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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 MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

Pursuant to 28 U.S.C. §§ 2201 and 2202, F.R.C.P. 56 and L.R.Civ. 56.1, the National Labor Relations Board ("NLRB" or "Board") moves the Court for a declaratory judgment finding that Arizona State Constitution Article 2 § 37 ("Article 2 § 37"), to the extent it applies to private employees, employers, and labor organizations subject to the National Labor Relations Act ("NLRA"), is preempted by operation of the NLRA and the Supremacy Clause. The question whether a federal law "occupies the field" and preempts state law is "purely legal." *Sayles Hydro Assoc. v. Maughan*, 985 F.2d 451, 454 (9th Cir. 1993).

I. INTRODUCTION

The NLRB is an independent agency of the United States charged with exclusive administration of the NLRA. 29 U.S.C. § 151 *et seq*. The NLRA was enacted in 1935 to provide a nationwide administrative mechanism to peacefully

and expeditiously resolve questions concerning employee representation, to protect the stability of the collective bargaining process, and to maintain peaceful industrial relations. *See American Fed'n of Labor v. NLRB*, 308 U.S. 401, 405, 409-11 & nn. 2-3 (1940); *Boire v. Greyhound Corp.*, 376 U.S. 473, 476-79 (1964). The NLRA affords employees two different paths to choose a bargaining representative: mandatory recognition of a union based upon certification by the Board after the agency has conducted a secret ballot election pursuant to Section 9, 29 U.S.C. § 159, *or* voluntary recognition based upon other convincing evidence of majority support. *See Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 306-307 (1974); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 597, 598-99 n.14 (1969).

Article 2 § 37, made part of the Arizona Constitution by popular referendum in 2010, provides:

> The right to vote by secret ballot for employee representation is fundamental and shall be guaranteed where local, state, or federal law permits or requires elections, designations or authorizations for employee representation.

The Board initiated this preemption lawsuit on the alternative claims that: (a) Article 2 § 37 conflicts with the NLRA by eliminating the possibility of voluntary recognition of a union as bargaining representative of private sector employees; and (b) "even if it were fairly possible to construe Arizona State Constitution Article 2 § 37 as only supporting the NLRA's guarantee of a secret ballot election if the voluntary recognition option is not chosen, Article 2 § 37 is preempted

insofar as it creates a parallel state enforcement mechanism for protecting employee representation rights that Congress assigned to the National Labor Relations Board." Doc 1, Compl. Paras XIII, and XV.

The State Attorney General has opined that Article 2 § 37 is not properly interpreted to conflict with the NLRA by eliminating voluntary recognition, but rather "support[s] the current federal law that guarantees an election with secret ballots if the voluntary recognition option is not chosen." *See* Doc. 7 Ex. 2 at 1. The State formally reaffirmed this interpretation after the Board filed its initial Complaint. *See* Doc. 6, Mot. to Dismiss at 7. In accordance with the State's representations, and to simplify the issues before this Court, the Board amended its Complaint on January 13, 2012, to proceed solely on the claim that even under the State's interpretation, Article 2 § 37 is preempted because it authorizes recourse to state courts to protect employee representation rights that Congress assigned exclusively to the NLRB to protect. *See* Doc. 31, Amended Compl. Para. XIII, XV; Doc. 23 at 2. The Board now requests summary judgment on the grounds that there are no disputed material facts and Article 2 § 37 is preempted as a matter of law.

II. ARGUMENT

A. The Lawsuit is Properly Before The Court

The Court denied Defendant's motion to dismiss on October 12, 2011 (Doc 18), holding that the NLRB has authority to bring this action under *NLRB v. Nash-Finch*, 404 U.S. 138 (1971), that the Board has standing, that the

case satisfies both the constitutional ripeness and prudential ripeness doctrines, that the Court has jurisdiction under 28 U.S.C. §§ 1331 and 1337(a), and that exercising its discretion to maintain jurisdiction under the Discretionary Judgment Act is appropriate. The Court specifically noted that:

> [P]laintiff's injury has already occurred. This is because the amendment itself creates a parallel mechanism for a person alleging a violation of his right to a secret ballot election to seek vindication. Either he may file a charge with the plaintiff, which then has the power to file a complaint, investigate, and rule on whether the conduct amounted to an unfair labor practice, see 29 U.S.C. § 160(b), or he may bring an action in an Arizona state court alleging that his state constitutional rights have been infringed. Arizona courts, as well as the NLRB, are now tasked with ensuring that a person's right to vote by secret ballot in the labor context is not impeded. [Doc. 18 at 5].

