

1 Eric G. Moskowitz
 2 Assistant General Counsel
 Abby Propis Simms
 3 Deputy Assistant General Counsel
 Laura Bandini, Senior Attorney
 4 Mark G. Eskenazi, Attorney
 5 National Labor Relations Board
 Special Litigation Branch
 6 1099 14th Street, N.W., Suite 8600
 7 Washington, DC 20570
 8 Tel: (202) 273-2931/Fax: (202) 273-1799
eric.moskowitz@nlrb.gov
 9 *Attorneys for the National Labor Relations Board*

10 UNITED STATES DISTRICT COURT
 11 FOR THE DISTRICT OF ARIZONA

NATIONAL LABOR RELATIONS)
BOARD,)
Plaintiff,)
)
v.)
)
STATE OF ARIZONA,)
Defendant.)

19
 20 COMPLAINT FOR DECLARATORY JUDGMENT

21 I.

22 Plaintiff seeks a declaratory judgment under 28 U.S.C. §§ 2201 and 2202 that
 23 Arizona Constitution Article 2 § 37 (“Article 2 § 37”), attached hereto as Exhibit A,
 24 conflicts with the rights of private sector employees under the National Labor Relations
 25 Act, as amended, 29 U.S.C. § 151 et seq. (“NLRA”) and is therefore preempted.
 26
 27
 28

1 II.

2 Article 2 § 37 is preempted by operation of the NLRA and the Supremacy
3 Clause of the United States Constitution (Article VI, Clause 2) because it prohibits
4 alternative routes to union representation that are authorized and protected by the NLRA.

5 III.

6 This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1337. This action
7 arises under the NLRA and the Supremacy Clause of the United States Constitution
8 (Article VI, Clause 2).

9 IV.

10 Venue is proper under 28 U.S.C. § 1391 because the Defendant resides in this
11 judicial district.

12 V.

13 Plaintiff National Labor Relations Board is an independent agency of the
14 United States, created by Congress in 1935 and charged with the administration of the
15 NLRA. 29 U.S.C. § 153.

16 VI.

17 Defendant State of Arizona is one of the fifty states of the United States.

18 VII.

19 On November 2, 2010, the voters of Arizona approved Article 2 § 37, entitled
20 “Right to secret ballot; employee representation,” which is now in effect. Article 2 § 37
21 states “[t]he right to vote by secret ballot for employee representation is fundamental and
22 shall be guaranteed where local, state or federal law permits or requires elections,
23 designations or authorizations for employee representation.”

24 VIII.

25 Article 2 § 37 applies to private employees, employers, and labor organizations
26 also subject to the NLRA.
27
28

1 IX.

2 Section 7 of the NLRA, 29 U.S.C. § 157, provides in part that “Employees
3 shall have the right to self-organization, to form, join, or assist labor organizations, to
4 bargain collectively through representatives of their own choosing, and to engage in other
5 concerted activities for the purpose of collective bargaining or other mutual aid or
6 protection, and shall also have the right to refrain from any or all such activities.”

7 X.

8 Section 9(a) of the NLRA, 29 U.S.C. § 159(a), states in part that
9 “Representatives designated or selected for the purposes of collective bargaining by the
10 majority of the employees in a unit appropriate for such purposes, shall be the exclusive
11 representatives of all the employees in such unit for the purposes of collective bargaining
12 in respect to rates of pay, wages, hours of employment, or other conditions of
13 employment.” Section 9(c) of the NLRA, 29 U.S.C. § 159(c), provides in part, in
14 circumstances where employees or employers file a representation petition and a
15 “question of representation exists, [the Board] shall direct an election by secret ballot and
16 shall certify the results thereof.”

