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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 CONSOLIDATED OPPOSITION TO DEFENDANT AND INTERVENOR-DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT**

INTRODUCTION

Article 2 § 37 of the Arizona Constitution guarantees the right to vote by secret ballot for employee representation where "federal law permits or requires elections, designations or authorizations for employee representation." In response to the National Labor Relations Board (Board) allegation that Article 2 § 37 is preempted insofar as it applies to private employees, employers, and labor organizations subject to the National Labor Relations Act (NLRA), the State responded that Article 2 § 37 is a valid constitutional provision that supports federal law's guarantee of a secret ballot election where an employer does not voluntarily recognize its employees choice to be represented or not. The State and Intervenor-Defendants now seek summary judgment on the theory that Article 2 §

37 regulates in an area where states and the federal government have concurrent jurisdiction and that because Article 2 § 37 serves interests deeply rooted in local feeling and responsibility, it is not preempted. The arguments of the State and Defendant-Intervenors are contrary to well-settled preemption principles. Accordingly, their cross-motions should be denied and the Board's motion for summary judgment granted.

ARTICLE 2 § 37 IS PREEMPTED AS A MATTER OF LAW

I. Comprehensive Federal Scheme

The State and the Intervenor-Defendants rehearse at some length the rich history of state regulation in the labor and employment area that has been held to serve legitimate state interests and not to be preempted by federal law. Their wide-ranging discussion is largely a distraction, however, because it does not come to grips with the underlying legal principles that animate the cases. As explained in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747-48, 756 (1985) ("*Met Life*"), heavily relied on by the State (State MSJ at 3, 6, 7, 9), a finding of preemption is justified if it is shown "'from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States'" or if concurrent state jurisdiction "prevents the accomplishment of the purposes of the federal act." That is the case here.

As shown in the Board's motion for summary judgment, the Supreme Court early determined that concurrent state and federal regulation of employee

representation elections would produce unacceptable uncertainty and conflict in an area where Congress was concerned that employee representation disputes be resolved with expedition. Thus, in *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 772 (1947), the Supreme Court held that it was beyond the power of New York State to apply its labor law to a private sector union representation dispute, explaining "[i]t has long been the rule that exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of such result is wanting." *Id.* "[W]hen federal administration has made comprehensive regulations effectively governing the subject matter of the statute, the Court has said that a state regulation in the field of the statute is invalid. . . ." The Court concluded that the New York State representation law could not apply because the NLRB had jurisdiction, and it had asserted control of labor relations in the area. Accordingly, "[w]e do not believe this leaves room for the operation of the state authority asserted." *Id.* at 774.

The Supreme Court reaffirmed this principle when it invalidated a Wisconsin state representation law in *LaCrosse Tel. Corp. v. Wisconsin Employment Relations Bd.*, 336 U.S. 18, 25 (1949). The Court held that Wisconsin had no jurisdiction to determine the representation status of a union because "certification by a state board under a different or conflicting theory of representation may . . . be as readily disruptive of the practice under the federal act as if the orders of the two boards made a head-on collision." *Id.* at 26. *Accord: Pittsburgh Railways Co. Substation Operators and Maintenance Employees'*

Case, 357 Pa. 379, 385 (Super. Ct. Pa. 1947) (Pennsylvania Labor Board lacked jurisdiction to entertain a representation petition, because "[t]he issue, - determination of the collective bargaining unit and collective bargaining agent, - represents a basic and fundamental part of the Congressional regulation. Congress, having exercised its power, did not intend to permit state action with regard thereto").

In view of the Supreme Court's determination that concurrent state and federal regulation of employee representation elections would produce unacceptable conflict, the State errs in invoking court decisions applying a legal presumption against federal preemption of state law. (State MSJ at 6). That presumption does not apply where, as here, "the State 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) ("The presumption against federal preemption disappears . . . in fields of regulation that have been substantially occupied by federal authority for an extended period of time"). Accordingly, there is no presumption against preemption where, as here, "[t]he 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." *NLRB v. Waterman SS Corp.*, 309 U.S. 206, 225 (1940).

