IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, et al. Plaintiffs, v. NATIONAL LABOR RELATIONS BOARD, et al., Defendants	Case No. 2:11-cv-02516-DCN **Defendants' Memorandum in Opposition to Cross-Motion for Summary Judgment**

The Chamber of Commerce of the U.S. and the South Carolina Chamber of Commerce (collectively, "the Chamber"), and its Amici (36 Members of the U.S. House of Representatives) challenge a rule issued by the National Labor Relations Board that requires all employers covered by the National Labor Relations Act to post a government notice informing employees of their NLRA rights.[1] *See* 76 Fed. Reg. 54,006 (2011) (the "Rule"). Informational notices are widely considered a minimal necessity to ensure that employees are aware of their workplace rights. The Board found that an informational notice is similarly necessary under the NLRA and that it has the authority to promulgate this Rule. The Chamber sued to challenge the Board's authority, and the parties moved for summary judgment. However, the objections that the

[1] References to Amici in this brief are *only* to the brief filed by the 36 Members of the House of Representatives on November 16, 2011. This Opposition does not specifically respond to the eleventh-hour amicus brief that the Motor and Equipment Manufacturers Association (MEMA) moved for leave to file late yesterday. MEMA submitted a virtually identical brief to the District Court of D.C. two weeks ago, just before briefing closed in that case. In any event, a specific response to MEMA's amicus brief is unnecessary because MEMA's submission simply provides "additional analysis and perspective on issues already addressed by the parties." Minute Order, *Nat'l Ass'n of Mfrs. v. NLRB*, No. 11-01629-ABJ (D.D.C. Nov. 21, 2011) (attached as exhibit).

Chamber and its Amici have raised to the Board's motion for summary judgment are insufficient as a matter of law.

ARGUMENT

I. The Claim That the Board Lacks Authority to Promulgate the Rule is Without Merit.

In promulgating this Rule, the Board relied first on its express rulemaking authority under Section 6 of the NLRA and second, on its authority under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"), to construe Section 8(a)(1) of the NLRA to adapt its broadly written provisions to current industrial circumstances. The Chamber and Amici challenge both bases for the Rule. The Chamber wrongly contends that the Board's rulemaking authority does not justify the Rule because the Board failed to demonstrate how the Rule reasonably relates to other more specific provisions of the NLRA and because no NLRA provision authorizes the Board to place an affirmative duty on an employer before the filing of an election petition or unfair labor practice charge. The Chamber and Amici also mistakenly challenge the Board's rulemaking authority under *Chevron* on the grounds that Congress intended to withhold from the Board the authority that it granted other agencies to require the posting of statutory rights, and that the Board incorrectly interpreted the language of Section 8(a)(1) of the NLRA. As shown below, these challenges do not pass muster.

A. The Chamber Incorrectly Claims that the Notice-Posting Rule Does Not Carry Out Provisions of the NLRA.

It is undisputed that "the exercise of rulemaking authority under Section 6 . . . must be shown to relate reasonably to some other provision as part of the overall statutory scheme contemplated by Congress." (Plaintiffs' Motion for Summary Judgment ("Pls.") 8 (quoting 76 Fed. Reg. at 54,039) (Member Hayes, dissenting)). *See Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973).

Contrary to the Chamber's assertions, the Board reasonably concluded that its notice-posting rule does operate to carry out the provisions of NLRA Sections 1, 7, 8, 9, and 10. 76 Fed. Reg. at 54,010-011. As the Board explained, the NLRA's stated purpose is to encourage collective bargaining by employees; the full and free exercise of Section 7 rights, including the right to engage in collective bargaining, depends on employees' knowing those rights and, also, that the Board protects them under Sections 8, 9, and 10. *Id.* Because such protections are dependent on a private party initiating proceedings by filing an election petition under Section 9 or an unfair labor practice charge within in the six-month statute of limitations as set forth in Section 10, employee knowledge of NLRA rights and how to timely seek their enforcement is crucial to effectuate Congress's national labor policy. (Board's Motion for Summary Judgment ("NLRB MSJ") 6).

The Rule addresses this need by requiring employers to post in the workplace an official Board notice reciting employees' Section 7 rights and examples of employer and union misconduct prohibited by Section 8. The notice also tells employees how to contact the Board for additional information or to report a violation of the Act. This regulatory mandate reflects the Board's sensible determination that the Rule will further the NLRA's objectives of "encouraging the practice and procedure of collective bargaining" and "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." 29 U.S.C. § 151.

Because the Board has demonstrated how its Rule reasonably relates to the NLRA's purposes and its specific statutory provisions, this case is entirely unlike *Global Van Lines, Inc., v. ICC*, 714 F.2d 1290, 1293-95 (5th Cir. 1983), relied on by the Chamber (Pls. 8). There, the agency cited to no particular statutory provisions being carried out by the regulation at issue.

Here, because the Board's regulation is "reasonably related to the purposes of the enabling legislation," and does not unduly burden the subjects of the regulation (as discussed below, pp. 13, 30-32, 34), this Court should uphold the Rule as a valid exercise of the NLRB's broad rulemaking authority under Section 6. *Mourning*, 411 U.S. at 369.

B. The Chamber's Argument That the Board Does Not Possess Statutory Authority Under Section 6 to Impose Affirmative Obligations On Employers Lacks Merit.

Even though the Rule carries out the provisions of the NLRA, the Chamber nevertheless claims that, as a matter of law, the Board lacks authority to require employers to notify employees of their statutory rights because, in doing so, "the Board seeks to dictate employer conduct that would occur **prior** to the filing of a petition or charge, i.e., prior to the Board's authority going into effect." (Pls. 9 n.5). As discussed in the Board's MSJ at 9, the requirement of a petition to commence Board proceedings under Sections 9 or an unfair labor practice charge to initiate proceedings under Sections 8 and 10 is not a limitation on the Board's authority under Section 6 to specify affirmative requirements that further the NLRA's objectives and that are not contrary to any statutory provisions. *See Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606 (1991) ("*AHA*"). *AHA* teaches that the Board's Section 6 authority is limited by other provisions of the Act *only* if those provisions specifically say so. *Id.* at 613.[2]

In suggesting that the Board's powers are somehow uniquely constricted to prevent the Board from establishing affirmative duties under Section 6, the Chamber and Amici fail to acknowledge that legislative rulemaking authority, like that granted to the Board, is routinely construed to authorize the agency to impose "standards of conduct" on those subject to the

[2] The Chamber and Amici attempt to limit *AHA* to its facts but provide no convincing reason to disregard the Court's explicit instruction regarding attempts to narrow the Board's Section 6 authority. (*See* Pls. 9 n.5; Amici 17-18 n. 43).

statute. *See, e.g., Pac. Gas & Elec. Co. v. Federal Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974) ("A properly adopted substantive rule establishes a standard of conduct which has the force of law."). Such a "standard of conduct" may be expressed either as a negative command or as an affirmative command.[3] Thus, Section 6 must be read as a broad grant of legislative rulemaking authority to impose both affirmative and negative obligations.[4]

C. Amici Incorrectly Contend that the Board's Rule Exceeds its Jurisdiction.

For similar reasons, there is no merit to Amici's repeated claim that the Board exceeded its "jurisdiction" (at 1, 17-19, 21 n.47, 22, 23 n. 51, 24, 25) by issuing a notice-posting rule that applies to all employers, regardless of whether they are parties to an election petition or an unfair labor practice charge. Amici are correct in stating that the Board's "jurisdiction" to decide unfair labor practice cases is dependent on the filing of a charge by a private party. Jurisdiction in that sense "is the power to hear and determine the controversy presented in a given set of circumstances." *In re NLRB*, 304 U.S. 486, 494 (1938).

But it is also true that Congress intended the jurisdictional breadth of the NLRA to encompass the full extent of Congress' power to regulate commerce. *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963). The legal principles that have been established under the

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[3] *See Belltone Elecs. Corp. v. FTC*, 402 F. Supp. 590, 598 (N.D. Ill. 1975) (discussing FTC's imposition of affirmative duties on all manufacturers and sellers of products through use of its Trade Regulation Rule); Oren Bar-Gill & Rebecca Stone, *Mobile Misperceptions*, 23 Harv. J. L. & Tech. 49, 110 (2009) (explaining that the FCC regulates cellular providers through both affirmative and negative disclosure provisions).

