

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF )  
MANUFACTURERS et al., )  
 )  
Plaintiffs, )

v. )

Case No. 1:11-cv-01629-ABJ  
Judge Amy Berman Jackson

NATIONAL LABOR RELATIONS )  
BOARD et al., )  
 )  
Defendants. )

\_\_\_\_\_ )

NATIONAL RIGHT TO WORK LEGAL )  
DEFENSE AND EDUCATION )  
FOUNDATION, INC. et al., )  
 )  
Plaintiffs, )

v. )

NATIONAL LABOR RELATIONS )  
BOARD et al., )  
 )  
Defendants. )

\_\_\_\_\_ )

MOTION FOR SUMMARY JUDGMENT BY PLAINTIFFS NATIONAL RIGHT TO  
WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC., NATIONAL  
FEDERATION OF INDEPENDENT BUSINESS, SOUTHEAST SEALING, INC., AND  
RACQUETBALL CENTERS, INC. D/B/A LEHIGH VALLEY RACQUET & 24-7  
FITNESS CLUBS

Pursuant to Federal Rule of Civil Procedure 56 and Local Rules 7(h)(2) and 7(n),  
Plaintiffs National Right to Work Legal Defense and Education Foundation, Inc.,  
National Federation of Independent Business, Southeast Sealing, Inc., and Racquetball

Centers, Inc. d/b/a Lehigh Valley Racquet & 24–7 Fitness Clubs, respectfully move for summary judgment in this challenge to the National Labor Relations Board’s rule entitled “Notification of Employee Rights Under the National Labor Relations Act” (“the Notice Posting Rule”), 76 Fed. Reg. 54,006, codified at 29 C.F.R. pt. 104 (Aug. 30, 2011). There are no disputed facts in this case, and the administrative record contains all of the facts and documents that the Court must consider in deciding this Motion for Summary Judgment.

As set forth more fully in the attached Memorandum of Points and Authorities, summary judgment is warranted as a matter of law because the Notice Posting Rule is unlawful and must be permanently enjoined by this Court.

Respectfully submitted,

/s/ Glenn M. Taubman

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MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT OF PLAINTIFFS'  
MOTION FOR SUMMARY  
JUDGMENT

v. )

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BOARD et al., )  
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\* Cases upon which Plaintiffs primarily rely are marked with an asterisk.

## INTRODUCTION

In its 76-year history, the National Labor Relations Board (“NLRB” or “Board”) has never required a notice posting by employers who have committed no violations of the National Labor Relations Act (“NLRA”) or who are not involved in a representation proceeding before the Board. This is for good reason because, as the Board itself admits, Congress did not grant it explicit statutory authority to require postings of notices, as it did with other federal agencies. *See* Notice of Proposed Rulemaking (“NPRM”), 75 Fed. Reg. 80,410, 80,411. The Board’s decision to issue the Notice Posting Rule, 76 Fed. Reg. 54,006 (Aug. 30, 2011), and compel approximately six (6) million employers to post a permanent notice upon pain of severe legal sanctions exceeds its statutory authority under the NLRA, 29 U.S.C. § 141 *et seq.*, and, therefore, is unlawful under Section 706(2)(C) of the Administrative Procedure Act (“APA”), 5 U.S.C § 706(2)(C).<sup>1</sup> Because the Notice Posting Rule and the sanctions it imposes are inconsistent with the NLRA’s unambiguous text and are unreasonable, it must be vacated under the familiar two-step analysis of *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

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<sup>1</sup> For the convenience of the Court, a copy of the challenged Notice Posting Rule is attached to this Motion for Summary Judgment as part of the Declaration of Attorney Glenn Taubman. Moreover, the Court can take judicial notice of that NLRB-published document. *American Farm Bureau v. United States Env’tl. Prot. Agency*, 121 F. Supp. 2d 84, 106 (D.D.C. 2000) (taking judicial notice of items published in the Federal Register), citing *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621 (D.C. Cir. 1997).

## STATEMENT OF THE CASE<sup>2</sup>

### A. The Parties

The National Right to Work Legal Defense and Education Foundation, Inc. (“NRTW”) is a non-profit, charitable legal aid organization headquartered in Virginia. NRTW is an “employer” as defined in Section 2(2) of the NLRA, 29 U.S.C. § 152(2) and in the Notice Posting Rule, and meets the NLRB’s jurisdictional standards for coverage under the NLRA. In its more than 40 years of existence, NRTW has never been found to have violated the NLRA. *See* Decl. of Mark A. Mix, ¶ 3.

The National Federation of Independent Business (“NFIB”) is a non-profit, mutual benefit corporation and an association of small businesses representing approximately 350,000 member businesses. The typical NFIB member has 10 employees, reports gross annual sales of approximately \$500,000 per year, and is subject to the jurisdiction of the NLRA. NFIB is an “employer” as defined in Section 2(2) of the NLRA, 29 U.S.C. § 152(2), and in the Notice Posting Rule, and meets the NLRB’s jurisdictional standards for coverage under the NLRA. It and most of its members will be required to post a notice

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<sup>2</sup> Two related cases were consolidated by this Court on October 4, 2011, *National Association of Manufacturers v. NLRB*, 1:11-cv-1629-ABJ and *National Right to Work Legal Defense and Education Foundation v. NLRB*, 1:11-cv-1683-ABJ, and the latter case was ordered closed on the clerk’s docket. (Docket No. 16). This Motion for Summary Judgment is being filed by the Plaintiffs in the latter of these now-consolidated cases.