There is no merit to the State's attempt to justify Article 2 § 37's regulation of representation disputes by reference to NLRA Section 14(b) (29 U.S.C. §

164(b)).[1] State MSJ at 5-6. The State acknowledges, as it must, that Section 14(b) was enacted in 1947 precisely to protect from NLRA preemption a specific form of state action: state "right-to-work" laws prohibiting agreements requiring union membership as a condition of employment. *See Retail Clerks Local 1625 v. Schermerhorn*, 373 U.S. 746, 751 (1963) ("As is immediately apparent from its language, § 14(b) was designed to prevent other sections of the Act from completely extinguishing state power over certain union-security arrangements").[2] Indeed, in the very case cited by the State (MSJ at 5-6), the court explained that

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[1] 29 U.S.C. § 164(b) provides:

> Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

[2] Congress made its intent to preclude preemption explicit. *See* H.R. No. 245, 80th Cong., 1st Sess. at 44 (1947):

> Since by the Labor Act Congress preempts the field that the act covers insofar as commerce within the meaning of the act is concerned, and since when this report is written the courts have not finally ruled upon the effect upon employees of employers engaged in commerce of State laws dealing with compulsory unionism, the committee has provided expressly in section 13 [now 14(b)] that laws and constitutional provisions of any State that restrict the right of employers to require employees to become or remain members of labor organizations are valid, notwithstanding any provision of the National Labor Relations Act. In reporting the bill that became that became the National Labor Relations Act, the Senate committee to which the bill had been referred declared that the act would not invalidate any such State law or constitutional provision. The new section 13 [14(b)] is consistent with this view.

"Section 14(b) of the Taft-Hartley Act, 29 U.S.C.A. § 164(b), amending the National Labor Relations Act, specifically recognizes the right of states to pass such legislation. . . ." *Am. Fed. of Labor v. Am. Sash & Door*, 67 Ariz. 20, 36 (1948), *aff'd*, 335 U.S. 538 (1949).

Similarly unhelpful is the State's attempt to cast Article 2 § 37 as just another of many state employment statutes that have long existed alongside the NLRA. (State MSJ at 3-4). The vast majority of those statutes concern matters clearly outside the scope of the NLRA. *See Met Life*, 471 U.S. at 756 (citing "child labor laws, minimum and other wage laws, laws affecting occupational health and safety. . . laws requiring that employers contribute to unemployment and workmen's compensation funds, laws prescribing mandatory state holidays, and those dictating payment to employees for time spent at the polls or on jury duty. . . ."). To the extent that some of the other cited state statutes may overlap the Board's regulatory authority, they do not intrude on the Board's exclusive authority over questions concerning employee representation, as Article 2 § 37 does, and they do not provide persuasive analogies for Article 2 § 37's intrusion into a field that Congress assigned to the Board.[3]

[3] Thus, although A.R.S. §§ 23-1341 to 1342 criminalizing yellow dog contracts remains on the books, the equivalent statute in Oklahoma has recently been declared preempted by the NLRA. *See Local 514 Transp. Workers Union of Am. v. Keating*, 358 F.3d 748, 753-54 (10th Cir. 2004); (2) Although A.R.S. §§ 23-1321 to 1342 concern picketing and secondary boycotts, they have been narrowly construed by an Arizona court in deference to the NLRA preemption principles of *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). *See Transp.*

The State misapprehends the scope of NLRA regulation when it erroneously asserts that although Article 2 § 37 "may be analogous to § 9 of the NLRA, it is not at all clear that § 37 would interfere with the Board's primary jurisdiction to decide unfair labor practices" (State MSJ at 7). The State's argument fails to recognize that in providing employees the ability to freely support or refrain from supporting union representation, Congress codified in NLRA Section 7 the right to select or reject union representation, and it deliberately crafted the representation procedures set forth in Section 9 and the unfair labor practice procedures set forth in Section 10 in the manner in which it did in order to safeguard employees' Section 7 rights, and to insulate the Board's exercise of its primary jurisdiction over employee representation matters until such time that the Board has made an unfair labor practice finding. *See* NLRB MSJ at 5-7.

Under this comprehensive scheme for protecting employees' Section 7 rights, Congress precluded immediate court review even where a dispute arises over a Board resolution of a representation proceeding. Judicial review must await the Board's conduct of an unfair labor practice proceeding based on an employer's or union's refusal to accept the certified results of an election.[4] Thus,

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Workers Union, Local 502 v. Tucson Airport Auth., Inc., 11 Ariz. App. 296, 299-300 (1970).