[4] *See also Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713-14 (2011); *Thorpe v. Hous. Auth.*, 393 U.S. 268, 277 n.28 (1969); *Lincoln Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 856 F.2d 1558 (D.C. Cir. 1988) (declining to read the agency's general grant of rulemaking authority as being limited by other provisions in the statute); *Nat'l Ass'n of Pharm. Mfrs. v. FDA*, 637 F.2d 877 (2d Cir. 1981) (Friendly, J.) (noting that the "generous construction of agency rulemaking authority has become firmly entrenched").

NLRA, whether through adjudication or rulemaking, apply to all employers within the Board's statutory jurisdiction.[5] For example, in *NLRB v. Washington Aluminum Co*., 370 U.S. 9, 16-17 (1962), the Supreme Court held that a nonunion employer's plant rule forbidding employees to leave work without permission did not provide a lawful cause for discharge when applied to the unorganized employees' concerted activity in spontaneously walking out to protest lack of heat in the workplace. The holding in that case defines a standard of conduct for employers generally.[6] Employer breaches of these obligations may go unremedied if no unfair labor practice charges are filed by a private party, but that question is distinct from whether case law and regulations place obligations on employers. *See NLRB v. Pease Oil Co.*, 279 F.2d 135, 137 (2d Cir. 1960) ("An Act of Congress imposes a duty of obedience unrelated to the threat of punishment for disobedience."). Thus, whenever a new NLRA rule—whether established by adjudication or rulemaking—is created, it imposes similar legal obligations on all employers subject to the Act. Regardless of their origin, such rules are enforced in the same way—through unfair labor practice proceedings initiated by a private party.

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[5] *See, e.g.*, Bruce Michael Cross & Andrew Moriarty, *Update: Federal Labor Law Protects Nonunion Employees* Perkins Coie News/Blogs (March 3, 2011) available at http://www.perkinscoie.com/federal-labor-law-protects-nonunion-employees-03-04-2011 ("[M]any nonunion employers . . . mistakenly think that the federal law protecting union activities, the National Labor Relations Act ("NLRA"), does not apply to them. The reality is that the NLRA protects nonunion employees in exactly the same way it protects employees engaged in union activities. And the law applies to virtually all private sector employers"); Jon E. Pettibone, *Advising Private-Sector Clients, Don't Forget the NLRA*, 39 Arizona Attorney 18 at 18 (May, 2003) ("Nearly all private-sector employers, regardless of whether their employees are unionized, are subject to the NLRA").

[6] *See* Nancy J. King, *Labor Law for Managers of Non-Union In Traditional And Cyber Workplaces*, 40 Am. Bus. L.J. 827, 855, 856 (2003) (cautioning non-union employers that their workplace policies are subject to the NLRA and that "[e]mployers who have workplace rules that prohibit employees from discussing the terms and conditions of employment with other employees or that require management's approval before employees may engage in protected concerted activity will violate Section 7").

In sum, the Board's understanding of its Section 6 authority is consistent with Supreme Court decisions interpreting Section 6 and with Supreme Court and circuit court decisions construing similar language in other statutes.[7]

D. The Chamber's *Chevron*-based Attack on the Board's Rule Fails.

1. Under *Chevron* Step 1, the NLRA Does Not Speak Directly to the Precise Question of General Informational Notice-Posting.

A regulation passes *Chevron* Step 1 whenever "the statute is silent or ambiguous with respect to the specific issue." 467 U.S. at 843. Here, the Act is silent because it does not speak to this sort of notice posting and has no provision for making the "knowledge of the rights afforded by the statute and the means for their timely enforcement" available to employees covered by the Act. 76 Fed. Reg. at 54,011. The Chamber nevertheless maintains that "Congress's silence evidences Congress's intent" with regard to notice posting (Pls. 14). In so arguing, the Chamber and Amici rely on legislative history, a comparison to other statutes, and the text of NLRA Section 8(a)(1). However, these arguments lack support.

a. Contrary to Amici's Assertion, the Legislative History Does Not Manifest any Clear Congressional Intent to Preclude Notice Posting.

Amici rely heavily on legislative history that, because it is irrelevant, neither the Chamber nor the Board have raised to this point. Amici are attempting to demonstrate that, because Congress considered a provision and did not adopt it, this inaction must be read into the

[7] The Board does not dispute Amici's claim (Amici 20-21) that aspects of the Wagner Act legislation were shaped by an effort to stay within the confines laid out by the Supreme Court in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), including the structure of the Board's enforcement machinery, specific definitions of unfair labor practices, and portions of the Act's Section 1 concerning the protection of interstate commerce. Irving Bernstein, The New Deal Collective Bargaining Policy 121-22 (Da Capo Press ed. 1975) ("Bernstein"). But none of these topics have any bearing on the Agency's Section 6 rulemaking authority.

Act. Amici specifically rely upon Section 304(b) of the earliest introduced version of what would later become the Wagner Act:

> Any term of a contract or agreement of any kind which conflicts with the provisions of this Act is hereby abrogated, and every employer who is a party to such contract or agreement shall immediately so notify his employees by appropriate action.

S. 2926, 73d Cong. § 304(b) (1934), *reprinted in* 1 NLRB, Legislative History of the National Labor Relations Act, 1935, at 14 (1959) (hereinafter "Leg. Hist."); H.R. 8423, 73d Cong. § 304(b) (1934), *reprinted in* 1 Leg. Hist. at 1140. That version further provided under Section 5(5) that it would be an unfair labor practice "to fail to notify employees in accordance with the provisions of section 304(b)." S. 2926 §5(5), *reprinted in* 1 Leg. Hist. at 3; H.R. 8423, *reprinted in* 1 Leg. Hist. at 1130.

Amici claim that Congress's withdrawal of both Section 304(b) and Section 5(5) manifests Congress's intent to withhold from the Board any authority to require employers to post general notices of NLRA rights (Amici 13-17). The extensive legislative materials amassed by the Amici do not support this contention.

For example, the United Mine Workers President (Amici 9) objected to the scope of the abrogation provision, not the employee notice provision. *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Educ. & Labor*, 73d Cong. 157 (1934), *reprinted in* 1 Leg. Hist. 187 (statement of John L. Lewis seeking to exclude certain dispute resolution procedures from Section 304(b)). Similarly, the testimony of L.L. Balleisen (Amici 9) objected to Section 304(b)'s retroactively invalidating existing contracts between employers and employees and did not complain of Section 5(5)'s making failure to post a 304(b) notice an unfair labor practice. *S. 2926 Hearing* 652-53, 656, *reprinted in* 1 Leg. Hist. 690-91, 694. Amici italicize the portions of the testimony of James A. Emery, General Counsel of the

National Association of Manufacturers, that mention the notice-posting obligation (Amici 10-11.) But as Amici's own account demonstrates, these notice-posting references were ancillary to Mr. Emery's repeated objection that, if an employer had "initiated or participated" in setting up a plan for dealing with its employees, Section 304(b) abrogated such arrangements "no matter how old they may be, or agreeable to the parties . . . . [T]hey are not only abrogated by this bill, but the employer must immediately so notify his employees, and they are destroyed." *S. 2926 Hearing* 360, *reprinted in* 1 Leg. Hist. 394.[8] Significantly, to the extent that the withdrawal of Section 304(b) and Section 5(5) had constitutional overtones for Mr. Emery and Senator Wagner, those concerns were triggered by Mr. Emery's complaint that "any old plans, any systems of employment relationship, which are in existence in which the employer participated or which he influenced are all outlawed by that provision right now." *Id.*, *reprinted in* 1 Leg. Hist. 394. It was at that point that Senator Wagner acknowledged "there is raised there a more serious question of constitutional law," and that the Committee had unanimously agreed to eliminate Section 304(b). *Id.* at 360-61, *reprinted in* 1 Leg. Hist. 394-395. In sum, the focus of concern in the 1934 debates was on the abrogation provision, not the notice-posting provision, and there is no evidence that Congress specifically intended to withhold from the Board the authority to require employers to post notices of employee rights.