Pursuant to the Court’s request made at the hearing on October 5, 2011, the undersigned have coordinated with counsel in the consolidated case to attempt to minimize duplication between and among their respective summary judgment briefs. For this reason, Plaintiffs adopt and incorporate any additional arguments made in the brief filed by the National Association of Manufacturers and the Coalition for a Democratic Workplace.

under the Notice Posting Rule. In its more than 65 years of existence, NFIB has never been found to have violated the NLRA. *See* Decl. of Donald A. Danner, ¶ 5.

Southeast Sealing, Inc. is engaged in sealing concrete floors. It is incorporated in the State of Georgia and has twenty employees. It is an “employer” as defined in Section 2(2) of the NLRA, 29 U.S.C. § 152(2), and in the Notice Posting Rule, and meets the NLRB’s jurisdictional standards for coverage under the NLRA. It will be required to post a notice under the Notice Posting Rule. In its more than 40 years of existence, Southeast Sealing, Inc. has never been found to have violated the NLRA. *See* Decl. of Mike Sullivan, ¶ 5.

Racquetball Centers, Inc. d/b/a Lehigh Valley Racquet & 24-7 Fitness Clubs provides fitness and sports facilities. It has 260 employees, is an “employer” as defined in Section 2(2) of the NLRA, 29 U.S.C. § 152(2), and in the Notice Posting Rule, and meets the NLRB’s jurisdictional standards for coverage under the NLRA. It will be required to post a notice under the Notice Posting Rule. In its more than 33 years of existence, Lehigh Valley Racquet & 24-7 Fitness Clubs has never been found to have violated the NLRA. *See* Decl. of John Brinson, ¶ 5.

Defendant National Labor Relations Board is an independent agency in the executive branch of the federal government, established by 29 U.S.C. § 153 to administer the NLRA. The Board serves a quasi-judicial function, with its General Counsel acting as

the agency's prosecutor. With a minor exception not relevant here,<sup>3</sup> the Board's statutory duties are limited to: (1) conducting elections when a representation or deauthorization petition is properly filed under Section 9 of the NLRA, 29 U.S.C. § 159, and (2) adjudicating unfair labor practice complaints that are brought by the NLRB General Counsel after a third party files an unfair labor practice charge to initiate an investigation. Sections 8 and 10 of the NLRA, 29 U.S.C. §§ 158 and 160. As an adjudicatory body, the Board can only act against employers or unions when petitioned to do so in a representational proceeding or when presented with an unfair labor practice complaint by the General Counsel after an unfair labor practice charge has been filed. *See, e.g., NLRB v. Fant Milling Co.*, 360 U.S. 301, 306-09 (1959); *NLRB v. Ind. & Mich. Elec. Co.*, 318 U.S. 9, 17 (1943) ("The Act requires a charge before the Board may issue a complaint ...."); *NLRB v. Hopwood Retinning Co.*, 98 F.2d 97, 101-02 (2d Cir. 1938) (Board has no jurisdiction over employer against whom no unfair labor practice charge was filed). At full strength the Board has five members. The Board is currently comprised of Chairman Mark Pearce and Members Craig Becker and Brian Hayes, with two positions vacant. Lafe Solomon is the Acting General Counsel.

**B. Statement of the Facts**

In its 76-year history, the NLRB has never issued a notice-posting order to all employers subject to its jurisdiction. This is not surprising, given the NLRB's

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<sup>3</sup> The minor exception is that the Board also oversees jurisdictional disputes between unions under 29 U.S.C. §§ 158(b)(4)(D) and 160(k).

acknowledgment that “[t]he NLRA is almost unique among major Federal labor laws in not including an express statutory provision requiring employers routinely to post notices at their workplaces informing employees of their statutory rights.” NPRM, 75 Fed. Reg. at 80,411.<sup>4</sup>

On August 30, 2011, the Board issued its Notice Posting Rule, which orders all employers covered by the NLRA to permanently post a notice describing some of the rights that employees possess under that statute. Approximately 6 million businesses will be affected by the Notice Posting Rule, *see* NPRM, 75 Fed. Reg. at 80,415, at a cost estimated to be \$386 million.<sup>5</sup>

The Notice Posting Rule originated from a rulemaking petition submitted in 1993 by a labor law professor, Charles J. Morris, which requested the issuance of a broad rule requiring employers to post notices advising employees of rights and duties under the NLRA, regardless of their culpability for having committed an unfair labor practice or

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<sup>4</sup> Unlike the NLRA, Congress explicitly required or allowed notice postings under the Fair Labor Standards Act, 29 U.S.C. § 211 (implementing regulation 29 CFR § 516.4); Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-10(a)); the Age Discrimination in Employment Act (29 U.S.C. § 627); the Occupational Safety & Health Act (29 U.S.C. §§ 651, 657(c)); the Americans with Disabilities Act (42 U.S.C. §§ 12101, 12115); the Family Medical Leave Act (29 U.S.C. §§ 2601, 2619(a)); the Uniformed Service Employment & Reemployment Rights Act (38 U.S.C. § 4334); the Railway Labor Act (45 U.S.C. § 152, Eighth); the Employee Polygraph Protection Act (29 U.S.C. § 2003); and the Migrant & Seasonal Agricultural Workers Protection Act (29 U.S.C. § 1821), among other federal statutes.

<sup>5</sup> The NLRB estimates that it will cost the average employer \$64.40 to comply with the Notice Posting Rule in the first year. 76 Fed. Reg. at 54,042-54,045. Since the Rule affects 6 million employers, the total estimated cost to the nation is \$386,400,000 in one year.

involvement in a representation election. NPRM, 75 Fed. Reg. at 80,411. For almost twenty (20) years the Board did not act on this proposal. Then, on December 22, 2010, a divided four-member Board suddenly issued the NPRM to create a nationwide notice posting requirement for all employers subject to the NLRA. NPRM, 75 Fed. Reg. 80,410. Member Brian Hayes dissented. 75 Fed. Reg. at 80,415.