The reasoning of the Court's October 12 decision is no less applicable today. As explained below, a primary objective of the NLRA is to ensure uniform application of the federal substantive law and minimize disruptions likely to result from a variety of local procedures. *Garner v. Teamsters Chauffeurs and Helpers Local 776,* 346 U.S. 485, 490 (1953). Article 2 § 37 is law in the State of Arizona, and its provisions are "mandatory." Arizona Const. Art. 2 § 32. Provisions of the Arizona Constitution are enforceable in its courts. *Bailey v. Myers,* 206 Ariz. 224, 230 (App. Ct. 2003). Accordingly, Article 2 § 37 grants residents of Arizona recourse to Arizona state courts to pursue claims that the right to vote by secret ballot for employee representatives has been infringed in NLRB proceedings. No more need be demonstrated for the Court to consider granting summary judgment to the Board.

B. Article 2 § 37 is preempted as a matter of law

"[I]n passing the NLRA Congress largely displaced state regulation of industrial relations." *Wisconsin Dep't of Indus. v. Gould Inc.*, 475 U.S. 282, 286 (1986). *See also New York Tel. Co v. New York State Dep't of Labor*, 440 U.S. 519, 528 (1979). By Congressional design, the purpose of the NLRA 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.'" *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)); *see also Amalgamated Ass'n of Street Elec. Railway & Motor Coach Employees of Am. v. Lockridge*, 403 U.S. 274, 286 (1971); *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. at 529 n.9.

1. Congress Has Established a Comprehensive Scheme for the Regulation of Private Sector Disputes over Employee Representation through the Conduct of Secret Ballot Elections

Specifically, with respect to the NLRA's protection of the right to a secret ballot election for the purpose of resolving representational disputes, Congress enacted an integrated scheme of rights, protections, and prohibitions governing private sector employee, employer, and union conduct during organizing campaigns and representation elections and for resolving disputes about the rights established in such elections. NLRA Section 7 affords employees the right "to self-organization" and "to form, join, or assist labor organizations," and "to refrain from . . . such activities." 29 U.S.C § 157. Section 8 creates a network of

substantive unfair labor practice prohibitions on employer and union conduct that has a reasonable tendency to interfere with employees' Section 7 rights. 29 U.S.C. § 158. Section 9 establishes secret ballot election procedures for determining and certifying employees' decisions on unionization. 29 U.S.C. § 159. Under Section 9, the Board also regulates employer and union conduct that is prejudicial to a fair election, even if not prohibited by Section 8. *See General Shoe Corp.*, 77 NLRB 124, 126 (1948), *enf'd* 192 F.2d 504 (6th Cir. 1951). *See generally* JOHN E. HIGGINS, JR., ED., *The Developing Labor Law*, pp. 471-636 (5th ed. 2006) (reviewing Board regulations defining the manner in which such elections should be conducted to best ensure that the result of the election is reliable evidence of the employees' desires).

Section 9 authorizes the Board to investigate election petitions filed by private parties and to determine whether there is reasonable cause to believe that the petition raises a question concerning representation affecting commerce. Whether a secret ballot election may be conducted at all is dependent on there being a question concerning representation, *NLRB v. Fin. Inst. Employees (Sea First)*, 475 U.S. 192, 198, 202-203 (1986), and the Board has discretion to refuse to conduct an election where, on balance, not holding an election furthers the purposes of the NLRA. *See generally Brooks v. NLRB*, 348 U.S. 96, 104 (1954); *Carpenters Local 1545 v. Vincent*, 286 F.2d 127, 131 (2d Cir. 1960); *Poole Foundry & Mach. Co. v. NLRB*, 192 F.2d 740, 741 (4th Cir. 1951).

In enacting Section 9, Congress entrusted the Board with a "wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *Napili Shores Condominium Homeowners' Ass'n v. NLRB*, 939 F.2d 717, 718 (9th Cir. 1991) (*quoting NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946)). In the exercise of that discretion, the Board is charged with deciding, subject to federal court review, whether the right to a secret ballot election has been afforded to employees. That responsibility entails the Board's resolving the host of questions that can be raised by the parties objecting to the outcome of the election, among them complaints about the adequacy of the voting booth,[1] the use of English-only ballots,[2] the alleged transparency of the paper ballot,[3] the possibility of chain voting schemes,[4] the effect of the challenged ballot procedure on voters,[5] the security of the ballot box,[6] the possibility that voters put identifying marks on their ballots,[7] or claims that a ballot should not be counted because the voter failed clearly to manifest a choice for one side or the other.[8]