Further, under accepted legal principles, weight should be given to Congress's rejection of a bill or amendment *only* if it is clear that Congress considered and rejected the very position argued before the court. *See Blau v. Lehman*, 368 U.S. 403, 411-12 (1962). Otherwise, "[t]o

[8] In fact, one of the major points of opposition to the 1934 bill was the proposed outlawing of company unions, because of the number of companies that would have been affected. For example, in the manufacturing and mining industries at that time, over 60 percent of firms had established such unions. Bernstein, *supra*, at 50, 70.

explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities." *Helvering v. Hallock*, 309 U.S. 106, 119-120 (1940); *see also, e.g.*, *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998) (committees' failures to report proposals to Congress "provide no support for the hypothesis that both Houses of Congress silently endorsed" a particular position); *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 187 (1994) (warning that failed legislative proposals are "a particularly dangerous ground" for statutory interpretation, as "several equally tenable inferences may be drawn from [congressional] inaction").

Amici have failed to uncover any legislative history documenting Congress' consideration of whether employers subject to the NLRA should post a government-provided notice setting forth the core provisions of the NLRA and informing employees of their rights and how to exercise them. The type of notice implicated in Section 304(b) differs from the notice in the Rule here, and the rejection of one in no way implies rejection of the other. The notice required by Section 304(b) was an individualized notice prepared by the employer, not a uniform government-supplied notice. The notice required by Section 304(b) was exclusively devoted to detailing the provisions of private agreements that were no longer in effect at particular facilities, not an official government statement of the key provisions of a public law applicable to employees nationwide. Moreover, Amici's attempt to equate the notice envisioned in Section 304(b) with this Rule's notice requirement is refuted by their own account of the Railway Labor Act, which treats the two kinds of notice in separate and distinct provisions, and by Amici's categorization of different types of notice statutes, which again demonstrate that Congress

recognized the difference between the then-Section 304(b) notice and a general notice of statutory rights. (Amici 5 n.12, 25-26.)[9]

Thus, Amici attempt to square the circle by arguing that Congress's rejection of the more narrow Section 304(b) notice signifies that it was also rejecting the idea of a broader notice. (Amici 14.). Accordingly, this argument must be rejected because the one type of notice does not include the other.[10]

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[9] Nor is there any merit to Amici's assertion (at 12) that the notice provisions in the Railway Labor Act ("RLA") determine Congressional intent regarding the NLRA's notice posting authority because the two statutes were on parallel tracks in 1934. There is no direct evidence to support this claim and the inferences that the Amici would have the Court draw are not well supported. For example, the abrogation and employee notice provisions at issue in the RLA amendments had nothing to do with the proposed NLRA provision setting aside arrangements for dealing with employees that the employer had initiated or participated in establishing. Rather, the RLA's abrogation and employee notice provisions were addressed to the quite different issue of whether employees could be required to be members of a union as a condition of employment. Section 2, Fifth, 45 U.S.C. § 152. As the Board noted in the Rule, this is an area where the Board's right to require that employees be notified of their rights has been upheld. 76 Fed. Reg. at 54,006 n.5, 54,032 (citing *Cal. Saw & Knife Works*, 320 NLRB 224, 233 (1995), *enf'd sub nom. Int'l Ass'n of Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998)).

[10] Amici also exaggerate the significance of the fact that the NLRA has been amended a number of times since 1935, without adding a notice obligation. (Amici 16.) But a number of cases discount whether mere reenactment suffices to show congressional intent. *See, e.g.*, *Zuber v. Allen*, 396 U.S. 168, 185-86 n.21 (1969) ("The verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible. . . . Congressional inaction frequently betokens unawareness, preoccupation, or paralysis."); *Girouard v. United States*, 328 U.S. 61, 69 (1946) ("It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.") (quoting *Hallock*, 309 U.S. at 119). This Court should especially refuse to give any weight to inaction on this issue during the NLRA's amendments, because legislative consideration at those times was addressed to matters wholly apart from notice-posting of NLRA rights. *See Aaron v. SEC*, 446 U.S. 680, 695 n.11 (1980).

Multiple bills have been introduced in Congress seeking to amend the NLRA to limit and/or preclude notice-posting generally and specifically to repeal this Rule. These bills are sponsored or co-sponsored by a majority of the Members of Congress who have signed on as amici curiae in the Amici brief filed in this case. *See, e.g.*, Protecting American Jobs Act of 2011, H.R. 2978, 112th Cong., § 2(b) (2011) (clarifying and limiting Section 6 rulemaking authority to Board "internal functions" and "prohibit[ing the Board] from promulgating rules that affect the substantive rights of any person, employer, employee, or labor organization."); Employee

b. The Chamber Is Mistaken in Arguing that the Provisions of Other Statutes Convert the Silence of the NLRA Into Language Prohibiting a Notice-Posting Requirement.

In a further attempt to make legislative silence speak, the Chamber argues that since other federal employment statutes expressly *require* notice posting, the silence of the NLRA must be understood as an affirmative refusal to delegate to the Board interpretive authority on this issue. (Pls. 6-10.) However, the Chamber's argument ignores *Chevron's* teaching that speculation about why Congress included a provision in one statute but not another is not a *Chevron* Step I basis for foreclosing an agency's exercise of its *Chevron* Step II discretion to provide reasoned answers to interpretative questions raised by Congressional silence (Board's MSJ 11-12). *Chevron*, 467 U.S. at 865; *see also Cheney R.R. Co. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990). Instead, the Chamber relies upon *Estate of Romani*, 523 U.S. at 530-34, which addressed a different question--whether an older and general statute was modified by a more recent and specific one. These two statutes addressed the very same question: the priority treatment of federal tax claims. *Id.* Thus, in that context it was reasonable to conclude that those statutes must be read together and harmonized. Here, by contrast, the specific notice in the RLA does nothing to change the silence of the NLRA and thus there is no need to harmonize any conflict.

The Chamber's further argument that the Board's notice-posting rule is an "elephant" that the Board found in a "mousehole" misses the mark (Pls. 10). The cases in this line are plainly inapposite, as they concern extraordinarily aggressive expansions of legislative authority—many

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Workplace Freedom Act of 2011, H.R. 2833, 112th Cong., § 2(a), (b) (2011)(repealing the Rule and prohibiting the Board from "promulgat[ing] or enforc[ing] any rule that requires employers to post notices relating" to the Act). These bills demonstrate what the law would look like if it did speak "directly to the precise question at issue" as required by *Chevron*, and provide an enlightening contrast to the current text of the Act.

involve agency efforts to expand regulation to cover *whole new industries*.[11] The Board's Rule applies only to the same employers long covered by the Act. As noted in the Rule, this notice-posting provision is not the type of "major policy decision," that Congress would not have wanted to the Agency to decide. 76 Fed. Reg. at 54,009 (quoting *Am. Ship Bldg Co. v. NLRB*, 380 U.S. 300, 318 (1965)). Compliance requires no more than downloading the notice, taping together two 8.5" x 11" pieces of paper, and posting it where other labor and employment notices are already posted. Thus, if the regulation of greenhouse gas emissions in *Massachusetts v. EPA* was not an "elephant," then certainly a rule for which compliance is so simple, and only gives notice of federal rights and obligations, must truly be a mouse.

In sum, the Act is silent and there is no reason that such silence should be accorded unusual significance; therefore, the regulation passes *Chevron* Step 1.

2. The Board Has Not Created a "New" Unfair Labor Practice but, Consistent With Past Practice, Has Permissibly Interpreted the Failure to Post as a Violation of Section 8(a)(1) of the Act.

The Chamber argues that "the Board does not point to a single Section 7 right with which the employer would interfere by failing to post a notice, let alone how a failure to post would interfere with, restrain or coerce those rights," within the meaning of Section 8(a)(1) (Pls. 11). It further argues that employers can not be obliged to "*affirmatively* educate employees about certain Section 7 rights." (Pls. 9; *see also* Amici 23-24). Contrary to the Chamber, the Board has two valid bases under *Chevron* for finding that a failure to post an official government-supplied notice of core NLRA rights interferes with employee rights in violation of Section 8(a)(1).