[4] As the Board explained (NLRB MSJ at 12-13), Board election proceedings and decisions are reviewable only if and when an unfair labor practice charge under NLRA §§ 8(a)(1), 8(a)(5) is filed alleging that the employer is refusing to bargain

as the Supreme Court has long observed, the representation proceeding and the unfair labor practice proceeding "are really one." *Pittsburgh Plate Glass v. NLRB*, 313 U.S. 146, 158 (1941).

Article 2 § 37 is thus preempted by virtue of the Board's Section 9 representation procedures. As noted above, the Supreme Court has twice settled the Board's primary jurisdiction over Section 9 representation proceedings and concluded that there was no room for parallel state regulation. *See* NLRB MSJ at 9 (citing *LaCrosse Tel. Corp. v. Wisconsin Employment Relations Bd.*, 336 U.S. 18, 25-26 (1949); *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 776-777 (1947)). Similarly, a federal court enjoined a San Francisco airport commission's rule that would have required voluntary recognition through card check on the basis of the plaintiff's likely success under *Garmon* because such local rule conflicted with Section 9. *See Aeroground, Inc. v. City and County of San Francisco*, 170 F.Supp.2d 950 (N.D.Cal. 2001). The court explained that *Garmon* was not limited to Sections 7 and 8, but rather "has also been applied to conduct related to the activities regulated by section 9 of the act, such as the

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in good faith with a properly certified bargaining representative. Congress expressly considered and rejected legislation that would have provided for direct judicial review of Board representation determinations because of fear that parties otherwise would resort to appeals to delay NLRB representation proceedings. *See Bays v. Miller*, 524 F.2d 631, 633 (9th Cir. 1975) (internal citation omitted). Article 2 § 37 will interfere with this process because it permits Arizona to also resolve whether a Board secret ballot election was proper or was tainted by union or employer coercive conduct, or some other misstep that the Board failed properly to consider. *See* cases in NLRB MSJ at 7, nn. 1-8.

process for determining union representation." *Id*. at 955 (collecting cases). Similarly, the Third Circuit has held that a state court lawsuit against individuals associated with a labor union was preempted under *Garmon* by virtue, *inter alia*, of NLRA Section 9. *See Penn. Nurses Ass'n v. Penn State Educ. Ass'n*, 90 F.3d 797, 802-04 (3d Cir. 1996).

Thus, Garmon's protection of the Board's primary jurisdiction is not confined to unfair labor practice cases conducted under Sections 7 and 8 of the Act. It reaches all NLRA proceedings which Congress entrusted the Board alone to implement to safeguard employee Section 7 rights. This includes the very representational matters at issue in this case, which are an essential part of Congress's scheme to protect employees' NLRA rights. Accordingly, as explained in the Board's motion for summary judgment, the State's establishment of a parallel procedure to resolve secret ballot election issues determining whether a majority of employees exercised their Section 7 right to select or reject a union representative prevents the accomplishment of Congress' purpose in entrusting to the Board alone resolution of the question whether employees have been afforded the safeguards of a secret ballot election, subject to limited review in the federal courts.

II. Local Interest Exception

The *Garmon* exception for conduct that is "deeply rooted in local feeling and responsibility" does not shield Article 2 § 37 from preemption. *See Garmon*, 359 U.S. 243-244.[5]

A. The State's Argument

The State's central local interest argument is that it has "an overriding interest in protecting employees from intimidation and undue influence when deciding whether to be represented by a union." (State MSJ at 10). However, there is no local interest exception for claiming concurrent jurisdiction where it is otherwise foreclosed. That is the case here given the NLRB's primary jurisdiction to regulate employee representation not only through Section 9 election proceedings, but also by enforcing employees' NLRA right, codified in 29 U.S.C. § 157, to be free from intimidation and coercion in the course of representation cases.

The local interest exception to preemption may apply only if the "harm to the regulatory scheme established by Congress" is outweighed by "the importance of the asserted cause of action to the state as a protection of its citizens." *Local*

[5] As the Board noted (NLRB MSJ at 14), there is also an exception to *Garmon* preemption where the activity is "merely peripheral" to the NLRA. However, neither party argues that this exception applies, and Intervenor-Defendants explicitly disclaim reliance on this exception. (Intervenor-Defendants' MSJ at 5).