The Board received over 7,000 comments regarding the NPRM, including comments in opposition from Plaintiffs NRTW and NFIB. On August 30, 2011, a divided three-member Board adopted the Notice Posting Rule with minor modifications to the NPRM. 76 Fed. Reg. 54,006. Member Hayes again dissented, contending, *inter alia*, that the Board lacked the statutory authority to issue the Rule. 76 Fed. Reg. at 54,037.

The Notice Posting Rule establishes severe sanctions and penalties for employers that do not post the mandatory notice. First, the Board creates a new unfair labor practice for employers who fail to post the notice that is found nowhere in Section 8(a) of the NLRA, 29 U.S.C. § 158(a). Second, the Rule stipulates that an employer's refusal to post the notice constitutes an expression of anti-union animus in unfair labor practice proceedings, and is deemed to interfere with employees' rights in violation of Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1). Third, the six-month statute of limitations that Congress enacted in Section 10(b) of the NLRA, 29 U.S.C. § 160(b), is effectively repealed with respect to all unfair labor practice charges filed against noncompliant employers. 76 Fed. Reg. at 54,033.

**C. This Lawsuit**

On September 16, 2011, Plaintiffs filed a two-count complaint with this Court, seeking declaratory and injunctive relief against the NLRB and its officials. Case No. 1:11-cv-1683-ABJ. Count I of the Complaint alleges that the Notice Posting Rule violates Section 706(2)(C) of the APA, 5 U.S.C. § 706(2)(C), because the Board lacks the statutory authority to impose the Rule and the accompanying sanctions under the NLRA. Count II alleges that NLRB's promulgation and enforcement of the Notice Posting Rule, without statutory authority, coerces Plaintiffs' and other employers' speech in violation of the First Amendment to the United States Constitution. On October 5, 2011, the Court consolidated this case with one alleging similar violations, *National Association of Manufacturers v. NLRB*, 1:11-cv-1629-ABJ.

**D. Jurisdiction**

This Court has jurisdiction over those portions of the action arising under the APA pursuant to 5 U.S.C. §§ 702 and 703, those portions of the action arising under the NLRA pursuant to 28 U.S.C. §§ 1331 and 1337, and those portions of the action arising under the First Amendment to the United States Constitution pursuant to 28 U.S.C. § 1331.

Plaintiffs have standing to bring this suit because they are all employers subject to the Notice Posting Rule. Decl. of Mark Mix ¶ 2; Decl. of Donald Danner ¶ 4; Decl. of John F. Brinson ¶ 4; Decl. of Mike Sullivan ¶ 4. Moreover, the NFIB also has standing to

pursue this action on behalf of its members under the three-part test of *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). Decl. of Donald Danner ¶ 8. First, NFIB's members would otherwise have standing to sue in their own right; second, the interests at stake in this case are germane to NFIB's organizational purposes; and third, neither the claims asserted nor the relief requested requires the participation of NFIB's individual members. Because most of NFIB's member employers are subject to the Notice Posting Rule, they have a direct and concrete interest in the outcome of this case.

**E. Standard of Review of the Notice Posting Rule under the APA**

The Notice Posting Rule is reviewed under the two-step analysis of *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). First, the Court must determine whether the NLRB has statutory authority to issue the regulation. If, as Plaintiffs contend, the NLRB has no such statutory authority, the inquiry ends at *Chevron* Step One. See *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000), quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988) (“Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority ‘in a manner that is inconsistent with the administrative structure that Congress enacted into law.’”); *Railway Labor Execs’ Ass’n v. Nat’l Mediation Bd.*, 29 F.3d 655 (D.C. Cir. 1994) (en banc) (National Mediation Board has no statutory authority to create a procedure for employers to file representation

election petitions).

Second, if the Notice Posting Rule survives *Chevron* Step One, the Court then must inquire if the Rule is a reasonable construction of the NLRA. *Chevron*, 467 U.S. at 842-43. “When statutory language is ambiguous it is not a foregone conclusion that an Agency’s interpretation is a reasonable one to which the Court must defer.” *AFL-CIO v. Chao*, 409 F.3d 377, 384 (D.C. Cir. 2005); *see also Landstar Express Am., Inc. v. Fed. Maritime Comm’n*, 569 F.3d 493, 500 (D.C. Cir. 2009); *American Library Ass’n v. FCC*, 406 F.3d 689, 705 (D.C. Cir. 2005).

## ARGUMENT

### **THE NLRB LACKS THE STATUTORY AUTHORITY TO PROMULGATE THE NOTICE POSTING RULE AND CREATE SANCTIONS FOR NONCOMPLIANCE.**

- A. The NLRB Is a Remedial and Quasi-Judicial Agency with No Roving Commission to Require All Law-Abiding Employers to Post Notices (or to Do Anything Else). The Notice Posting Rule Violates Section 706(2)(C) of the APA Because the NLRB Has No Power to Require Any Notice Posting by Employers Absent the Filing of (1) an Unfair Labor Practice Charge and the Issuance of a Complaint and Finding of a Violation under Sections 8 and 10 of the NLRA, 29 U.S.C. §§ 158 and 160, or (2) an Election Petition Initiated under Section 9 of the NLRA, 29 U.S.C. § 159.

Some background concerning the structure of the NLRA is necessary for the Court to properly evaluate this case. The NLRB is not a regulatory agency in the traditional sense, but rather is a quasi-judicial body. Its functions are largely limited to deciding the merits of unfair labor practice complaints brought by the General Counsel and conducting secret-ballot elections to resolve representational disputes.

With respect to unfair labor practice cases, the [NLRB] more nearly resembles a court than a regulatory agency. Its principal function is judicial in character, and it is wholly divorced from the investigation and prosecution of unfair labor practice charges, which are the responsibility of the General Counsel. The Board has no authority over issuance of formal complaints and, therefore, rules only upon those unfair labor practice cases that the General Counsel decides to prosecute.