[11] *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *ABA v. FTC*, 430 F.3d 457, 465 (D.C. Cir. 2005); *cf. Massachusetts v. EPA*, 549 U.S. 497, 530-31 (2007) (EPA found to have authority to regulate greenhouse gases).

First, Section 8(a)(1) has long been interpreted to mean that employee rights are interfered with where an employer has failed to perform an affirmative duty required by the NLRA. For example, a violation of the duty to supply relevant bargaining information on demand, required by Section 8(a)(5) of the NLRA, also interferes with Section 7 rights in violation of Section 8(a)(1). *See Standard Oil Co. of Ca., W. Operations, Inc. v. NLRB*, 399 F.2d 639, 642 (9th Cir. 1968) ("It is elementary that an employer's violation of § 8(a)(5) of the Act by wrongfully refusing to bargain collectively with the statutory representative of its employees does 'interfere with, restrain and coerce' its employees in their rights of self organization and collective bargaining, in violation of § 8(a)(1) of the Act."); *Truitt Mfg. Co.*, 110 NLRB 856, 857, 870 (1954), *enf. denied*, 224 F.2d 869 (4th Cir. 1955), *rev'd*, 351 U.S. 149 (1956) (*Truitt*). Consistent with that longstanding interpretation of Section 8(a)(1), a similar result is warranted where, as here, a rule validly promulgated under Section 6 places an affirmative duty on an employer and the employer fails to perform it. Here, because the requirement to post the notice of employee rights is expressly designed to "ensure effective exercise of Section 7 rights," 76 Fed. Reg. at 54,032, violation of the Board's legislative rule does "interfere with, restrain, or coerce" employees in the exercise of Section 7 rights. 29 U.S.C. § 158(a)(1).

In the alternative, *Chevron* also supports construing Section 8(a)(1) by itself to support a finding that employers have an affirmative duty to post a government notice of employee rights. That result follows from the Supreme Court's recognition that the NLRA "left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms." *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945); *accord NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260-67 (1975) (recognizing the Board's authority to adapt the Act "to changing patterns of industrial life").

Whereas in *Truitt*, the Board relied upon the employer's failure to perform its duty to bargain under Section 8(a)(5) to support a finding of interference within the meaning of Section 8(a)(1), here, the Board reasonably relied on *Republic Aviation* to conclude that Section 8(a)(1) is sufficient to impose an affirmative duty on employers to post an official government notice informing employees of their Section 7 rights.

In sum, on two alternative grounds, the Board has a reasonable basis under *Chevron* for finding that employers have an affirmative duty to post an official government-supplied notice of core employee rights under the NLRA and that a failure to perform that affirmative duty is an interference with employee rights that violates Section 8(a)(1). Because the Board created that duty as an exercise of its authority to interpret Section 8(a)(1), the Chamber's argument that the Board impermissibly created a "new" unfair labor practice fails under *Chevron* and *Republic Aviation.*[12]

II. The Chamber's Claim that the Rule Impairs Employers' Rights Under the First Amendment and Section 8(c) of the Act Fails as a Matter of Law.

A. No Precedent Supports the Idea that the Notice is Anything Other than Government Speech or That It Otherwise Violates the Constitution.

The government-supplied official notice of statutory rights that employers must post pursuant to the Board's Rule is a prime example of government speech, which is "not subject to scrutiny under the Free Speech Clause" of the First Amendment. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1129 (2009). As the Board has explained, the funding, control, and

[12] The Chamber attempts to distinguish the FMLA's similar use of "interfere" by claiming that the FMLA notice enforced thereby is "an explicit statutory requirement" (Pls. 11.) The Chamber does not explain why this distinction would make any difference, and, in any event, the Chamber is wrong: under the FMLA, *both* statutory and wholly regulatory notices are enforced through the "interfere" language. 29 C.F.R. § 825.300 (discussed and interpreted at 73 Fed. Reg. 67,933, 67,990-99 (2008)).

attribution of the poster all point to the conclusion that government speech is present.[13] Moreover, even if the poster is not government speech, it easily satisfies the relaxed test under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985), which applies to mandatory disclosures in commercial contexts (NLRB MSJ 18-19 & n.13).

The Chamber disputes these contentions by relying on inapposite cases, ignoring contrary decisions, and "exaggerating the reach of . . . First Amendment precedents." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 70 (2006) ("*FAIR*").

For example, in the Chamber's view, the poster does not qualify as government speech because "the Notice must be posted on private property, not government property" (Pls. 24). But there is no basis for the Chamber's argument that government speech must be confined to government property. The Supreme Court has permitted the government to "enlist[] private entities to convey its own message." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). Indeed, the government routinely requires private parties to transmit its message so that members of the public might receive pertinent information. Examples of this long-standing requirement can be found not only in other workplace notice requirements but also in fire marshal signs announcing occupancy limits as well as the Surgeon General's warnings regarding tobacco use and alcohol consumption. *See, e.g.*, 27 C.F.R. § 16.21 (2011).

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[13] NLRB MSJ 17-18; *see also Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't. of Motor Vehicles*, 288 F.3d 610, 618-19 (4th Cir. 2002) (applying a four-factor test that analyzes the "purpose" of the speech, the degree of "editorial control" exercised by the government, the identity of the "literal speaker," and who bears "ultimate responsibility" for the content of the speech).

The Chamber correctly acknowledges that the Board controls the content of the message. (Pls. 4 (stating that the "Notice must contain specific language" that the Board has prescribed); *id.* 21 (noting that "the message has been shaped by the NLRB").

Nonetheless, in support of its proposition, the Chamber relies on *Wooley v. Maynard*, 430 U.S. 705 (1977). In that case, New Hampshire's requirement that certain license plates carry the state motto "Live Free or Die" compelled the challengers to "publicly advertise," *id.* at 717 n.15, by means of "an automobile, which is readily associated with its operator," *id.* at 717 n.15, an "ideological point of view," *id.* at 715, which was "repugnant to their moral, religious, and political beliefs," *id.* at 707. The Court struck down this requirement on First Amendment grounds by relying on precedents establishing "the broader concept of 'individual freedom of mind.'" *Id.* at 714 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

The Chamber strips *Wooley* of any context and then reframes the case as broadly holding that the government cannot require government speech to be posted on "private property" (Pls. 24).[14] But this interpretation of *Wooley*'s holding is grounded in the Chamber's mistaken claim that the majority "rejected the dissent's argument that the license plate's government logo transformed the message into government speech" and did so "because such speech was on private property (a car)." (*Id.* (citing *Wooley*, 430 U.S. at 719-22 (Rehnquist and Blackmun, JJ., dissenting).) In fact, the dissent *never* mentioned the "license plate's government logo" or seal, much less its impact on any government speech analysis. Further, to the extent that the dissent advocates a government speech approach, the Chamber's gloss on the majority's refusal to adopt the dissent's reasoning does not withstand scrutiny. The majority did not announce a categorical prohibition of government speech on private property. Rather, it refused to allow the government to compel citizens to disseminate an "*ideological message*," 430 U.S. at 715

[14] The Board does not dispute the Chamber's point that the government cannot compel persons to make "subjective, political speech on private property" (Pls. 23). However, this case does not involve compelled private speech, but rather government speech that is funded, controlled, and attributed to the Board. And even if private speech interests were implicated, this Rule does not involve "subjective, political speech" as explained *infra*.

(emphasis added), on "an automobile, which is *readily associated with its operator*," *id.* at 717 n.15 (emphasis added). In contrast, the Board's poster is factual—not ideological—and there is no danger that the message will be misattributed to the employer. Thus, even under the Chamber's revisionist interpretation of the case, *Wooley* provides no support for disputing the Board's position that its notice is government speech that employers can be required to post.

