



**UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL**

Washington, D.C. 20570

January 13, 2011

The Honorable Alan Wilson
Attorney General
State of South Carolina
P.O. Box 11549
Columbia, SC 29211

Re: Preemption of State of South Carolina Constitution Article 2, Section 12
by the National Labor Relations Act

Dear Mr. Wilson:

I am writing to apprise you of the National Labor Relations Board's conclusion that a recently approved amendment to the South Carolina Constitution, Article 2, Section 12 (attached) ("the Amendment"), conflicts with the rights afforded individuals covered by the National Labor Relations Act. 29 U.S.C. 151, et seq. ("NLRA"). The purpose of this letter is to explain the Agency's position and to advise you that I have been authorized to bring a civil action in federal court to seek to invalidate the Amendment. See NLRB v. Nash-Finch Co., 404 U.S. 138, 144-147 (1971) (authorizing the NLRB to seek declaratory and injunctive relief to invalidate state laws that conflict with the NLRA). I also want to express our willingness to first discuss any alternative you can see to satisfy the Agency's desire to preclude persons from relying upon the Amendment so as to interfere with employees' rights under the NLRA.

The NLRA, enacted by Congress in 1935, is the primary law governing relations between employees, employers, and unions in the private sector. The NLRA implements the national labor policy of assuring "full freedom" in the choice of employee representation and encouraging collective bargaining as a means of maintaining industrial peace. 29 U.S.C. § 151. Section 7 of the NLRA guarantees the right of employees to organize and select their own bargaining representatives, as well as the right to refrain from all such activity. Id. at § 157. This Section 7 right of employees to select their own representatives is a "fundamental right." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937).

Congress could have conditioned that fundamental Section 7 right on the employees' choice "surviv[ing] the crucible of a secret ballot election." NLRB v. Gissel Packing Co., 395 U.S. 575, 598-599 n.14 (1969) (Gissel). But Congress did not do so. Section 9(a), 29 U.S.C. § 159(a), the section that defines the conditions under which a

union may obtain the status of "exclusive representative," requires only that the union be "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes." As a result, "[a]lmost from the inception of the Act . . . it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation" Gissel, 395 U.S. at 596-597.

The recent Amendment to the South Carolina Constitution, Article 2, Section 12, approved by voters on November 2, 2010, conflicts with the employee rights and employer obligations set forth in the NLRA. Federal law provides employees two different paths to vindicate their Section 7 right to choose a representative: certification based on a Board-conducted secret ballot election *or* voluntary recognition based on other convincing evidence of majority support. Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301, 309-310 (1974); Gissel, 395 U.S. at 596-597. Article 2, Section 12, by contrast, allows only one path to union representation. It states that a secret ballot vote is required for any designation, selection, or authorization of employee representation by a labor organization. By closing off an alternative route to union representation authorized and protected by the NLRA, this Amendment creates an actual conflict with private sector employees' Section 7 right to representatives of their own choosing. The Amendment is therefore preempted by operation of the Supremacy Clause of the United States Constitution. See U.S. Const. art. VI, cl. 2; Brown v. Hotel & Rest. Employees & Bartenders Int'l Union Local 54, 468 U.S. 491, 501 (1984); Livadas v. Bradshaw, 512 U.S. 107, 134-135 (1994) (finding conflict preemption where a state policy had "direct and detrimental effects on the federal statutory rights of employees"); NLRB v. State of North Dakota, 504 F. Supp. 2d 750, 758 (D.N.D. 2007) (finding statute requiring non-union members to pay the union for the costs of processing their grievances preempted as a matter of law because in actual conflict with employee rights under the NLRA).

The inevitable consequence of this Amendment is that South Carolina employers are placed under direct state law pressure to refuse to recognize – or withdraw recognition from – any labor organization lacking an election victory. In addition, employees unhappy with a union designated by the majority of their fellow employees and recognized by their employer in accordance with federal law could bring state court lawsuits against their employer and union claiming a violation of their constitutional rights. Cf. Adcock v. Freightliner LLC, 550 F.3d 369, 371, 373-375 (4th Cir. 2008) (upholding employer-union card check agreement in the face of a legal challenge brought by individual employees). In these circumstances, the Amendment impairs important federal rights of employees, employers, and unions covered by the NLRA in South Carolina.