*How to Take a Case Before the NLRB* (8th ed.), A.B.A. Section of Lab. & Emp't L.

(2008), at 38.<sup>6</sup>

The NLRB has no “roving commission” to ferret out unfair labor practices, initiate

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<sup>6</sup> Another treatise, Rothschild & Koch's *Fundamentals of Administrative Practice and Procedure* (Michie Bobbs-Merrill 1981), at 20-21 (emphasis added), describes the structure and power of the NLRB this way:

The National Labor Relations Board was created in 1935 (the Wagner Act) to prevent and remedy certain denominated unfair labor practices by employers, and to establish secret ballot election procedures to determine employees' collective bargaining representatives. Congress delegated to a three-member Board, appointed by the President and confirmed by the Senate, the authority to investigate and decide unfair labor practice allegations. *The Board's authority to promulgate “such rules and regulations as may be necessary to carry out the provisions of this Act” was necessarily limited by this adjudicatory structure.* The Wagner Act specifically codified quasi-judicial complaint, hearing, and decision procedures, modeled after those earlier conferred upon the Board's predecessor in 1934. Section 10 precluded the Board from invoking its jurisdiction, and section 11 limited the Board's broad investigating authority to hearings and investigations involving persons who first invoked its jurisdiction. Congress created a quasi-judicial system for the gradual development of substantive precedents.

\* \* \*

In 1947 Congress recast the adjudicatory process to more closely resemble the quasi-judicial model in the Taft-Hartley Act. The Board was expanded to five members to manage additional unfair labor practice jurisdiction extended to labor organizations. Congress responded to public criticism of the Board's combined investigatory and adjudicatory responsibilities by creating an independent General Counsel, appointed by the President with the consent of the Senate, with “final authority” over investigation and prosecution of unfair labor practice complaints.

Other amendments imposed a six-month statute of limitations upon unfair labor practice allegations, substituted a stiffer preponderance of the testimony for the Wagner Act “all the testimony” burden of proof, and inserted an intermediate examiner report and a recommended order in the adjudicatory process. Congress also amended the Act to conform to the Administrative Procedure Act.

elections, or issue affirmative orders to the entire universe of employers, unions and employees subject to its jurisdiction. By statute, the NLRB decides unfair labor practice and representation election cases brought before it, nothing more. This is made explicit in Sections 10(b) and 9(c)(1) and of the NLRA. *See* 29 U.S.C. § 160(b) (“*Whenever it is charged* that any person has engaged in or is engaging in any such unfair labor practice, the Board ... shall have the power to issue and cause to be served upon such person a complaint.” (emphasis added); 29 U.S.C. § 159(c)(1) (“*Whenever a petition shall have been filed ... the Board shall investigate such petition ...*” ) (emphasis added)).

Numerous decisions of the Supreme Court and lower federal courts make it clear that the Board can only order a union or employer to perform an affirmative act, such as the posting of a notice, after an unfair labor practice violation is found or an election petition filed. For example, in *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940), the Court struck down a Board remedy that provided relief to entities that were not parties in the actual case before it.

The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes. The Act does not prescribe penalties or fines in vindication of public rights or provide indemnity against community losses as distinguished from the protection and compensation of employees. Had Congress been intent upon such a program, we cannot doubt that Congress would have expressed its intent and would itself have defined its retributive scheme.

*Id.* at 10.

The Court went on to state that:

We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that ‘this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order’. We have said that the power to command affirmative action is remedial, not punitive. We adhere to that construction. In that view, it is not enough to justify the Board’s requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end.

*Id.* at 11-12 (citations omitted); *see also Fant Milling Co.*, 360 U.S. at 306-09 (Board has no independent power to act in any unfair labor practice case unless and until a third party files an unfair labor practice charge to initiate the litigation process); *Indiana & Mich. Elec. Co.*, 318 U.S. at 17 (same); *Hopwood Retinning*, 98 F.2d at 101-02 (same); *Kelley v. NLRB*, 79 F.3d 1238, 1245-46 (1st Cir. 1996) (same); *NLRB v. National Licorice Co.*, 104 F.2d 655, 658 (2d Cir. 1939) (“a ‘charge’ is a condition precedent upon the Board’s power to issue a complaint”), *aff’d as modified*, 309 U.S. 350, 368-69 (1940).<sup>7</sup>

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<sup>7</sup> With the exception of the Notice Posting Rule, the Board recognizes and abides by this statutory limitation on its ability to act against parties or persons who are not properly before it. As it said in *Triboro Carting Corp.*, 117 NLRB 775 (1957):

It is well settled that a charge is not a pleading, but merely serves to initiate an investigation to determine whether a complaint shall issue. Further, because Section 10 (b) requires that a charge be filed before any complaint may issue, and the courts have consistently held that the Board may not initiate complaints on its own motion, it follows that some relationship is required between the charge and allegations of the complaint. Otherwise the Board could be said to be initiating the proceeding on its own motion.

*Id.* at 777 (footnotes omitted).

The Supreme Court's opinion in *Local 357, Teamsters v. NLRB*, 365 U.S. 667 (1961) is instructive, if not controlling. In that case, the Board found a hiring hall agreement unlawfully discriminatory because it did not include a provision for posting certain anti-discrimination notices that the Board declared was necessary in every hiring hall. *Id.* at 672. The Court disagreed, stating:

Perhaps the conditions which the Board attaches to hiring-hall arrangements will in time appeal to the Congress. Yet, where Congress has adopted a selective system for dealing with evils, the Board is confined to that system. Where, as here, Congress has aimed its sanctions only at specific discriminatory practices, the Board cannot go farther and establish a broader, more pervasive regulatory scheme.