Similarly, there is no support for the Chamber's further contention that the poster contains "subjective, controversial political speech," in violation of the *Zauderer* standard for mandatory commercial disclosures (Pls. 21).[15] As explained earlier, the Notice's description of rights merely follows the order established by Congress in Section 7 of the Act. *See* 29 U.S.C. § 157. The Board's poster cannot be accused of promoting an ideological agenda when it merely follows the pattern set forth by the NLRA itself.[16] In addition, the Chamber calls attention (Pls. 21) to the Board's decision not to elaborate certain rights in the notice, *see* discussion *infra*, Section III. But this does not advance the Chamber's case because the Supreme Court expressly stated in *Zauderer* that it is "unpersuaded by . . . argument[s] that a lawful disclosure

[15] The *Zauderer* standard applies only if the Board's poster is *not* government speech. (*See* NLRB MSJ 18-19). In addition, the Chamber's reliance on *R.J. Reynolds Tobacco Co. v. FDA*, No. 11-1482(RJL), 2011 WL 5307391 (D.D.C. Nov. 7, 2011), *appeal docketed*, No. 11-5332 (D.C. Cir. Nov. 30, 2011), is misplaced. (*See* Chamber Ex. D.) There, the district court struck down FDA's requirement that cigarette manufacturers include on boxes and advertisements "graphic images" such as "diseased lungs and a cadaver bearing chest staples on an autopsy table." *Id.* at *1. The court found that the images were "unquestionably designed to evoke emotion" and were not "purely factual." *Id.* at *5. There is a world of difference between the content of the Board's poster and the FDA's "graphic images."

[16] *Cf. Marquez v. Screen Actors Guild*, 525 U.S. 33, 44-48 (1998) (holding that a union does not violate its duty of fair representation merely by negotiating a union-security clause that tracks the language of the NLRA).

requirement is subject to attack if it is under-inclusive." 471 U.S. at 651 n.14 (quotation omitted).[17]

Finally, the Chamber errantly asserts that the Rule is subject to strict scrutiny (Pls. 22). But this argument fails for the reasons explained above and, also, because neither *Lake Butler Apparel Co. v. Secretary of Labor*, 519 F.2d 84 (5th Cir. 1975), nor *UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003), applied strict scrutiny—or anything close to it—to the contested workplace notices upheld in those cases.[18]

B. The Chamber's Section 8(c) Argument Is Also Meritless.

Just as the Board's rule does not offend the First Amendment, neither does it violate Section 8(c) of the Act, which permits employers and unions to express noncoercive "views, argument, or opinion" without fear of violating the NLRA. 29 U.S.C. § 158(c). Although the Chamber's Section 8(c) argument consists of only five sentences, and incorporates its First Amendment argument by reference (Pls. 14), it appears to assert that Section 8(c) protects employers who refuse to post the Board's notice from unfair labor practice liability. This assertion is without merit. As the D.C. Circuit has explained, a notice-posting obligation like the one under review is valid "even assuming that the § 8(c) right includes the right not to speak." *Chao*, 325 F.3d at 365.[19]

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[17] *Accord N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 134 (2d Cir. 2009) (holding that "the First Amendment does not bar the [government] from compelling such 'under-inclusive' factual disclosures").

[18] The Chamber attempts to escape the implications of its strict scrutiny framework by suggesting that the informational notice upheld in *Lake Butler* would survive that standard because, there, the enabling act expressly contained a notice-posting provision. (Pls. 23-24.) This distinction finds no support in case law and must be rejected.

[19] The Chamber mistakenly claims that the Rule "contains no exception for employers . . . who would deliver a different, but entirely lawful message" (Pls. 4). As the Board made clear in the

Moreover, there are no grounds for attacking the Rule's enforcement mechanisms as inconsistent with Section 8(c). Any unfair labor practice liability or finding of animus stemming from an employer's refusal to post the Board's notice[20] is attributable to the employer's *conduct*, not its *speech*.[21]

III. The Chamber is Incorrect that the Board Unlawfully Excluded Certain Provisions From the Notice, Thereby Demonstrating Bias.

Given the Board's objectives of clarity, conciseness, and overall readability, the Board reasonably rejected various employer suggestions that the notice should mention the right to decertify a union, rights under *Communications Workers v. Beck*,[22] and a description of "the important rights that employees give up" by joining a union (Pls. 21). To be informative, it is not necessary for the intentionally brief notice to include every NLRA right imaginable.

With respect to the right to decertify, the notice refers neither to the employees' right to seek certification of a union or their right to seek decertification. For that reason, as the Board explained in the Rule, "[t]o include instructions for exercising one right and not the other would upset the balanced recitation of rights." *Id.* at 54,022-23. Instead, the Board justifiably opted for

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preamble to the Rule, employers must post the Board's notice of statutory rights under the NLRA but they "remain free under this rule—as they have in the past—to express noncoercive views regarding the exercise of these rights as well as others." 76 Fed. Reg. at 54,012.

[20] Contrary to Amici's statement on p. 24 n.54, the lawfulness of this mechanism has not been challenged by the Chamber.

[21] *Cf. FAIR*, 547 U.S. at 65-66 (noting that the Court has "rejected the view that conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea") (quotation omitted).

[22] Before a union may seek to obligate newly hired nonmember employees to pay dues and fees under a union-security clause, it must inform them of their right under *Communications Workers v. Beck*, 487 U.S. 735, 763 (1988), to object to paying for union activities unrelated to the union's duties as the bargaining representative and to obtain a reduction in dues and fees of such activities. *Cal. Saw & Knife Works*, 320 NLRB at 233.

a more general and balanced notice informing employees both that they have the right to "organize a union" and "form, join or assist a union" and also have the right not to engage in union activity, "including joining or remaining a member of a union." 76 Fed. Reg. at 54,048.[23]

As to *Beck* rights, the Board's determination to exclude references to those rights was similarly reasonable. As noted above, those rights apply only to employees who are represented by unions under collective bargaining agreements containing union-security provisions. Unions seeking to obligate employees to pay dues and fees under such provisions are *already* required to inform those employees of their *Beck* rights. *See* n. 22, *supra*. The Board explained in the preamble to the Rule that no commenter presented any evidence suggesting that unions are failing to comply with these notice obligations. 76 Fed. Reg. at 54,023. In addition, *Beck* rights apply to relatively small number of employees. As the Board explained, only about eight percent of private sector employees are unionized, and not all of those are subject to union-security clauses. Moreover, in the 23 "right-to-work" states, which prohibit union-security clauses, no employees are covered by union security clauses.[24] Accordingly, because employees with *Beck* rights already receive notice of such rights and because these rights do not apply to the

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[23] Additionally, contrary to the Chamber's assertion in its "Statement of Undisputed Facts" (at 4), the Board amended the introduction to the notice to explicitly include the right to refrain. 76 Fed. Reg. at 54,020; Pls. Exhibit B at 6 ("The National Labor Relations Act (NLRA) guarantees the rights of employees to . . . refrain from engaging in any of the above activity.").

[24] The only exception in these states is for employees who work in a federal enclave where state laws do not apply. *Id.; see* NLRB MSJ at 21-23 for additional discussion of right-to-work laws.

"overwhelming majority of employees in today's private sector workplace," *id.*, the Board reasonably chose to exclude *Beck* rights from the notice.[25]

Finally, the Chamber's assertion that the Notice should have included "the important rights that employees give up by joining a union such as the right to speak directly with the employer about wages" (Pls. 21), was also fully answered by the Board in the Preamble, when the Board explained that no benefits or consequences of exercising any Section 7 right was listed, in the interests of conciseness noted above. 76 Fed. Reg. at 54,020.[26] The decision not to expand the notice in the ways suggested by the Chamber was a proper exercise of the Board's discretion.

IV. The Chamber's Attack on the Rule's Equitable Tolling Provision Disregards Established Tolling Principles.

The Rule informs the public that, in some cases, the Board "may find it appropriate" to equitably toll the statute of limitations where an employee is excusably unaware that the law has been violated because mandatory notice was not posted. 76 Fed. Reg. at 54,033, 54,049. The Chamber concedes, as it must, that the traditional equitable exceptions—not just the military service exception—apply to the statute of limitations, and that these exceptions include equitable tolling (Pls. 12-13). *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 392-98 (1982). And, the Chamber must concede that in numerous cases, the courts have appropriately tolled the

[25] Although the Chamber impugns the Board's motives for omitting "right to work" and *Beck* rights from the poster (Pls. 19-20, 21 n.9), the true reasons for their omissions were fully explained by the Board in the preamble to the Rule, as noted above.