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[1] *Fotomat Corp. v. NLRB*, 634 F.2d 320, 324 (6th Cir. 1980).
[2] *NLRB v. Precise Castings, Inc.*, 915 F.2d 1160, 1161-64 (7th Cir. 1990).
[3] *Crown Cork & Seal Co., Inc. v. NLRB*, 659 F.2d 127, 131 (10th Cir. 1981).
[4] *Newport News Shipbuilding & Dry Dock Co. v. NLRB*, 549 F.2d 8, 12 (4th Cir. 1979); *NLRB v. New Orleans Bus Travel Inc.*, 883 F.2d 382, 383 (5th Cir. 1989).
[5] *NLRB v. Doctors' Hospital of Modesto*, 489 F.2d 772, 776 (9th Cir. 1973); *Universal Division Leigh Products v. NLRB*, 610 F.2d 1390, 1391 (6th Cir. 1980).
[6] *Elizabethtown Gas Co. v. NLRB*, 212 F.3d 257, 267-68 (4th Cir. 2000)),
[7] *Liberty Coach Co. v. NLRB*, 418 F.2d 1191, 1202-03 (D.C. Cir. 1969); *NLRB v. Durion Co., Inc.*, 978 F.2d 254, 257-58 (6th Cir. 1992).
[8] *NLRB v. AmeriCold Logistics, Inc.*, 214 F.3d 935, 939-40 (7th Cir. 2000); *Wackenhut Corp. v. NLRB*, 666 F.2d 464, 468 (11th Cir. 1982).

2. Article 2 § 37 Impermissibly Creates a Parallel Mechanism For State Court Adjudication of NLRA Representation Disputes

Article 2 § 37 impermissibly creates a parallel state mechanism for protecting the right to a secret ballot in private sector representational disputes, a task that Congress assigned exclusively to the NLRB. That this is an effect of the Article 2 § 37 is not open to dispute. In response to the NLRB's preemption claim, the State's Attorney General stated, in agreement with his counterparts in other States that have adopted similar amendments, "Our constitutional amendments protect the right to cast secret ballots, a right the NLRB itself is 'under a duty to preserve.'" *See* Doc. 7 Ex. 2 at 2. Under the State's own interpretation, any aggrieved person claiming that his or her right to a secret ballot has been infringed in an NLRB proceeding can sue to enforce Article 2 § 37's guarantee in state court. *See* October 12, 2011 Order, Doc. 18 at 5 Mot. to Dismiss (Doc 6 at 6); State Reply to Mot. to Dismiss (Doc. 16 at 6).[9]

By thus opening its courts to litigation of the same kinds of secret ballot election issues that Congress assigned to the Board, Arizona has intruded in an area regulated exclusively by federal law. The Supreme Court early determined that "[t]he control of the election proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to

[9] Under the State's view that Article 2 § 37's guarantee kicks in "if the voluntary recognition option is not chosen" *see* Doc. 7 Ex. 2 at 1, parties to Board proceedings could also litigate in state courts the predicate question of whether voluntary recognition occurred. *See, e.g., Jerr-Dan Corp.*, 237 NLRB 302 (1978), *enf'd* 601 F.2d 575 (3d Cir. 1979).

the Board alone," subject to limited review in the federal courts. *NLRB v. Waterman S.S. Corp.*, 309 U.S. 206, 226 (1940). Faced with the attempts of some states to referee representation disputes among employers and employees within the NLRB's jurisdiction, the Supreme Court accordingly concluded that state regulation had no place in this area. *See 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). As the Court explained, "[t]he problem of employee representation is a sensitive and delicate one in industrial relations[]" *LaCrosse Tel. Corp.*, 336 U.S. at 26, and permitting concurrent state and federal jurisdiction in this area would necessarily result in uncertainty and conflict even though the Board had not yet acted in a particular dispute. *Id.*; *Bethlehem Steel Co.*, 330 U.S. at 775-76.[10]

The fact that Article 2 § 37 may be interpreted as being consistent with the NLRA -- as the State argues here -- does not exempt Article 2 § 37 from preemption. *See Lockridge*, 403 U.S. at 286-87. Multiple forums and the