926, Int'l Union of Op. Eng'rs v. Jones, 460 U.S. 669, 676 (1983).[6] As shown below, it does not.

Article 2 § 37's grant of authority to the Arizona courts to entertain private sector representation disputes is patently contrary to the Congressional design vesting the Board with primary jurisdiction with respect to private sector employees' Section 7 representation rights and to resolve resulting disputes. *See* NLRB MSJ at 8-13. Unless declared preempted, the inevitable result of Article 2 § 37's licensing state courts to address the same secret ballot issues that the Board is assigned to resolve would be a patchwork of conflicting policies and remedies. Allowing parallel state proceedings to review the same questions that Congress expected the Board to resolve promptly and with finality would also frustrate Congress' purpose to foster industrial peace by enabling employees and employers to put the passions of the election campaign behind them. (NLRB MSJ at 11-13).

For these reasons, the State's contention that Article 2 § 37 duplicates the NLRA is fatal to its local interest argument. Under the local interest exception standard, when looking to balance a claimed local state interest against the NLRA, the "critical inquiry" is "whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been . . . presented to

[6] Stated otherwise, a local interest exception may apply where "the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme." *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S 180, 188 (1978) ("*Sears*") (quoting *Farmer v. United Bhd. of Carpenters and Joiners of Am.*, 430 U.S. 290 (1977)).

the Labor Board." *Sears*, 436 U.S. at 197; *see also Jones, 460 U.S. at 682* (state claim preempted where fundamental element of claim also had to be proven to make out a case under NLRA § 8(b)(1)(B)). Here, as the State acknowledges, Article 2 § 37 permits the identical representation dispute to be brought before the Board and Arizona courts. *See, e.g.*, State Mot. to Dismiss at 6. Article 2 § 37 thus authorizes a clash between federal and local visions of employee. representation rights, similar to what the Supreme Court struck down in *Bethlehem Steel* and *LaCrosse* as precluded by the NLRA centralized representation process. Accordingly, this case is readily distinguishable from those cited by the State and Intervenor-Defendants where the merits of the state and federal controversies were distinct.

Farmer v. United Bhd. of Carpenters and Joiners of Am., Local 25, 430 U.S. 290 (1977) makes this critical distinction plain. In *Farmer*, the Court determined that a union member's action for intentional infliction for emotional distress was not preempted under the NLRA. In so holding, the Court explained that "as with the defamation actions preserved by *Linn* [*v. Plant Guard Workers*, 383 U.S. 53 (1966)], state-court actions to redress injuries caused by violence or threats of violence are consistent with effective administration of the federal scheme: Such actions can be adjudicated without regard to the merits of the underlying labor controversy." *Id*. at 299-300. Indeed, in *Linn*, the Court based its holding on the fact that "[t]he injury that the [allegedly defamatory] statement might cause to an individual's reputation – whether he be an employer or union

official – has no relevance to the Board's function. The Board can award no damages, impose no penalty, or give any other relief to the defamed individual." 283 U.S. at 63 (citation omitted).[7] In this case, by contrast, the merits of the labor controversy before the Board would mirror the merits of an Article 2 § 37 state court action, and both the NLRB and Arizona state court could impose varying remedies for the same conduct.

B. The Intervenor-Defendants' Argument

To the extent that Intervenor-Defendants support the State's argument that Article 2 § 37 protects existing federal rights, its argument against preemption fails for the same reasons that the State's does: since the early days of the NLRA, it has been established that federal preemption principles do not allow for states to set up parallel state forums to regulate the same representation disputes that Congress assigned to the Board to regulate. *See* NLRB MSJ at 9-10.

Unlike the State, however, Intervenor-Defendants also argue that existing federal labor policy is flawed to the extent that it denies employees the opportunity to demand a secret ballot election in some circumstances. Intervenor-Defendants

[7] The Court in *Belknap v. Hale,* 463 U.S. 491, 510-511 (1983) similarly held that "[t]he focus of these [Board] determinations . . . would be on whether the rights of strikers were being infringed. Neither controversy would have anything in common with the question whether Belknap made misrepresentations to replacements that were actionable under state law. . . . Hence, it appears to us that maintaining the misrepresentation action would not interfere with the Board's determination of matters within its jurisdiction." This distinction was also dispositive in *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 786 (9th Cir. 2001) and *Milne Emps. Ass'n v. Sun Carriers Inc*., 960 F.2d 1401, 1416-17 (9th Cir. 1991).