*Id.* at 676 (citation omitted).

Similarly, in *Consolidated Edison Co. of New York, Inc. v. NLRB*, 305 U.S. 197 (1938), the Court recognized that the NLRB could not issue affirmative orders to an entity in the absence of its having committed a wrong under the labor law that needed to be remedied.

We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.

The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act.

*Id.* at 235-36.

Again, in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-906 (1984), the Court placed further limits on the Board's ability to create or remedy speculative unfair labor practices:

Section 10(c) of the Act empowers the Board, *when it finds that an unfair labor practice has been committed*, to issue an order requiring the violator to "cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies" of the NLRA. 29 U.S.C. § 160(c).

*Id.* at 898 (emphasis added); *see also Local 60, United Bhd. of Carpenters & Joiners v. NLRB*, 365 U.S. 651, 655 (1961) (reiterating that the Board's "power to command affirmative action is remedial, not punitive").

These cases teach that the Board has no statutory authority to order any entity to do an affirmative act (like posting a notice) unless and until that entity has been found to have committed an unfair labor practice or is involved in a representational election.<sup>8</sup> The Notice Posting Rule plainly violates these statutory limitations on the Board's authority, and is therefore invalid.

Moreover, even when an unfair labor practice violation is found, the Board does not have unlimited authority regarding the timing and nature of the notices to be posted. For example, the Board's normal remedial notice postings are limited to a 60-day period

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<sup>8</sup> *Pannier Corp. v. NLRB*, 120 F.3d 603 (6th Cir. 1997), cited by the Board in the rulemaking (76 Fed. Reg. at 54,011) does not support a universal notice posting order. There, the Sixth Circuit upheld the Board's rule requiring employers to post a notice at least three days in advance of a representation election. (29 C.F.R. § 103.20). But the court noted that the rule makes "clear to the parties their respective responsibilities and obligations with respect to notice posting." *Id.* at 607, emphasis added. In other words, the notice posting order was valid because the employer was a party in the particular election proceeding.

at a single facility or location where the unfair labor practice occurred. *Consol. Edison Co. of New York, Inc.*, 323 NLRB 910, 911-12 (1997). Notice posting requirements that extend beyond the single facility where the wrongful conduct occurred generally are deemed to be “inappropriate.” *Rose-Terminix Exterminator Co.*, 315 NLRB 1283, 1288-89 (1995); *Hickmott Foods, Inc.*, 242 NLRB 1357, 1357 (1979) (finding that broad notices are “warranted only when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees’ fundamental statutory rights”). But here, the Notice Posting Rule mandates *permanent* postings in all covered workplaces, regardless of whether there has been any allegation or finding of an unfair labor practice. If the Board’s remedial authority over adjudicated labor law violators is limited, it surely lacks the power to compel *permanent* notice posting by employers who have never committed a violation.

Under § 10(c), the Board’s authority to remedy unfair labor practices is expressly limited by the requirement that its orders “effectuate the policies of the Act.”... [A] remedy must be sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair labor practices.

*Sure-Tan*, 467 U.S. at 900; *see also NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1322-23 & n.53 (D.C. Cir. 1972), citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941) (NLRB must tailor its remedies to the specific violations in each case and cannot issue a group remedy simply because “an individualized approach may cause some administrative difficulty”).

In short, the NLRB has no statutory power to compel the posting of a notice in six million workplaces where no election petition has been filed and/or no unfair labor practice violations have been alleged. The Notice Posting Rule exceeds the Board's authority under Sections 8(a), 9(c)(1) and 10 of the NLRA, 29 U.S.C. §§ 158(a), 159(c)(1) and 160.

**B. The Notice Posting Rule Violates Section 706(2)(C) of the APA Because the NLRB Lacks the Authority to Promulgate and Enforce the Notice Posting Rule under Section 6 of the NLRA, 29 U.S.C. § 156.**

The Board majority relies upon Section 6 of the NLRA, 29 U.S.C. § 156, as its statutory authority to issue the Notice Posting Rule. 76 Fed. Reg. at 54,008-54,011.

Section 6 states:

The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the [Administrative Procedure Act], such rules and regulations as may be necessary *to carry out the provisions of this subchapter.*

(Emphasis added). By its terms, Section 6 simply grants the Board the authority to make rules that will enable it to “carry out” other substantive “provisions” of the NLRA. It cannot support the Notice Posting Rule, because no substantive provision of the NLRA requires that all employers post mandatory notices. Indeed, the Board concedes that “[t]he National Labor Relations Act does not directly address an employer’s obligation to post a notice of its employees’ rights arising under the Act or the consequences an employer

may face for failing to do so.” 76 Fed. Reg. at 54,010.<sup>9</sup>

The Board’s theory that Section 6 grants it legislative authority to invent new substantive obligations and sanctions for employers beyond those provided in other provisions of the Act defies the last twelve words of Section 6: “as may be necessary to carry out *the provisions* of this subchapter.” (Emphasis added). The Board’s authority under Section 6 is explicitly tethered to enforcing or carrying out the “provisions” of the NLRA. It is not a blank check by Congress empowering the Board to invent and add new substantive provisions.

The Board’s reliance on *American Hospital Ass’n v. NLRB*, 499 U.S. 606 (1991) is misplaced. That case approved a rule defining what “shall be appropriate [bargaining] units . . . for petitions filed pursuant to Section 9(c)(1)(A)(i) or 9(c)(1)(B) of the [NLRA].” 29 CFR § 103.30 (1990); 499 U.S. at 608. That rule was clearly one to “carry out” an existing provision of the NLRA, namely the electoral provision of Section 9(c).