[26] Moreover, the Chamber overstates its case when it asserts that employees who unionize give up the right to speak directly with their employer about wages. The proviso to Section 9(a) of the Act, 29 U.S.C. § 159(a), explains that employees may adjust grievances with employers without their representative's involvement, so long as such adjustment is not inconsistent with the contract, and the representative has the opportunity to be present at the adjustment.

statute of limitations where a mandatory notice was not posted (Pls. 12-13, discussing *Mercado v. Ritz-Carlton San Juan Hotel*, 410 F.3d 41, 46-47 (1st Cir. 2005)).

The Chamber first tries to distinguish the cases by noting that many of them involved statutory, rather than regulatory, notice-posting obligations. But that does not distinguish the FLSA cases, which are regulatory and yet subject to tolling. *See Henchy v. City of Absecon*, 148 F. Supp. 2d 435, 439 (D.N.J. 2001).[27] Further, the Chamber gives no reason in law or logic why a statutory notice would result in tolling while an identical regulatory notice would not.

The Chamber then contends that the Board's tolling doctrine conflicts with the cases in two ways: first, it claims the Board's doctrine is a "per se" "blanket modification" or "categorical extension" that would toll *whenever* notice is not posted; second, it claims that the rule creates a "presumption," such that the employer must prove the employee's knowledge of his or her legal rights (Pls. 1, 12-13). The Chamber misinterprets both the Rule and the cases.

First, the Board's doctrine is not "per se," "blanket" or "categorical": the Board expressly embraced the equitable balancing doctrine articulated in the cases. 76 Fed Reg. at 54,035 ("[F]ailure to post the required notice will not automatically warrant a tolling remedy."). The Board outlined some of the factors that are considered, including prejudice to the employer. *Id.*

Second, the Board did not create presumptions or decide upon burdens of proof. The Board did not decide which party must prove whether the employee had actual knowledge; the Board simply noted, without elaboration, that, *if* the employer *could* so prove, then there would be no tolling. *See* 76 Fed. Reg. at 54,035 ("If an employer proves that an employee had [knowledge] . . . the Board will not toll the 10(b) period merely because of the employer's failure

[27] Thus, the Chamber's assertion that none of the labor and employment agencies it referenced have applied "penalties" unless such "penalties" existed in the governing statute (Pls. 7 n. 3), is incorrect.

to post the notice."). But even if the Board had created such a "presumption," it would not be inconsistent with the caselaw. To the contrary, as the court stated in *Beshears v. Asbill*, 930 F.2d 1348, 1352 (8th Cir. 1991), "[t]he law on this point is clear. The employee bears the burden of proving the absence of notice to justify equitable considerations. However . . . the employer bears the burden of proving that the employee was generally aware of his or her right not to be discriminated against on account of age if notice was not posted." (citations, quotations, and emendations omitted).

The Chamber also asserts that the Board has never applied equitable tolling except where the *facts* were unknown, not the law. (Pls. 12-13, citing cases, including *John Morrell & Co.*, 304 NLRB 896, 899 (1991)). But this argument amounts to nothing more than the simple point that the Board has not previously followed the notice-posting tolling cases. Of course, there has been no reason for the Board to apply notice-posting tolling because until now, notice posting has not been required.[28]

Finally, the Chamber does not adequately come to grips with *Lodge 64, IAM v. NLRB*, 949 F.2d 441, 444 (D.C. Cir. 1991), where the court stated that the silence of 10(b) regarding the

[28] It should be noted that, in an effort to make this argument, the Chamber confuses a number of distinct bases for equitable relief, misciting *Mercado* for support. (Pls. 13 n.7.) As the Board stated in its Rule, fraudulent concealment, the discovery rule, and notice-posting tolling are all concerned with basic equitable principles of fairness to the charging party. But the elements of each basis for tolling are very different. In fact, *Mercado* makes quite clear that these other kinds of tolling are wholly distinct from notice-posting tolling. The court emphasized that they arise from "two distinct lines of cases apply[ing] two distinct standards to two distinct bases for equitable tolling." *Mercado v. Ritz-Carlton San Juan Hotel*, 410 F.3d 41, 46-47, n.8 (1st Cir. 2005).

That said, the Chamber's confusion is understandable: as Judge Posner has explained at length, the subtleties of the various bases for equitable relief are often overlooked because the terminology is used in confusing and sometimes contradictory ways. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-52 (7th Cir. 1990) (cited with approval by *Holland v. Florida*, 130 S. Ct. 2549, 2561 (2010); *Klehr v. AO Smith Corp.*, 521 U.S. 179, 192 (1997)).

scope of equitable doctrines "clearly means that Congress has not 'directly spoken to the precise question at issue,' so that the Board is free to adopt any reasonable construction of the Act." For these reasons, the Board's interpretation of 10(b) is permissible.[29]

V. The Chamber is Wrong that the Board Was Required to Present New Empirical Studies In Support of Its Factual Finding that A Need for the Rule Existed.

Contrary to the Chamber's contention (16-17), in issuing the Rule, the Board reasonably relied, in part, on three law review articles that discussed employees' ignorance of their NLRA rights.[30] 76 Fed. Reg. at 54,006 & n.3 (citing articles).[31] The Chamber attacks the Board's reliance on those articles because they are "outdated,"[32] but that claim overlooks the dearth of

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[29] Additionally, employers who fail to comply with the Rule will not be "punished" (Pls. 2, 3). The remedies for Section 8(a)(1) violations are not punitive. *See Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-13 (1940). Rather, a Board finding of a Section 8(a)(1) violation would result in a remedial order requiring the employer's posting of the notice that it was legally required to post. 76 Fed. Reg. at 54,031-033. And to the extent there is a tolling of the limitations period that too is not punitive. As explained, the equitable tolling mechanism aims to preventing unfairness to employees who have failed to file a charge because an employer did not post a notice *Id.* at 54,033. *See Elliott v. Group Med. & Surgical Serv.*, 714 F.2d 556, 563-64 (5th Cir. 1983) (an employer's failure to post a required notice "vitiates the normal assumption that an employee is aware of his rights.").

[30] Citations to the administrative record, which was filed in conjunction with the Board's MSJ, are in the following format: "A.R. NLRB-000000."

[31] *See* DeChiara, *The Right to Know: an Argument for Informing Employees of Their Rights under the National Labor Relations Act*, 32 Harv. J. on Legis. 431, 436-38 (1995) ("DeChiara") (A.R. NLRB-000066, 000067-68); Morris, *Renaissance at the NLRB—Opportunity and Prospect for Non-Legislative Procedural Reform at the Labor Board*, 23 Stetson L. Rev. 101, 107, 111-12 (1993) ("Morris, *Renaissance*") (A.R. NLRB-000584, 000586, 000588); Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. Pa. L. Rev. 1673, 1675-76 (1989) ("Morris, *NLRB Protection")* (A.R. NLRB-000513, 000515-516).

[32] The Chamber's dubious suggestion that the now "widespread use of social media" and the Internet (Pls. 17-18) have somehow resolved employees' previously demonstrated lack of knowledge about NLRA rights must be rejected. 76 Fed. Reg. at 54017 & n.89. Its suggestion that employees can merely do an internet search for "start a union" (Pls. 18) completely neglects the fact that the NLRA's shield for protected, concerted activity regarding terms and conditions of employment applies regardless of the presence of any union on the scene. *See also* notes 5

research on the topic. A.R. NLRB-004149, 004150. Notably, the Chamber cites no authority suggesting that those studies are no longer pertinent or reliable.[33]

The Chamber further speculates (Pls. 17) that 1980's studies of high school students' knowledge of labor rights are of "dubious value," though each survey reached a conclusion that supports the need for the Rule—students preparing to enter the workforce had little or no knowledge of collective-bargaining rights, unions, or labor history, largely due to their absence from high school curricula.[34]

In any event, the Board's determination that the Rule was needed focused largely on the comments submitted by the public, *see* 76 Fed. Reg. at 54,015-18, many of which affirm the continuing validity of the surveys' results. The Chamber has not disputed these many comments from individual employees detailing widespread ignorance of the NLRA's protections. 76 Fed. Reg. at 54,015-16. Nor has the Chamber contested the Board's finding that the comparatively small percentage of private sector union-represented employees suggests that the number of

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and 6, *supra*. Similarly, few, if any, of the opposing comments asserting widespread NLRA knowledge specifically claimed that employees are aware of protections in the non-union setting. 76 Fed. Reg. at 54,016; *see, e.g.*, Comment G.1, A.R. NLRB-001188; Comment H.46, A.R. NLRB-003721; Comment H.59, A.R. NLRB-003757; Comment H.60, A.R. NLRB-003763.