MSJ at 7. In particular, Intervenor-Defendants argue that "[v]oluntary recognition supplants the freedom of choice guaranteed by the Act." *Id*. at 9. It marshals policy arguments for requiring secret ballot elections instead of allowing recognition on the basis of employee authorization cards, and sometimes in apparent response to economic pressure. *Id*. at 8-11. From this platform, Intervenor-Defendants then seek to justify Article 2 § 37 on the ground that states are entitled to provide greater protection for individual rights than federal law does. *Id*. at 12.

The short answer to Intervenor-Defendants' argument is that state constitutions may provide greater protections for individual liberties only to the extent that they do not conflict with any other provision of federal law. *Cf. Garnett v. Renton Sch. Dist.*, 987 F.2d 641, 646 (9th Cir. 1993) (finding that the Washington State Constitution's Establishment Clause, which prohibited student religious meetings on school grounds, must yield to the Equal Access Act, 20 U.S.C. §§ 4071-4074 (1988), which provided equal access to school premises for religious clubs in certain circumstances). Intervenor-Defendants' construction of Article 2 § 37, if accepted, would alter the balance that Congress struck in enacting the NLRA and make Arizona courts a forum for nullifying longstanding employee rights that Congress has authorized the Board to protect.

Contrary to the policy views espoused by the Intervenor-Defendants, national labor policy has long made voluntary recognition based on reliable evidence of majority support the source of important federal rights and

obligations. *See Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 304,309-310 (1974); *NLRB v. Broadmoor Lumber Co*., 578 F.2d 238, 241 (9th Cir. 1978); *Verizon Info. Sys*., 335 NLRB 558, 559, n. 7 (2001) (collecting cases). If private sector employees are able to persuade their employer to recognize their choice of a Section 9(a) representative on the basis of evidence of uncoerced majority status, other than a secret ballot election, the employees' Section 7 right to "representatives of their own choosing" is enforceable under Sections 8(a)(5) and 8(a)(1) of the NLRA. *See, e.g., NLRB v. CAM Indus., Inc*., 666 F.2d 411, 414 (9th Cir. 1982); *Jerr-Dan Corp*., 237 NLRB 302 (1978), *enf'd*, 601 F.2d 575 (3rd Cir. 1979); *Snow & Sons*, 134 NLRB 709,710 (1961), *enf'd*, 308 F.2d 687 (9th Cir. 1962).

Moreover, since the enactment of the NLRA, the right of employees to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection" has enabled employees and unions to use economic pressure to persuade employers to promptly recognize a Section 9(a) representative without an election.[8]

[8] *See, e.g., NLRB v. Clausen*, 188 F.2d 439, 442 (3d Cir. 1951) (employees' recognitional strike "was a legitimate concerted activity"); *New Hyden Coal Co*., 108 NLRB 1145, 1161 (1954) (employees' strike for recognition held a lawful economic strike), *enf'd* 228 F.2d 68 (6th Cir. 1955); *Wheeling Pipe Line, Inc*., 111 NLRB 244, 253-254, 258-259 (1955) (employee strike for recognition precipitated by employer insistence on secret ballot election), *enf'd* 229 F.2d 391, 395 (8th Cir. 1956); *NLRB v. Preston Feed Corp.*, 309 F.2d 346, 350-351 (4th Cir. 1962) (employees' strike for recognition deemed evidence of majority support for union); *NLRB v. Park Edge Sheridan Meats, Inc*., 323 F.2d 956, 957 (2d Cir.

Congress thoroughly reviewed that issue in 1959, and enacted Section 8(b)(7), 29 U.S.C. § 158(b)(7) as "a comprehensive code governing organizational strikes and picketing" that proscribes some peaceful activity, but "also establishes safeguards against the Board's interference with legitimate picketing activity." *NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639 (Curtis Bros., Inc.)*, 362 U.S. 274, 291 (1960). *See also Bristol Farms*, 311 NLRB 437, 438 n.8 (1993) (picketing for the recognitional or organizational objects regulated by §8(b)(7) is protected by §7 except where it is specifically prohibited by §8(b)(7)).

