January 27, 2011

Lafe E. Solomon, Esquire
Acting General Counsel
United States Government National Labor Relations Board
1099 14th Street, NW
Suite 8600
Washington, DC 20570

Re: **State Constitutional Right to Secret Ballot in Elections for Determination of Employee Representation**

Dear Mr. Solomon:

Your Office wrote to each of us on January 13, threatening to file lawsuits challenging our States' constitutional provisions guaranteeing the secret ballot in elections for determination of employee representation. We reject your demand to "stipulate to the unconstitutionality" of these amendments. These state laws protect long existing federal rights, and we will vigorously defend any legal attack upon them. That the NLRB would use its resources to sue our States for constitutionally guaranteeing the right to vote by a secret ballot is extraordinary, and we urge you to reconsider your decision.

The voters of our States overwhelmingly support the laws that you threaten to challenge. Indeed, 86% of South Carolina's voters approved the amendment supporting secret ballots. Likewise, the voters in Utah, South Dakota, and Arizona approved constitutional amendments protecting secret ballots by votes of 60%, 79% and 61% respectively.

You premise your proposed lawsuit on the erroneous conclusion that our constitutional provisions require elections when federal law does not. We do not believe that is true. Our amendments support the current federal law that guarantees an election with secret ballots if the voluntary recognition option is not chosen. *See Linden Lumber v. NLRB*, 419 U.S. 301, 310 (1974) (absent unfair labor practice, "a union with authorization cards purporting to represent a majority of the employees, which is refused recognition, has the burden of taking the next step in invoking the Board's election procedure").

Accordingly, your letter fails to establish that our State constitutional protections have disrupted the federal regulatory scheme in any way. Both the State amendments and the NLRA support secret ballot elections in selecting union representatives. Under the NLRA, "secret elections are generally the most satisfactory--indeed the preferred--method of ascertaining whether a union has majority support." *NLRB v. Gissell Packing Co.*, 395 U.S. 575, 602 (1969). *See also In re Dana Corp.*, 351 NLRB 434, 438 (2007) ("both the Board and courts have long recognized that the freedom of choice guaranteed employees by Section 7 is better realized by a secret election than a card check"); *Royal Lumber Co.*,

118 NLRB 1015, 1017 (1957) ("secret ballot is a requisite for a free election"). Our constitutional amendments protect the right to cast secret ballots, a right that the NLRB itself is "under a duty to preserve." *J. Bremer & Sons*, 154 NLRB 656, 659 n. 4 (1965). Secret elections promote freedom of association, here the freedom to decide for oneself, without interference, whether to join a union. *Cf. Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 233-235 (1977) ("Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments."). Through these constitutional amendments, the voters in our States expressed their support for this important right.

As Attorneys General, we will defend these provisions of our State Constitutions if they are challenged, but we also firmly believe that lawsuits by the federal government to attack these provisions would be misguided. Such lawsuits not only would cost the taxpayers substantially, but would seek to undermine individual rights that the NLRA and our state and federal Constitutions protect.

We urge you to respect the decision of our States' voters because nothing is more important to our democracy than preserving the right to vote by secret ballot. If you choose to proceed with the lawsuits described in your January 13 letters, we will, of course, vigorously defend our laws.

Sincerely,

Alan Wilson
Attorney General
State of South Carolina
P.O. Box 11549
Columbia, SC 29211
803-734-3970

Mark L. Shurtleff
Attorney General
State of Utah
350 North State St.
Suite 230
Salt Lake City, UT
84114-2320
801-538-9600

Tom Horne
Attorney General
State of Arizona
1275 W. Washington
Phoenix, AZ
85007
(602)542-8986

Marty J. Jackley
Attorney General
State of South Dakota
1302 E. Highway 14
Suite 1
Pierre, SD
57501-8501

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

January 13, 2011

The Honorable Tom Horne
Attorney General
State of Arizona
1275 West Washington Street
Phoenix, AZ 85007

Re: Preemption of State of Arizona Constitution Article 2, Section 36 by the National Labor Relations Act

Dear Mr. Horne:

I am writing to apprise you of the National Labor Relations Board's conclusion that a recently approved amendment to the Arizona Constitution, Article 2, Section 36 (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 Arizona Constitution, Article 2, Section 36, 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 36, by contrast, allows only one path to union representation. It states that a secret ballot vote is guaranteed where federal law permits or requires elections, designations or authorizations for employee representation. 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 Arizona 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 Arizona.

I understand that the Amendment adopted by the voters in November is not technically in effect and must still be proclaimed by the Governor of Arizona. A.R.S. Const. Art 4 Pt. 1 § 1(5). Accordingly, I am hopeful that, after a review of the NLRB's legal position, Arizona might be willing to take voluntary measures to ensure that the Amendment will not be proclaimed, and that the public will be so notified. Alternatively, 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 Arizona be made within two weeks. Absent any response, I intend to initiate the lawsuit.[1]

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[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).

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

By: Eric G. Moskowitz
Assistant General Counsel
Special Litigation Branch
National Labor Relations Board
1099 14th Street, N.W., Suite 8600
Washington, DC 20570
Telephone: (202) 273-2931

Abby Propis Simms
Deputy Assistant General Counsel

Mark G. Eskenazi
Attorney

1099 14th Street, NW
Washington, DC 20570
(202) 273-2930

Enclosure

CC: The Honorable Jan Brewer
Governor of Arizona
1700 West Washington Street
Phoenix, AZ 85007