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<sup>9</sup> Congress granted other agencies specific notice–posting authority, as set forth in the Railway Labor Act, 45 U.S.C. § 152, Eighth; Title VII of the Civil Rights Act, 42 U.S.C. § 2000e–10; the Age Discrimination in Employment Act, 29 U.S.C. § 627; the Occupational Safety & Health Act, 29 U.S.C. §§ 651, 657(c); the Americans with Disability Act, 42 U.S.C. §§ 12101, 12115; the Family Medical Leave Act, 29 U.S.C. §§ 2601, 2619(a); and the Uniformed Service Employment & Reemployment Rights Act, 38 U.S.C. § 4334. Notably, the Railway Labor Act’s notice–posting authority was added to the 1926 statute by congressional amendment in 1934, one year prior to the passage of the NLRA. 45 U.S.C. § 152, Eighth, Pub. L. No. 73–442, 48 Stat. 1185, 1188 (1934). Regarding the 1938 Fair Labor Standards Act, 29 U.S.C. § 201, although it does not contain a specific notice–posting provision, the statute’s mandatory employer recordkeeping provisions were used by the U.S. Department of Labor to require notice posting, but there is no provision for penalties for failure to post. 29 U.S.C. § 211(c); 27 Fed. Reg. at 525 (Jan. 18, 1962). In contrast, the NLRA contains no mandatory record keeping requirement.

Thus, the Supreme Court concluded that Section 6 is “unquestionably sufficient to authorize the rule at issue in this case unless limited by some other provision in the Act.” 499 U.S. at 610.

The Board claims that the above-quoted language in *American Hospital* stands for the proposition that Section 6 grants the Board “legislative” authority to issue *any* rule not contrary to other provisions of the Act. 76 Fed. Reg. at 54,008. This is incorrect for several reasons. First and foremost, the Court’s statement was confined to “the rule at issue in this case,” whose validity as being “necessary to carry out the provisions” of Section 9(c) of the NLRA was deemed “unquestionabl[e].” 499 U.S. at 610. Here, by contrast, the Notice Posting Rule is not necessary to enforce or carry out *any* provision of the NLRA.

Second, the language in *American Hospital* was in response to the Petitioners’ primary argument against the rule, which was not that the Board lacked authority under Section 6, but rather that the rule conflicted with Section 9(b) of the Act. 499 U.S. at 608-09. The Court’s rejection of this argument, 499 U.S. at 610-14, is not equivalent to holding that any rule not in conflict with another provision of the NLRA is inherently authorized by Section 6, as the Board now asserts.<sup>10</sup>

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<sup>10</sup> Moreover, in this case the Board *is* “limited by some other provision of the Act,” *American Hospital*, 499 U.S. at 610, because Congress never granted the Board authority to order persons or entities against whom no unfair labor practice charge or election petition has been filed to do anything, to notify anyone, or to post anything. *See* Section A *supra*, pages 9-16; *Indiana & Mich. Elec. Co.*, 318 U.S. at 17 (“The Act requires a charge before the Board may issue a complaint ....”).

Third, *American Hospital* contains no discussion about how to interpret Section 6. Given the absence of analysis, the Board's notion that the Court interpreted the phrase "necessary to carry out the provisions of this [Act]" in Section 6 to mean that the Board can promulgate any rule not expressly forbidden by other provisions of the Act is untenable.

Finally, as Member Hayes states in his dissent, the Board majority's interpretation of *American Hospital* is incorrect because it transforms congressional silence into a tactical grant of affirmative authority to agencies.

[T]he majority construes *American Hospital Association* as an endorsement of deference to the exercise of Section 6 rulemaking authority whenever Congress did not expressly limit this authority. This is patently incorrect. "To suggest, as the [majority] effectively does, that *Chevron* deference is required any time a statute does not expressly negate the existence of a claimed administrative power \* \* \*, is both flatly unfaithful to the principles of administrative law \* \* \* and refuted by precedent." *Railway Labor Executives' Ass'n v. National Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir.1994) (citation omitted). Were courts "to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Id.*

In sum, the majority's notice rule does not address a gap that Congress delegated authority to the Board to fill, whether by rulemaking or adjudication. The Supreme Court has made clear that "[w]here Congress has in the statute given the Board a question to answer, the courts will give respect to that answer; but they must be sure the question has been asked." *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 419, 432-433 (1960).

76 Fed. Reg. at 54,040.

Also inapposite are the Board's citations to *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294-95 (1974) and *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). See 76 Fed.

Reg. at 54,008.<sup>11</sup> Those cases stand for the proposition “that the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board’s discretion.” *Bell Aerospace*, 416 U.S. at 294. The cases have no bearing on the scope of the Board’s rulemaking under Section 6 or the limits on its statutory authority contained in Sections 8(a), 8(c), 9(c)(1) and 10 of the NLRA, which are dispositive of the matter here.

Moreover, the adjudicatory “rules” at issue in *Bell Aerospace* and *Wyman-Gordon* could likely have been promulgated by formal rulemaking under Section 6 because both were: (1) pursuant to the Board’s duty to “carry out” elections under the provisions of Section 9(c) of the Act; and (2) directed solely at employers who were parties to representational proceedings. *See Bell Aerospace*, 416 U.S. 267 (adjudicatory “rule” regarding who constitutes managerial personnel ineligible to vote in elections conducted under Section 9(c)); *Wyman-Gordon*, 394 U.S. at 766-67 (adjudicatory “rule” requiring that employers provide a list of eligible voters in elections conducted at their facilities under Section 9(c)).<sup>12</sup> Here, by contrast, the Notice Posting Rule is not grounded in *any*

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<sup>11</sup> *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971), which the Board also cites, has no bearing whatsoever on this case. *Nash-Finch* upheld the Board’s power to seek a federal court injunction when a preempted state law is applied to deny NLRA rights. This has no relevance to whether the Board has statutory authority to promulgate a rule that orders six million employers who have committed no labor law violations to post notices on their properties.