Under this compromise, peaceful recognitional picketing is barred only where such picketing has been conducted without an election petition being filed with the Board "within a reasonable time not to exceed thirty days from the commencement of such picketing." 29 U.S.C. § 158(b)(7). *See NVE Constructors v. NLRB*, 934 F.2d 1084,1090-91 (9th Cir. 1991); *Laborers' E. Region Org. Fund*, 346 NLRB 1251, 1254-55 (2006); *Operating Engineers Local 101 (St. Louis Bridge)*, 297 NLRB 485, 485 (1989). Furthermore, under the so-called publicity proviso to Section 8(b)(7), so long as the picketing is aimed at consumers and does not induce work stoppages, picketing for the purpose of publicizing that an employer does not have a collective bargaining agreement may go on indefinitely. *See Smitley d/b/a Crown Cafeteria v. NLRB*, 327 F.2d 351 (9th Cir. 1964). In

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1963) (employees' recognitional strike prompts employer agreement to recognize union).

addition, the courts have construed the secondary boycott prohibitions of the NLRA to avoid conflicts with the First Amendment rights of employees and unions to handbill consumers to support lawful objectives such as voluntary recognition. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. Trades Council*, 485 U.S. 568 (1988).

The issues of employee coercion that Intervenor-Defendants would have States address by providing a state right to a secret ballot election for employees who object to voluntary recognition have not been ignored in federal law but are addressed in a different manner. Federal law has long been clear that voluntary recognition is unlawful where it is established that the union did not have the support of an uncoerced majority of employees. *See, e.g., Int'l Ladies Garment Workers Union v. NLRB*, 366 U.S. 731, 738-40 (1961); *Waldinger Corp. v. NLRB*, 262 F.3d 1213, 1216-17 (11th Cir. 2001). And because coercion of employees is a problem affecting both secret ballot elections and voluntary recognition, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 603-604 (1969), the Board provides remedies for employee coercion in both contexts. *See, e.g., Veritas Health Serv. Inc. v. NLRB*, 671 F.3d 1267, 1272-73 (D.C. Cir. 2012); *Dairyland USA Corp. and Local 348-S, UFCW*, 347 NLRB 310 (2006), *enf'd* 373 Fed. Appx. 40 (2d Cir. 2008); *Sonoco of Puerto Rico*, 210 NLRB 493 (1974).

Intervenor-Defendants' reliance on the First Amendment right of free association also is not a valid justification for Article 2 § 37's providing a right to secret ballot elections to private sector employees who object to voluntary recognition. Federal law

has struck a balance of the conflicting legitimate interests that States are not free to ignore. Congress provided that any labor organization which secures the support of a majority of the employees in an appropriate bargaining unit is the exclusive representative of that unit. *See, e.g., Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 66 (1975); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967); *J.I. Case v. NLRB*, 321 U.S. 332, 339 (1944); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). To the extent that exclusive representation may disadvantage a minority opposed to the representational choice of the majority, federal law provides safeguards to protect the rights of the minority. *See Emporium Capwell*, 420 U.S. at 64. Chief among these safeguards is the duty imposed on unions to represent all employees, members and nonmembers alike, fairly and in good faith. *Id.*; *see also Communication Workers of America v. Beck*, 487 U.S. 735, 739 (1988). Thus, in the Supreme Court's judgment, the constitutional issues implicated by exclusive representation – including the compelled association of the minority opposed to union representation – are sufficiently accommodated by the union's obligation, enforceable through the NLRA's unfair labor practice procedures or by private suit, to represent all unit employees in a manner that is neither arbitrary, discriminatory, nor in bad faith. *See, e.g., Vaca v. Sipes*, 386 U.S. 171, 177-182 (1967); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