17 XI.

18 Section 8(f) of the NLRA, 29 U.S.C. § 158(f), states in part that “It shall not be
19 an unfair labor practice . . . for an employer engaged primarily in the building and
20 construction industry to make an agreement . . . with a labor organization of which
21 building and construction employees are members . . . because [] the majority status of
22 such labor organization has not been established under the provisions of section 159 of
23 this title prior to the making of such agreement”

24 XII.

25 The NLRA permits but does not require secret ballot elections for the
26 designation, selection, or authorization of a collective bargaining representative where,
27 for example, employees successfully petition their employer to voluntarily recognize
28 their designated representative on the basis of reliable evidence of majority support, in

1 accordance with Sections 7 and 9 of the NLRA, 29 U.S.C. §§ 157 and 159, or where a
2 construction union seeks recognition from a construction employer in accordance with
3 Section 8(f) of the NLRA, 29 U.S.C. § 158(f).

4 XIII.

5 Because Article 2 § 37 of Arizona's constitution provides that a secret ballot
6 election is "guaranteed" wherever federal law "permits or requires elections" (emphasis
7 supplied), Article 2 § 37 requires elections where federal law does not and thereby
8 deprives private sector employees of their right to pursue the other options permitted by
9 federal law to designate, select, or authorize representatives of their own choosing and to
10 secure their employers' voluntary recognition of such representatives.

11 XIV.

12 Article 2 § 37 of Arizona's constitution creates an actual conflict with private
13 sector employees' NLRA Section 7 right to representatives of their own choosing. The
14 Amendment is therefore preempted by operation of the Supremacy Clause of the United
15 States Constitution.

16 XV.

17 In addition, even if it were fairly possible to construe Arizona State
18 Constitution Article 2 § 37 as only supporting the NLRA's guarantee of a secret ballot
19 election if the voluntary recognition option is not chosen, Article 2 § 37 is preempted
20 insofar as it creates a parallel state enforcement mechanism for protecting employee
21 representation rights that Congress assigned to the National Labor Relations Board. See
22 29 U.S.C. §§ 157, 159; U.S. Const. Art. VI, cl. 2.

1 WHEREFORE, Plaintiff respectfully requests this Court:

2 1. To issue a declaration that Arizona State Constitution Article 2 § 37, to the
3 extent that it applies to private employees, employers, and labor organizations subject to
4 the National Labor Relations Act (29 U.S.C. § 151 et seq.), is preempted by operation of
5 the National Labor Relations Act and the Supremacy Clause of the United States
6 Constitution (Article VI, Clause 2); and

7 2. To grant such other and further relief as the Court may deem proper.
8

9
10 Dated: May 6, 2011

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

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

20
21 Laura Bandini
22 Senior Attorney
23 Tel: (202) 273-3784
Laura.Bandini@nlrb.gov

24 Mark G. Eskenazi
25 Attorney
26 Tel: (202) 273-1947
Mark.Eskenazi@nlrb.gov

C

Arizona Revised Statutes Annotated Currentness

Constitution of the State of Arizona (Refs & Annos)

▣ Article II. Declaration of Rights

→ § 37. Right to secret ballot; employee representation

Section 37. 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.

CREDIT(S)

Added by Laws 2010, 9th S.S., S.C.R. 1001, § 1, Prop. 113, approved election Nov. 2, 2010, eff. December 14, 2010.

HISTORICAL AND STATUTORY NOTES

Proposition 113, based on Laws 2010, 9th S.S., S.C.R. No. 1001, proposing amendment to the Constitution of Arizona, by addition of Article II, § 37, relating to the right to vote a secret ballot regarding employee representation, was approved by the electors at the November 2, 2010 general election as proclaimed by the Governor on December 14, 2010.

Reviser's Notes:

2010 Note. Pursuant to authority of title 41, chapter 8, article 1, Arizona Revised Statutes, this section, added by 2010 Proposition 113, sec. 1, was renumbered as § 37.

A. R. S. Const Art. 2 § 37, AZ CONST Art. 2 § 37

Current through the First Special Session, and legislation effective April 19, 2011 of the First Regular Session of the Fiftieth Legislature (2011)

(C) 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

END OF DOCUMENT