<sup>12</sup> Similarly, *Pannier Corp. v. NLRB*, 120 F.3d 603, 606-07 (6th Cir. 1997) approved a rule requiring employers to post workplace notices of upcoming elections when they were parties  
(continued...)

provision of the Act, yet it targets millions of employers who are not parties to any representation or unfair labor practice proceedings.

The Board's citation to cases regarding statutes *other* than the NLRA provide even less support for its position, as the statutes in those cases did, unlike here, provide the agencies with the requisite authority to act. *See* 76 Fed. Reg. at 54,008 and n.20 (citing *National Ass'n of Pharm. Mfrs. v. FTC* [sic], 637 F.2d 877, 880 (2d Cir. 1981) (FDA had authority to issue both substantive and procedural rules governing the manufacture and labeling of various food and medical products under the Federal Food, Drug, and Cosmetic Act of 1938, 21 U.S.C. § 351(a)(2)(B)); *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 686 (D.C. Cir. 1973) (Section 6 of the Trade Commission Act, 15 U.S.C. § 46, gives FTC explicit authority to declare unfair trade practices, which includes the failure to post octane ratings on gasoline pumps). These cases have no bearing on whether Section 6 of the NLRA grants the Board the requisite authority to issue the Notice Posting Rule.

As shown *supra* in Section A, the Board is not a regulatory agency like the FDA or FTC that have broad statutory powers to create substantive obligations, but is instead a quasi-judicial agency. The D.C. Circuit recognized as much in *Bell & Howell Co. v. NLRB*, 598 F.2d 136 (D.C. Cir. 1979):

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(...continued)

to the election. As with *Wyman-Gordon*, the rule was simply one to carry out the electoral provisions of Section 9 of the NLRA. It does not provide authority for the Board to issue affirmative orders to employers who are not parties to an election.

The Board's powers are remedial, not punitive, and the Board may not justify an order solely on grounds that it will deter future violations of the Act. *Republic Steel Co. v. NLRB*, 311 U.S. 7 (1940). The Board has broad discretion to adapt its remedies to the needs of particular situations so that "the victims of discrimination" may be treated fairly. But the power of the Board "to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act." *Local 60, United Brotherhood of Carpenters v. NLRB*, 365 U.S. 651 (1961).

*Id.* at 147 n.36.

In *National Petroleum*, the D.C. Circuit aptly stated that "[t]he extent of [an agency's] powers can be decided only by considering the powers Congress specifically granted it in the light of the statutory language and background," and that "[t]he question to be answered is 'not what the [agency] thinks it should do but what Congress has said it can do.'" 482 F.2d at 674 (citations omitted). Here, the power delegated by Congress to the Board under Section 6 is expressly limited to promulgating rules "necessary to carry out the provisions" of the NLRA. The Notice Posting Rule does not "carry out" any provision of the NLRA as enumerated by Congress, as no part of the NLRA requires the posting of notices by an employer who is not a party to unfair labor practice or representational proceedings. Accordingly, the Board has exceeded its statutory authority under Section 6.

C. The Notice Posting Rule Violates Section 706(2)(C) of the APA Because the NLRB Lacks the Authority to Create New Unfair Labor Practices That Congress Did Not Authorize in Section 8 of the NLRA, 29 U.S.C. § 158.

In Section 8(a) of the NLRA, Congress listed the employer actions that constitute unfair labor practices. 29 U.S.C. § 158(a). Failure to post a Board-created notice is not mentioned amongst this extensive list. Consequently, the Board exceeded its statutory authority by creating a new unfair labor practice that sanctions employers for inaction – the failure to post a notice – that does not appear in Section 8(a) of the NLRA.<sup>13</sup>

Directly on point is *Local 357, Teamsters v. NLRB*, 365 U.S. 667 (1961), which rejected an attempt by the Board to make it an unfair labor practice for employers and unions to refrain from posting a notice of non-discrimination when they enter into hiring hall arrangements. The Board sought to require that “[t]he parties to the agreement post, in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring agreement.” *Id.* at

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<sup>13</sup> *New Process Steel, L.P. v. NLRB*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 2635 (2010) is instructive of the Board’s lack of power to issue this Rule, especially after 76 years of never promulgating such requirements. In *New Process*, the Board delegated its decision-making power to only two Board Members, even though past practice demanded that there be at least three sitting Board Members to issue a decision. The Supreme Court held that the Board lacked the power to delegate its decision-making power to only two Board Members. The fact that this “interpretation of the delegation provision is consistent with the Board’s longstanding practice [of requiring three members] is persuasive evidence that it is the correct one, notwithstanding the Board’s more recent view.” 130 S. Ct. at 2641-42. Here, for 76 years the Board has never required a notice posting by employers that were not properly before it as parties to an unfair labor practice proceeding or an election. The Board’s longstanding practice of not requiring such notices is “persuasive evidence that it is the correct one, notwithstanding the Board’s more recent view.” *Id.*

672. This and related requirements were held to exceed the Board's authority under Section 8 of the Act. *Id.* at 676-77. The Court stated that "where Congress has adopted a selective system for dealing with evils, the Board is confined to that system," and "[w]here, as here, Congress has aimed its sanctions only at specific discriminatory practices, the Board cannot go farther and establish a broader, more pervasive regulatory scheme." *Id.* at 676 (citation omitted). Those words are equally applicable to the Notice Posting Rule at issue here.