In assuming that the First Amendment rights of employees opposed to union representation justify States in providing a right to a secret ballot election when voluntary recognition has been granted, Intervenor-Defendants fail to acknowledge that freedom of

association is not an absolute and may be outweighed by other important governmental interests. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). In balancing the competing interests at stake in freedom of association cases, the courts have made it clear that a "compelling" government interest can justify limiting First Amendment rights. *NAACP v. Button*, 371 U.S. 415, 438 (1963); *see also Linscott v. Millers Falls Co.*, 440 F.2d 14, 17 (1st Cir. 1971). In the labor relations setting, the Supreme Court has consistently found that there are compelling government interests justifying the constitutional burdens caused by the compulsory union affiliation resulting from exclusive representation. These compelling interests include, among other things, the government's interest in maintaining industrial peace and in preventing "free riding" by nonmembers who benefit from the union's collective-bargaining activities. *E.g., Locke v. Karass*, 555 U.S. 207, 213 (2009); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 222 (1977); *Int'l Assoc. of Machinists v. Street*, 367 U.S. 740, 768-72 (1961); *Railway Employees Dep't v. Hanson*, 351 U.S. 225, 238 (1956). *Accord: NLRB v. Int'l Union of Operating Eng'rs Local 501*, 806 F.2d 1405, 1410 (9th Cir. 1986)("The general associational freedom protected by the First Amendment is subject to the limitations necessary to effectuate the policy of the NLRA"); *NLRB v. Associated Gen. Contractors, Inc.* 633 F.2d 766, 772 n. 9 (9th Cir. 1980)("Association that would otherwise be protected [by the First Amendment] may be regulated if necessary to protect substantial rights of employees or to preserve harmonious labor relations in the public interest"); *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1287 (11th Cir. 2010) ("'[Compulsory union affiliation] has been sanctioned as a permissible burden on employees' free association rights,' based on a

legislative judgment that collective bargaining is crucial to labor peace") (citing *Abood*, 431 U.S. at 224).

Consequently, it is well established that the First Amendment permits the government to require employees who do not wish to join a union designated as their exclusive bargaining representative to nevertheless be represented by it and to pay a service fee to that union limited to the costs of collective bargaining, contract administration, and grievance adjustment. *Locke v. Karass*, *supra.* As noted above, as a result of Arizona's enactment of a right-to-work law authorized by Section 14(b) of the NLRA, employees in Arizona can not be required to pay even the service fee to their collective bargaining agent. The courts have also found that when religious practices come into conflict with labor practices authorized by statute, the balancing of interests requires the free exercise of religion to yield, in part, to the principle of exclusive representation encompassed in the NLRA. *See, e.g., Linscott v. Millers Falls Co.,* 440 F.2d at 17-18 (finding that dissenting employee's religious-based First Amendment interests were not sufficiently compelling to nullify congressionally supported principle of union shop which requires all employees in the bargaining unit to pay their fair share of the costs of union representation); *see also Hammond v. United Papermakers & Paperworkers,* 462 F.2d 174, 175 (6th Cir. 1972); *Gray v. Gulf Mobile & Ohio R.R. Co.,* 429 F.2d 1064, 1068-69 (5th Cir. 1970); *Otten v. Baltimore & Ohio R.R. Co., 205 F.2d 58, 61 (2d Cir. 1953).* Therefore, contrary to the Intervenor-Defendants' suggestion, the First Amendment right of free association (which includes the right not to associate) does

not justify the State inserting additional secret ballot protections (not required by federal law) in the union representation process.

For all the foregoing reasons, there is no merit to Intervenor-Defendants' claim that Arizona is entitled to provide "greater" protection for individuals than federal law. When considered in light of existing national labor policy, the actual meaning of Intervenor-Defendants defense of Article 2 § 37 is that, regardless of federal law, Arizona is entitled to give greater weight to the interests of employees who wish to refrain from union representation and less weight to the interest of employees who successfully petition their employer voluntarily to recognize their choice of a bargaining representative without an election and who may apply lawful economic pressure in support of their demands. The whole purpose of the preemption doctrine is to prevent states from regulating the same conduct that the Board regulates and doing so under different standards. *See, e.g., NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971) ("The purpose of the Act was to obtain 'uniform application' of its substantive rules and to avoid the 'diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies'") (quoting *Garner v. Teamsters Chauffeurs and Helpers Local Union*, 346 U.S. 485, 490 (1953)); *Amalgamated Ass'n of Street Elec. Ry. and Motor Coach Employees of Am. v. Lockridge*, 403 U.S. 274, 286 (1971). Under the Supremacy Clause, the recourse for citizens dissatisfied with existing national labor policy is to seek to change federal law at the federal level.

CONCLUSION

For the reasons stated above and in the NLRB's Motion for Summary Judgment, 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,

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Dated: June 13, 2012

CERTIFICATE OF SERVICE

I am an attorney and hereby certify that on June 13, 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.

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