[33] The Chamber also mischaracterizes (at 17) the nature of Morris' *NLRB Protection* article as viewing labor relations "through the prism of the Cold War." A.R. NLRB-000513, 000546-547. Rather, that article advocates for employee awareness of workplace rights, noting that other industrial nations are more productive when employees participate in workplace decision-making. The Chamber also fails to mention the Morris *Renaissance* article which, in discussing the improvement of Board remedies, recognized that a notice-posting rule is necessary because "[e]mployees . . . are generally unaware of their rights . . . it appears that most are even unaware of the existence of the Board and have no knowledge of what it is supposed to do. This is especially true of unorganized employees. . . ." A.R. NLRB-000584, 000588. Clearly, these articles reinforce the reasonableness of the Board's determination.

[34] A.R. NLRB-004149, 004151-152; A.R. NLRB-004166, 004174-176; A.R. NLRB-004184, 004188-189, 004197-198.

employees who do have ready access to the NLRA information is limited, or its finding that, due to the high percentage of immigrants in the work force, such workers are unlikely to be aware of NLRA rights. 76 Fed. Reg. at 54,014-15. Accordingly, these findings must stand, and the Chamber's attempt to discredit the Board's supportive authority should be disregarded.

Although the Chamber asserted that the Board's failure to commission an independent study of the level of NLRA knowledge by American employees should render the Board's attempt to implement the rule "fatal," (Pls. 17), no death wound has been struck. As discussed in the Board's MSJ at 24-26, agencies are not required to commission independent studies to confirm their experienced judgment. And as the courts have explained, there is a crucial distinction between cases in which the agency is required to arrive at a scientifically valid result in order to make the necessary policy determination[35] and those cases where any such result may be either impossible to obtain[36] or not essential. An example of this last category is *National Association of Regulatory Utility Commissioners v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984) (per curiam). In that case, there was an absence of data about a particular communications issue but a regulatory solution was still deemed necessary and the court upheld the FCC's action, reasoning:

> If an agency in the course of an informal rulemaking does not attempt either to close itself off from informed opinion or to extend its reach beyond the scope of permissible authority, then it is our duty to accept that judgment if it is rational and not unreasonable. The fact that an agency's decision . . . rests on a set of

[35] *See, e.g., Motor Vehicle Manufacturers Association of the United States., Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 45-46 (1983) ("*State Farm*") (agency failed to properly evaluate the costs and benefits of different auto safety technologies prior to mandating a particular device); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 402 (D.C. Cir. 1973) (court condemned EPA's promulgation of "standards of performance" for emission of air pollutants, in part for use of old test data).

[36] *FCC v. Fox Television Stations*, 129 S. Ct. 1800, 1813 (2009) ("scant empirical evidence" could be marshaled regarding impact of broadcast profanity on children, because of impossibility of creating multiyear study in which some children would be shielded from all indecency, and remainder would be exposed to only broadcast profanity).

> evidentiary facts less desirable or complete than one which would exist in some regulatory utopia does not alter our role. We remain here to insist upon a necessary minimum: When an agency is obliged to make policy judgments . . . where facts alone do not provide the answer, it should so state and go on to identify the considerations it found persuasive.

Id. at 1140 (quotation omitted).

Here too, the Board justifiably relied not only on the existing studies but also on the anecdotal evidence in the record and the reasonable inferences that it drew from the fact that notices of statutory rights are commonly regarded as a minimal necessity to inform employees of their rights and that fewer employees have access to unions, a traditional source of information. As the Board explained: "To the extent that employees' general level of knowledge is uncertain, the Board believes that the potential benefit of a notice posting requirement outweighs the modest cost to employers." *Id.* at 54,015. After all, even "if only 10 percent of workers were unaware of [their NLRA] rights, that would still mean that more than 10 million workers lacked knowledge of one of their most basic workplace rights." *Id.* at 54,018 n.96. Thus, the Board logically concluded, based on its expertise, that discovering the precise number of employees who lack knowledge of the NLRA's provisions was beside the point, because even if a relatively small number are without knowledge, that small number would still justify imposing the modest burden of the Rule on employers.[37]

[37] Amici's third argument (Amici 25-28), that the creation of a notice obligation without statutory authority "undermines important rights afforded by *other* statutes in which Congress has included express statutory notice requirements," , only rehashes the comments that the Board received regarding "cluttered bulletin boards." 76 Fed. Reg. at 54,017, 54,027. As the Board noted there, comments indicated that employees know more about their rights under statutes requiring notice-posting than they do about their NLRA rights precisely because of those notices. Comment G.1, A.R. NLRB-000776; Comment G.1, A.R. NLRB-000672. In fact, as Amici point out, so many employer notices are already required, what possible difference could one additional notice make, rendering that one alone in excess of statutory authority?

VI. The Chamber's Regulatory Flexibility Act Arguments Fail Because the Board Has Fully Complied with the RFA.

The Chamber said nothing about the RFA in their eleven-page, single-spaced administrative comment to the Board (Pls. Ex. C at 39). In this proceeding, the Chamber, for the first time alleges that the Board violated the RFA and further, improperly attempts to have this Court consider extra-record evidence in support of that claim. Based on RFA agency guidance, precedent and legislative history, this Court should find that the Board fully complied with the RFA.

A. The Affidavits Submitted By the Chamber in Exhibit B Are Not Part of the Administrative Record on Review and Should Not Be Considered.

A basic axiom of administrative law is that judicial review of agency action is based on the administrative record that was before the agency at the time it made its decision.[38] In direct contravention of this principle, the Chamber submitted affidavits to this Court from individuals at three small businesses, (Pls. Ex. B), that were not submitted during the Board's open comment period.

The Fourth Circuit reversed a district court decision for considering extra-record material in a case very similar to this one.[39] The district court had invalidated a Department of Labor regulation, based in part on the testimony of two consultants who challenged the rule and

[38] *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419-20 (1971) (judicial review of agency action must be based on "the 'whole record' compiled by the agency") (quoting 5 U.S.C. § 706); *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (overturning lower court decision to permit fact-finding in review of agency decision); *see also Trinity American Corp. v. EPA*, 150 F.3d 389, 401 n.4 (4th Cir. 1998) ("[r]eview of agency action is limited to the administrative record before the agency when it makes its decision").

[39] *Virginia Agr. Growers Ass'n, Inc. v. Donovan*, 774 F.2d 89, 92 (4th Cir. 1985) ("[t]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.").

suggested alternatives in a hearing held in district court. On appeal, Labor argued that the district court exceeded its limited function as a reviewing court when it considered the extra-record material, and the Fourth Circuit agreed, stating that the "Court is not empowered to substitute its judgment for that of the agency." *Id.* at 92 & 93. *Donovan* precludes this court from looking outside the administrative record.[40]

B. The Chamber Erroneously Conflates the Cost of Complying With the NLRA With the Cost of Complying With This Notice-Posting Rule.

1. The Only Direct Costs Imposed By the Rule Are the Costs Necessary to Obtain and Post the Free Pre-Printed Notice.

The Chamber's accusation (Pls. 29-30), that the Board "arbitrarily" ignored training costs is misguided. The Chamber assumes, contrary to the authorities cited in the Board's MSJ at 33, that training about the NLRA is a cost of compliance with this Rule. But there are no training costs here: the only possible training costs of the rule could be those necessary to train someone to post the notice. But employers already have employees trained to post other required workplace notices, so at most any such cost should be de minimis. *See also* 76 Fed. Reg. at 54,043-54,045. If an employer decides to share with its employees its opinion of the Notice or the NLRA itself, as is the employer's right under Section 8(c) of the NLRA (*see supra*, note 19), such discussion is a choice, not a cost of compliance with the Rule.