I understand that the Amendment adopted by the voters in November is not technically in effect and must still be ratified by the South Carolina General Assembly. S.C. Const. Art. 16 § 1. Accordingly, I am hopeful that, after a review of the NLRB's legal position, South Carolina might be willing to take voluntary measures to ensure that the Amendment will not be ratified, and that the public will be so notified. Alternatively,

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if you agree with our legal position, I would welcome a judicially sanctioned stipulation concerning the unconstitutionality of the Amendment, so as to conserve state and federal resources. The Attorney General of Wisconsin recently executed such a stipulation in a preemption case. See Final Stipulation in Metro. Milwaukee Ass'n of Commerce v. Doyle, Case No. 10-C-0760 (E.D. Wis. Nov. 4, 2010) avail. at www.wispolitics.com/1006/Final_Stipulation.pdf (last visited Jan. 10, 2011).

In light of the significant impact of this Amendment, I request that any response to this letter on behalf of South Carolina be made within two weeks. Absent any response, I intend to initiate the lawsuit.¹

¹ In similar situations, where offending enactments have not yet ripened into actual enforcement actions, the courts have nonetheless permitted suits to bar their enforcement where a danger exists that public knowledge of the provision may result in "self-censorship; a harm that can be realized even without an actual prosecution." See, e.g., Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 392-393 (1988); Awad v. Ziriax, 2010 WL 4814077, at *4-5 (W.D. Okla. Nov. 29, 2010); Am. Soc'y of Composers, Authors, and Publishers v. Pataki, 1997 WL 438849, at *1, 6 (S.D.N.Y. Feb. 27, 1997). See generally Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 536 (1925). That principle is applicable here since it is foreseeable that widespread public knowledge of the Amendment will deter some employers from granting voluntary recognition or abiding by their commitments to recognize a union on the basis of a card check. Cf. ATC/Vancom of Cal. L.P., 338 NLRB 1166 (2003), enforced 370 F.3d 692 (7th Cir. 2004) (employer relied on soon-to-be-effective state law to repudiate agreement with union regarding use of bulletin boards).

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Please feel free to contact directly Mark G. Eskenazi, the attorney assigned to this matter (202) 273-1947), Deputy Assistant General Counsel Abby Propis Simms (202) 273-2934), or myself with any questions or to discuss the Board's position. Thank you for your attention to this matter. I look forward to hearing from you.

Sincerely yours,

LAFE E. SOLOMON
Acting General Counsel



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Enclosure

South Carolina General Assembly
118th Session, 2009-2010

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~~Indicates Matter Stricken~~

Indicates New Matter

A295, R157, H3305

STATUS INFORMATION

Joint Resolution

Sponsors: Reps. Bedingfield, Merrill, Bingham, Duncan, Loftis, G.R. Smith, Cato, Owens, Crawford, A.D. Young, Nanney, Bannister, Daning, Harrison, Horne, Kirsh, Lowe, Lucas, E.H. Pitts, Stringer, Thompson, Toole, Wylie, T.R. Young, Long, Rice, Parker, Allison, Littlejohn, Cole, Hiott, Edge, Whitmire, Hearn, Hardwick, D.C. Smith, Pinson, J.R. Smith, Simrill, Brantley, Willis, Hamilton, Erickson, Sottile, Scott, Harrell, Delleney, Gullick, Frye, Clemmons, G.M. Smith, Battle, Sandifer, Millwood, Haley, Ballentine, M.A. Pitts, Cooper, White, Gambrell, Bowen, Umphlett, Forrester, Barfield, Chalk, Herbkerman, Viers, Spires, Huggins, Limehouse, Stewart, Kelly, Brady and D.C. Moss

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Companion/Similar bill(s): 316

Introduced in the House on January 15, 2009

Introduced in the Senate on March 26, 2009

Last Amended on February 25, 2010

Passed by the General Assembly on March 10, 2010

Governor's Action: No signature required

Summary: Secret ballots

HISTORY OF LEGISLATIVE ACTIONS

Date	Body	Action Description with journal page number
1/15/2009	House	Introduced and read first time <u>HJ-440</u>
1/15/2009	House	Referred to Committee on Judiciary <u>HJ-440</u>
1/27/2009	House	Member(s) request name added as sponsor: T.R.Young
1/28/2009	House	Member(s) request name added as sponsor: Long
2/10/2009	House	Member(s) request name added as sponsor: Rice, Parker, Allison, Littlejohn, Cole, Hiott, Edge, Whitmire, Hearn, Hardwick
2/10/2009	House	Member(s) request name removed as sponsor: McLeod
2/10/2009	House	Member(s) request name added as sponsor: D.C.Smith, Pinson, J.R.Smith, Simrill, Brantley, Willis, Hamilton, Erickson, Sottile, Scott
2/11/2009	House	Member(s) request name added as sponsor: Harrell, Delleney, Gullick
2/18/2009	House	Committee report: Favorable Judiciary <u>HJ-3</u>
2/19/2009	House	Member(s) request name added as sponsor: Frye, Clemmons
2/19/2009		Scrivener's error corrected
2/24/2009	House	Member(s) request name added as sponsor: G.M.Smith,