[10] More recent decisions likewise recognize that NLRA preemption bars state regulation of employee election disputes that might frustrate the Board's exercise of its primary jurisdiction. *Michigan Cmty Services, Inc. v. N.L.R.B.*, 309 F.3d 348, 361 (6th Cir. 2002) (Board assertion of jurisdiction over question concerning representation ousts state board of jurisdiction); *Penn. Nurses Ass'n v. Penn. State Educ. Ass'n*, 90 F.3d 797, 802-03 (3d Cir. 1996) (finding state tort claims preempted where they involved "core activities" subject to the Board's authority over representation elections and unfair labor practices); *NLRB v. Comm. of Interns and Residents*, 566 F. 2d 810, 814-816 (2d Cir. 1977) (following *Bethlehem Steel* and holding that where the Board had concluded that requiring health care employers to bargain with interns and residents would be contrary to national labor policy, state was not free to require such bargaining).

potential variety in their procedures are as likely to cause inconsistent results as would different rules of substantive law. *Garner*, 346 U.S. at 491. Even if the Board and a state court could reach the same conclusion to resolve a particular dispute, the state enforcement mechanism is nonetheless preempted because conflict in technique can be as disruptive to the legal system established under the NLRA. *Lockridge*, 403 U.S. at 278, 287, 289; *Gould*, 475 U.S. at 286; *see also Sears, Roebuck and Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 194 n.21 (1978). In short, even if the state court "may purport to apply legal rules identical to those prescribed in the federal Act or may eschew the authority to define or apply principles specifically developed to regulate labor relations does not mean that all relevant potential for debilitating conflict is absent." *Lockridge*, 403 U.S. at 289.

To hold otherwise would open the door to a patchwork of local forums in various states making potentially inconsistent policy determinations and imposing a variety of remedies based on their respective views and policies. This is not an idle concern. Several other states have put into effect similar rules governing employee rights to a secret ballot election. *See e.g.*, S.C. Const. Art. 2 § 12; S.D. Const. Art. 6 § 28; Utah Const. Art. 4 § 8. "Each [such] additional statute incrementally diminishes the Board's control over enforcement of the NLRA and thus further detracts from the 'integrated scheme of regulation' created by Congress." *Gould*, 475 U.S. at 288-89 (citation omitted). *Cf. Chamber of Commerce v. Brown*, 554 U.S. 60, 77 (2008).

3. Article 2 § 37 Licenses the Kind of Court Challenges to Board-Conducted Secret Ballot Elections that Congress Enacted the NLRA to Avoid

Article 2 § 37 is preempted for the further reason that its affording a right to a competing state forum for the protection of private sector employees' right to a secret ballot election frustrates Congress' purpose in devising streamlined federal procedures to expedite the resolution of employee representation disputes. By encouraging collateral litigation in state courts by persons disappointed with the Board's exercise of its representation case authority under Section 9 of the NLRA, Arizona has erected of the kind of obstacles to industrial peace that Congress sought to remove in enacting the NLRA "as an instrument of the national labor policy of minimizing industrial strife . . . ." *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975).

"Time is a critical element in election cases." *NLRB v. Sun Drug Co.*, 359 F.2d 408, 414 (3d. Cir. 1966). *Accord Sears, Roebuck & Co. v. NLRB*, 957 F.2d 52, 55 (2d Cir. 1992); *Int'l Union of Elec., Radio and Mach. Workers v. NLRB*, 418 F.2d 1191, 1196-97 (D.C. Cir. 1969).[11] For that reason, in order to expedite the resolution of representation disputes, Congress authorized the Board's use of informal investigative procedures that are exempt from the Federal Rules of Evidence and freed from the Administrative Procedure Act's strictures on

[11] See also NLRB FY 2011Performance and Accountability Report at 18-19 (reporting that the Board's goal of resolving 85% of all representation cases within 100 days of filing was substantially achieved), available at http://www.nlrb.gov/sites/default/files/documents/189/nlrb_2011_par_508.pdf (last visited May 11, 2012).

adjudication. *See Inland Empire Dist. Council v. Millis*, 325 U.S. 697, 706-710 (1945); *Beth Israel Hosp. and Geriatric Ctr. v NLRB,* 688 F.2d 697, 700 (10th Cir. 1982) (*en banc*); *NLRB v. W.S. Hatch Co., Inc*., 474 F.2d 558, 562 (9th Cir. 1973); *NLRB v. Union Bros., Inc.*, 403 F.2d 883, 888 (4th Cir. 1968); 5 U.S.C. § 554(a)(6).