[40] The Chamber's reliance on out-of-circuit district court cases must fail. Its only support for including the affidavits (Pls. 5, 28), is a district court decision from Florida where the judge carefully noted that his decision "stand[s] independently on the administrative record[,]" *Southern Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411, 1436 n.34 (M.D. Fla. 1998), and a district court case from California that settled before the Ninth Circuit had an opportunity to review, and possibly, reverse. *Am. Fed'n of Labor v. Chertoff*, 552 F.Supp.2d 999, 1013 (N.D. Cal. 2007); *see infra* pp. 33-34 (distinguishing this case because the regulation there substantially changed extant law).

Similarly, the Rule creates no legal costs because posting a pre-printed government-created notice does not require small entities to hire human resources staff, retain counsel, or resort to litigation (Pls. 30-31). Employer questions will be answered free of charge by the Board.[41] Unlike, for example, the complicated regulations promulgated pursuant to the Sarbanes-Oxley Act or the Immigration Reform and Control Act, the Rule does not require employers to change their business in any legal or practical way.

There is no evidence in the administrative record that the Rule will increase the cost of or harm labor relations.[42] The Chamber's suggestion that the possibility of employees' exercise of their statutory rights is a "cost" adversely impacting small business cannot be reconciled with NLRA Section 1 which seeks to encourage collective bargaining because "[e]xperience has proved that protection by law of the right of employees to organize and bargain . . . remove[es] certain recognized sources of industrial strife and unrest." 29 U.S.C. § 151.[43] *If* more employees decide to assert their rights under the Act, and *if* those actions impact profits, that cost flows from Congress's decision to enact the NLRA, and not from this Rule.

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[41] The Board is training staff to answer all questions, including those from employers, at government expense. NLRB, Operations-Management Memos, *Outreach Effort Related to the Board's Notice Posting rule*, http://www.nlrb.gov/publications/operations-management-memos (Dec. 2, 2011).

[42] Rules can be certified even if they create a small reduction in gross revenue. *Washington v. Daley*, 173 F.3d 1158 (9th Cir. 1999) (upholding agency certification of a rule that resulted in a 1-3% reduction in annual gross revenue for small entities); *Grocery Services, Inc. v. USDA Food and Nutrition Services*, No. H-06-2354, 2007 WL 2872876 *12 (S.D. Tex. Sept. 27, 2007) (upholding certification for rule that may have a significant impact on 3-4% of about 45,000 small vendors).

[43] The RFA does not require agencies to consider the total impact on the economy (Pls. 32), as such analysis is required under the Congressional Review Act, 5 U.S.C. § 801 *et seq*. *See* 76 Fed Reg. at 54045 (addressing the CRA). *Northwest Min. Ass'n v. Babbitt* (Pls. 32), merely indicates that the RFA requires agencies to consider the impact of regulations on small businesses. 5 F.Supp.2d 9, 16 (D.D.C. 1998).

2. The Legislative History of the RFA Proves that the Economic Impact Analysis is Limited to the Direct Costs of Compliance With the Rule.

The Chamber's selective citations to the legislative history of the RFA do not aid its attempt to expand the RFA's requirements (Pls. 26). The citations actually illuminate Congress's focus on *direct* compliance costs, such as paperwork, reporting requirements, and recordkeeping.[44] The cited House Report noting that the meaning of significant "will vary from case to case[,]" pointed to "major new reporting requirements" as a significant cost. 126 Cong. Rec. H24,589 (Sept. 8, 1980). The cited Senate Report used "extensive bookkeeping translations from a customary system to one which would produce an answer in a form required by the agency" as its example of a significant cost. 126 Cong. Rec. S21,458 (Aug. 6, 1980). And the company required to spend $1,270 annually spent that money completing federal paperwork. 126 Cong. Rec. S21,454 (Aug. 6, 1980). The Board's rule contains none of the costs that concerned Congress: there are no reporting, bookkeeping, or paperwork requirements. In sum, the legislative history supports limiting RFA analysis to direct compliance costs.[45]

[44] The Chamber (at 26) also included two inapposite examples. The example with 175 staff hours discussed the *savings* that accrued to railroads from a regulation decreasing the number of forms to be filed. 126 Cong. Rec. S10,938 (Aug. 6, 1980). The $500 fine ($1,376.75 in today's dollars), was assessed to a company that paid a fine instead of complying with the regulation, which required filling out a 63-foot long form. 126 Cong. Rec. H24,578 (Sept. 8, 1980).

[45] Congress is manifestly capable of explicitly requiring agencies to consider additional costs. Proposed legislation is pending in both the House and the Senate that would require agencies to consider *indirect costs* of regulations in their RFA analysis. *See* S.B. 1601, 112th Cong. §6(a) (2011) (requiring agencies to consider the "direct, indirect, and cumulative costs and benefits" of regulations); H.R. 527, 112th Cong. §2(b) (2011) (redefining 'economic impact' to include "indirect economic effect on small entities . . . "). But current law requires agencies only to consider direct compliance costs. *See Mid-Texas Electric Co-op v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985).

3. Courts Regularly Approve Certified Rules Supported By Far Less of a "Factual Basis" Than the Information Provided By the Board.

The Board provided an ample factual basis for its certification. 76 Fed Reg. at 54043-54045. In fact, a Maryland district court recently rejected a similar claim from the U.S. Chamber of Commerce, upholding a certification where the agency's RFA analysis considered the costs that compliance would have on small business - there, the costs of incorrect results produced by using E-Verify to determine an employee's eligibility for hire. *Chamber of Commerce of U.S. v. Napolitano*, 648 F.Supp.2d 726, 741-42 (D. Md. 2009). The agency did not consider the costs to employers of terminating unauthorized workers identified through the use of E-Verify, and neither did the court – because that cost flows from the underlying law, not from the regulation. *Id.*

Courts frequently approve certified rules supported by far less information than was provided by the Board.[46] *American Federation of Labor v. Chertoff*, 552 F.Supp.2d 999, 1012-13 (N.D. Cal. 2007) *("AFL")*, relied on by the Chamber in support of its claim that more information is necessary (Pls. 27), arises in an entirely different regulatory context than this one. The regulation in *AFL* substantially changed applicable law: employers who received no-match letters from the Social Security Administration (SSA) were required to take multiple steps to

[46] *Southwestern Pa. Growth Alliance v. Browner*, 121 F.3d 106, 123 (3d Cir.1997) (upholding certification although agency did not specify the number of impacted small entities); *White Eagle Co-op Ass'n. v. Johanns*, 508 F.Supp.2d 664, 677-78 (N.D. Ind. 2007) (upholding certification supported only by conclusion "that the regulation has no disparate impact on small entities"); *Cactus Corner LLC v. Dept. of Ag.*, 346 F.Supp.2d 1075, 1115-16 (E.D. Cal. 2004) (upholding certification although agency did not know the number of impacted small entities); *Sargent v. Block*, 576 F. Supp. 882, 893 (D.D.C. 1983) (upholding certification although agency did not include facts in its analysis and merely concluded that the regulation would not impose a major increase in cost).

confirm their employees' social security numbers within 90 days -- or to face possible civil or even criminal sanctions. *Id.* at 1002.[47] There, compliance required employers to create new procedures to quickly track and resolve discrepancies in the social security numbers. This Rule's only requirement is for employers to post a pre-printed, freely provided notice. Accordingly, this Court should reject the Chamber's RFA challenge.

CONCLUSION

For all the foregoing reasons, this Court should grant summary judgment in favor of the Board.

[47] Although the Chamber suggests otherwise (Pls. 27), the only costs considered in *AFL v. Chertoff* were the direct costs of compliance with the rule, e.g., the costs of dedicating human resources staff to track and resolve mismatches within the 90-day timeframe, hiring legal and consultant services to help employers comply with the legal changes, and paying for training in-house counsel and human resources staff to design systems to resolve mismatches with the employee's cooperation within the ninety-day window. 552 F.Supp.2d 999, 1013 (N.D. Cal. 2007).

RESPECTFULLY SUBMITTED,

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