Battle

2/24/2009	House	Objection by Rep. Cobb-Hunter and RL Brown <u>HJ-26</u>
2/24/2009	House	Requests for debate-Rep(s). Bedingfield, Cato, Bannister, JE Smith, Owens, Nanney, GR Smith, King, Skelton, Hiott, Crawford, Lowe, Daning, Sellers, Duncan, Jefferson, and Hart <u>HJ-26</u>
2/26/2009	House	Member(s) request name added as sponsor: Sandifer, Millwood, Haley, Ballentine, M.A.Pitts, Cooper, White, Gambrell, Bowen, Umphlett
2/26/2009	House	Debate adjourned until Tuesday, March 10, 2009 <u>HJ-100</u>
3/4/2009	House	Member(s) request name added as sponsor: Forrester
3/5/2009	House	Member(s) request name added as sponsor: Barfield
3/10/2009	House	Member(s) request name added as sponsor: Chalk, Herbkersman, Viers, Spires, Huggins, Limehouse, Stewart, Kelly, Brady
3/24/2009	House	Member(s) request name added as sponsor: D.C.Moss
3/25/2009	House	Read second time <u>HJ-47</u>
3/25/2009	House	Roll call Yeas-88 Nays-25 <u>HJ-47</u>
3/26/2009	House	Read third time and sent to Senate <u>HJ-28</u>
3/26/2009	Senate	Introduced and read first time <u>SJ-6</u>
3/26/2009	Senate	Referred to Committee on Judiciary <u>SJ-6</u>
4/16/2009	Senate	Referred to Subcommittee: L.Martin (ch), Rankin, Hutto, Bright, Davis
5/6/2009	Senate	Committee report: Favorable Judiciary <u>SJ-14</u>
2/11/2010	Senate	Special order, set for February 11, 2010 <u>SJ-18</u>
2/25/2010	Senate	Amended <u>SJ-153</u>
2/25/2010	Senate	Debate interrupted <u>SJ-153</u>
2/26/2010		Scrivener's error corrected
3/3/2010	Senate	Debate interrupted <u>SJ-28</u>
3/4/2010	Senate	Read second time <u>SJ-42</u>
3/9/2010	Senate	Debate interrupted <u>SJ-41</u>
3/10/2010	Senate	Read third time and returned to House with amendments <u>SJ-39</u>
3/10/2010	House	Concurred in Senate amendment and enrolled <u>HJ-158</u>
3/10/2010	House	Roll call Yeas-106 Nays-12 <u>HJ-160</u>
3/25/2010		Ratified R 157
3/29/2010		No signature required
4/1/2010		Effective date 03/25/10
9/9/2010		Act No. 295

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VERSIONS OF THIS BILL

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[2/26/2010](#)

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JOINT RESOLUTIONS. WHEN THIS DOCUMENT IS PUBLISHED IN THE ADVANCE SHEET, THIS NOTE WILL BE REMOVED.

(A295, R157, H3305)

A JOINT RESOLUTION TO PROPOSE AN AMENDMENT TO ARTICLE II OF THE CONSTITUTION OF SOUTH CAROLINA, 1895, RELATING TO THE RIGHT OF SUFFRAGE, BY ADDING SECTION 12 SO AS TO GUARANTEE THE RIGHT OF AN INDIVIDUAL TO VOTE BY SECRET BALLOT FOR A DESIGNATION, A SELECTION, OR AN AUTHORIZATION FOR EMPLOYEE REPRESENTATION BY A LABOR ORGANIZATION.

Be it enacted by the General Assembly of the State of South Carolina:

Amendment proposed

SECTION 1. It is proposed that Article II of the Constitution of this State be amended by adding:

"Section 12. The fundamental right of an individual to vote by secret ballot is guaranteed for a designation, a selection, or an authorization for employee representation by a labor organization."

Submission of amendment to qualified electors

SECTION 2. The proposed amendment in Section 1 must be submitted to the qualified electors at the next general election for representatives. Ballots must be provided at the various voting precincts with the following words printed or written on the ballot:

"Must Article II of the Constitution of this State, relating to the right of suffrage, be amended by adding Section 12 so as to provide that the fundamental right of an individual to vote by secret ballot is guaranteed for a designation, a selection, or an authorization for employee representation by a labor organization?"

Yes ☐

No ☐

Those voting in favor of the question shall deposit a ballot with a check or cross mark in the square after the word 'Yes', and those voting against the question shall deposit a ballot with a check or cross mark in the square after the word 'No'."

Ratified the 25th day of March, 2010.

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