Congress also made a reasoned decision to minimize delays in the NLRB union election certification procedures by declining to enable interested persons to apply to the courts for relief whenever they were dissatisfied with the Board's conduct of a secret ballot election. *Boire v. Greyhound Corp.*, 376 U.S. 473, 476-79 (1964). Congress decided that, unlike in unfair labor practice proceedings, Board election proceedings and decisions should *not* be directly reviewable in the courts. Rather, with rare exceptions,[12] they are reviewable only if and when the dispute concerning the correctness of the election certification eventuates in a finding of an unfair labor practice by the Board. *Id.* Typically this occurs when an employer refuses to bargain with a certified representative of its employees, as in the cases discussed above, p. 7 nn. 1-8.[13]

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[12] *E.g., Leedom v. Kyne*, 358 U.S. 184 (1958).

[13] When the Act was amended in 1947, a House bill contained an amendment to permit any "aggrieved person" to obtain direct post-election review of a Board election certification in the federal courts of appeals. The proposed amendment was deleted in favor of the Senate bill with the current preclusion of direct review "because, as Senator Taft noted, 'such provision would permit dilatory tactics in representation proceedings." *Boire*, 346 U.S. at 479.

Congress' objective, in making these procedural choices, was that the Board resolve election disputes efficiently and speedily in order that the majority's choice could be fairly ascertained and the passions of the election campaign defused. *See NLRB v. A.J. Tower*, 329 U.S. 324, 330-332 (1946). Contrary to these Congressional objectives, Article 2 § 37 invites persons disappointed with Board-certified election results to initiate collateral state proceedings alleging that the guarantee of a secret ballot was infringed. Any such state litigation, with its formal procedural and evidentiary rules, inevitably would perpetuate controversies that the NLRA was enacted to resolve and do so by the very procedural means in ways that Congress rejected as an impediment to the final resolution of representational disputes.

4. No Local Interest Exception Applies

The Supreme Court declared that a state law would not normally be preempted if it addressed conduct that was "a merely peripheral concern of the [NLRA]" or it "touched interests . . . deeply rooted in local feeling and responsibility." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243-244 (1959) ("*Garmon*"). Neither *Garmon* exception is available here, where Congress actually addressed the very conditions under which employees are entitled to a secret ballot election prior to either securing union representation or having it imposed upon them. The *Garmon* exceptions are not applicable to a state law that regulates precisely the same conduct as the NLRA. *See Brown v.*

Hotel & Rest. Employees Int'l Union Local 54, 468 U.S. 491, 502-503 (1984).[14]

Here, the conceded and "manifest purpose and inevitable effect" of the challenged state law is to regulate conduct that is already regulated by the NLRA. "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. The terms "peripheral concern" and "local interest" are only useful in this case as a way of highlighting how great the contrast is between cases within the *Garmon* exceptions and this one.

Far from applying to a concern "merely peripheral" of the NLRA, Article 2 § 37 strikes at the heart of the functions Congress assigned to the Board to expeditiously resolve questions concerning employees' right to choose a bargaining representative. *See Pa. Nurses Ass'n v. Pa. State Educ. Ass'n*, 90 F.3d 797, 803 (3d Cir. 1996). *See also* NLRB FY 2011 Performance and Accountability Report at 1 (stating that the conduct of secret ballot elections among employees to determine whether or not employees wish to be represented by a union is one of the Board's "two primary functions"), available at http://www.nlrb.gov/sites/default/files/documents/189/nlrb_2011_par_508.pdf (last visited May 11, 2012). Article 2 § 37 also will frustrate the purpose of the Act to obtain uniform application of its substantive rules and to avoid a variety of local procedures and attitudes. *Nash-Finch Co.*, 404 U.S. at 144.

[14] Not surprisingly, the State has not identified any specific local interest *Garmon* exception. Rather, the State claims that Article 2 § 37 merely mirrors existing federal law. *See* Mot. to Dismiss at 7.

The kind of "local concerns" that may permit a state law to stand in the face of potential conflict with the NLRA are generally limited to a circumscribed set of traditional core local interests typically regulated by the state—defamatory speech, violence, trespass, obstruction of access to property, intentional infliction of emotional distress. *See Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53, 63-64 (1966); *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131, 139-140 (1957); *Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 207 (1978); *United Auto Workers* v. *Russell*, 356 U.S. 634, 644-646 (1958); *Farmer* v. *United Bhd. of Carpenters*, 430 U.S. 290, 302-306 (1977). Regulation of private sector union elections is not comparable.

CONCLUSION

The NLRB respectfully requests that the Court grant the Board's Motion for Summary Judgment.

Respectfully submitted,

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Dated: May 14, 2012

CERTIFICATE OF SERVICE

I am an attorney and hereby certify that on May 14, 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, Defendant Intervenors', 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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