2 § 37 is preempted. *See Michigan Cmty. Serv. Inc. v. NLRB*, 309 F.3d 348 (6th Cir. 2002). In that case, when an election petition was

initially filed with the NLRB for employees of Michigan Community Services, Inc., it was dismissed by the Board based on a finding that the Board then lacked jurisdiction over the employer. *Id*. at 351. After the Michigan Employee Relations Commission (MERC) then held elections for those employees, the representation dispute was brought back to the Board, which issued another decision regarding the same employees. Applying a *new* Board jurisdictional standard for private employers doing business with a state, the Board found that it *had* jurisdiction over the elections at issue. *Id*. (citing *Management Training Corp*., 371 NLRB 1355 (1995)). The Board then chose, on the one hand, to extend comity to the MERC elections conducted during the time the Board was declining to assert jurisdiction, but refused, on the other hand, to extend comity to MERC elections "that took place after *Management Training* was decided when [MERC] did not have jurisdiction." *Id*. at 354. The Sixth Circuit upheld the Board's decision in all respects, agreeing that after issuing its decision in *Management Training,* the Board had exclusive jurisdiction to direct or supervise the union elections. *Michigan Cmty. Serv.*, 309 F.3d at 361, discussing *Sears,* 436 U.S. at 202; *San Diego Building Trades Council v. Garmon,* 359 U.S. at 246; *Labor Relations Comm'n v. Blue Hill Spring Water Co.,* 11 Mass.App.Ct. 50, 414 N.E.2d 351 (1980).

The Sixth Circuit reasoned that requiring the Board to extend comity to a state election conducted when the NLRB was asserting jurisdiction "would directly violate the intent of Congress to vest exclusive jurisdiction with the Board

and subvert the goal announced in *New York Telephone Co. v. New York State Dept. of Labor*, 440 U.S. 519 (1979) of promoting a unified nationwide scheme of labor law implemented by a centralized agency." *Michigan Cmty. Serv.*, 309 F.3d at 361, citing *NLRB v. Waterman S.S. Corp.*, 309 U.S. 206, 226 (1940) ("The control of the election proceedings, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone").

The State's citation of *Standby One Associates*, 274 NLRB 952 (1985) (State Resp. at 3-4) is also unavailing. In that case, pursuant to an Agreement for Consent Election entered into by the union and employer, the New York State Labor Relations Board (NYSLRB) conducted a secret-ballot election which the union won. When the employer refused to bargain, the union filed a charge with the NLRB, and the Board's General Counsel issued complaint alleging that the company had committed an unfair labor practice. The Board exercised its discretion to extend comity to the results of that election, and then found the refusal to bargain to be an NLRA violation.

In suggesting that the Board's jurisdictional stance in *Standby One Associates* is in conflict with its position here, that State overlooks that the two situations are not at all comparable. Arizona is asserting a right to regulate in disregard of the Board's exclusive jurisdiction over private sector representation disputes, while New York's regulation is expressly subject to the Board's overriding jurisdiction. Specifically, the NYLRB election in *Standby One*

Associates was conducted pursuant to a state law that explicitly disclaims applicability to any employer who acknowledges that it is subject to the NLRA. McKinney's Labor Law § 715. This self limiting provision is not unusual. In its labor law regulating agricultural workers, Arizona similarly states that it "applies only to such persons, labor organizations or activities as are not within the jurisdiction of the National Labor Relations Act . . . ." Ariz. Rev. Stat. Ann §23-1394. In sharp contrast, both the State and Defendant-Intervenors in this case insist that Article 2 § 37 applies to employers, unions and employees who are within the jurisdiction of the NLRA, *and* that such persons must be free to apply to Arizona courts to decide representation issues Congress assigned to the Board. Defendants are not seeking comity. Rather, they are demanding the right to provide an independent, parallel state forum to enforce rights guaranteed by Section 7 of the NLRA.

In sum, the Board has jurisdiction over private sector Arizona employees; their representation issues are subject to the Board's jurisdiction, and the Board's discretionary policy of comity provides no exception to preemption.

CONCLUSION

Article 2 § 37 is preempted by operation of the Supremacy Clause and the NLRA. The NLRB respectfully requests that the Court grant the Board's Motion for Summary Judgment and deny the State and Intervenor-Defendants' cross Motions for Summary Judgment.

Respectfully submitted,

/s/Eric G. Moskowitz
Eric G. Moskowitz
Assistant General Counsel
National Labor Relations Board
Special Litigation Branch
1099 14th Street, NW
Washington, DC 20570
Tel: (202) 273-2931
Fax: (202) 273-1799
Eric.Moskowitz@nlrb.gov

Abby Propis Simms
Deputy Assistant General Counsel
Tel: (202) 273-2934
Abby.Simms@nlrb.gov

Laura Bandini
Senior Attorney
Tel: (202) 273-3784
Laura.Bandini@nlrb.gov

Dated: July 3, 2012

CERTIFICATE OF SERVICE

I am an attorney and hereby certify that on July 3, 2012, I electronically filed the attached document with the Clerk of the Court for the United States Court – District of Arizona by using the CM/ECF system, causing it to be served on Defendant, Intervenor-Defendants, and Amicus Curiae's counsel of record listed below. The Defendant State of Arizona, Intervenor-Defendants, and Amicus Curiae are registered CM/ECF users and service will be accomplished by the District Court's CM/ECF system.

Michael Goodwin
Christopher Munns
1275 W. Washington, Phoenix, AZ 85007
Michael.Goodwin@azag.gov
Christopher.Munns@azag.gov
Attorneys for Defendant

Clint Bolick
Diane S. Cohen
Christina Sandefur
Taylor C. Earl
Scharf-Norton Center for Constitutional Litigation at the Goldwater Inst.
500 E. Coronado Rd., Phoenix, AZ 85004
Attorneys for Intervenor-Defendants

Stanley Lubin
Lubin & Enoch PC
349 N 4th Ave
Phoenix, AZ 85003
Attorney for Amicus Curiae

Dated: July 3, 2012

/s/ Eric G. Moskowitz
Eric G. Moskowitz
Attorney for NLRB