The Board attempts to distinguish *Local 357, Teamsters* on the grounds that "this rulemaking does not involve those provisions of the NLRA that *Local 357, Teamsters* addressed." 76 Fed. Reg. at 54,014. But this parsing of the case ignores the key similarity between the hiring hall rule struck down in *Local 357, Teamsters* and the Notice Posting Rule, that both create a new unfair labor practice – failure to post a notice – that Congress did not enumerate. *Local 357, Teamsters* is directly on point and confirms the Board's lack of authority under Section 8(a)(1), 29 U.S.C. § 158(a)(1), to make the simple act of refraining from posting a notice an unfair labor practice.

Furthermore, the Board contorts the English language by positing that employers "interfere" with employees' exercise of their rights under Section 8(a)(1) by not posting a notice because the notice will, ostensibly, educate employees about their rights. 76 Fed. Reg. at 54,032. One does not, and indeed cannot, "interfere" with the actions of others by not providing them with unrequested information, absent a duty to provide it. Under the

Board's logic, telemarketers can be said to "interfere" in a person's life if they do *not* call the person with information about the potentially useful products they offer. To "interfere" connotes an affirmative act to prevent the desired action of another.<sup>14</sup>

The Board's assertion that failure to provide information in other contexts under the NLRA can be an unfair labor practice is inapposite, because in such situations an independent provision of the law created an affirmative legal duty to provide the information. 76 Fed. Reg. at 54,032. For example, employers must provide unions with certain information during collective bargaining as a result of their obligation to bargain in good faith under Section 8(d) of the Act. 29 U.S.C. § 158(d); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-53 (1956). A union must provide employees with certain information to compel them to pay union dues as a result of the judicially-created "duty of fair representation," which is grounded in Section 9(a) of the Act. *See Penrod v. NLRB*, 203 F.3d 41, 45 (D.C. Cir. 2000); *Communications Workers v. Beck*, 487 U.S. 735 (1988).

Here, by contrast, no provision of the NLRA creates a legal duty for employers to post a notice or inform employees of any of their legal rights or obligations. The Board cannot construct such a duty from the prohibitions contained in Section 8(a)(1). Accordingly, just like the hiring hall notice at issue in *Local 357, Teamsters*, the Notice Posting Rule exceeds the Board's statutory authority under Section 8 of the Act.

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<sup>14</sup> *Cf.* Black's Law Dictionary (9th ed. 2009) ("interference: 1. The act of meddling in another's affairs. 2. An obstruction or hindrance.").

D. The Notice Posting Rule Violates Section 706(2)(C) of the APA Because the NLRB Has No Power to Effectively Repeal the Statute of Limitations Specified in Section 10(b) of the NLRA, 29 U.S.C. § 160(b).

The portion of the Notice Posting Rule that effectively eliminates Congress' statute of limitations for filing an unfair labor practice charge as a penalty for failure to post the notice is incompatible with Section 10(b) of the NLRA, 29 U.S.C. § 160(b); 76 Fed. Reg. at 54,049. Section 10(b) states that "no complaint shall issue based upon any unfair labor practice occurring more than sixth months prior to the filing of the charge with the Board." 29 U.S.C. § 160(b). The only exception contemplated in the statute is for delay caused by an employee's service in the armed forces. *Id.*

Section 10(b) reflects Congress' policy judgment that a six-month statute of limitations is best suited to ensure industrial peace and stability, as it requires workplace disputes to be brought to a head in short order rather than over an extended period. *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 424-30 (1960); *Kelley v. NLRB*, 79 F.3d 1238, 1245-46 (1st Cir. 1996). The NLRB has no authority to ignore this congressional determination by issuing a blanket rule that permits the Board to waive Section 10(b)'s statute of limitations whenever a notice is not posted. *See* 76 Fed. Reg. at 54,049.

Courts have required the Board to strictly adhere to the limitations period. *See Local Lodge No. 1424; Precision Concrete v. NLRB*, 362 F.3d 847, 851-52 (D.C. Cir. 2004). As one court of appeals aptly noted under a different statutory scheme:

Statutes of limitations are not arbitrary obstacles to the vindication of just claims, and therefore they should not be given a grudging application. They protect

important social interests in certainty, accuracy, and repose. The statute of limitations is short in age discrimination cases as in most employment cases because the delay in bringing of suit runs up the employer's potential liability; every day is one more day of backpay entitlements. We should not trivialize the statute of limitations by promiscuous application of tolling doctrines.

*Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452-53 (7th Cir. 1990). In short, the Notice Posting Rule is unlawful because it effectively repeals the NLRA's statute of limitations as a sanction for not posting the Notice.

- E. The Notice Posting Rule Violates Section 706(2)(C) of the APA Because the NLRB Has No Power to Create an Unfair Labor Practice for Employers Who Fail to Post the NLRB-Specified Notice That Is Not Provided for by Congress in Section 8(a) of the NLRA, 29 U.S.C. § 158(a) and Which Is in Fact Prohibited by Section 8(c) of the NLRA, 29 U.S.C. § 158(c).

The Notice Posting Rule is also invalid because it exceeds the statutory limit that Congress imposed on the Board's authority in Section 8(c) of the NLRA, 29 U.S.C. § 158(c), which prohibits the Board from regulating expression absent a threat or promise of benefit. That provision states:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

*Id.* The Notice Posting Rule declares it to be both an unfair labor practice and evidence of additional unfair labor practices for an employer to fail to post the requisite notice.<sup>15</sup>

Because it is inconceivable that an employer *not* posting a notice communicates a "threat

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<sup>15</sup> See 76 Fed. Reg. at 54,031 (unfair labor practice to not post notice); 76 Fed. Reg. at 54,035 (failure to post notice evidence of unlawful motive in unfair labor practice case).

of reprisal or force or promise of benefit” to employees, the Notice Posting Rule is plainly invalid under Section 8(c).

Tellingly, the Board does not attempt to assert that every employer in the nation has been threatening or promising benefits to its employees for the past 76 years by not posting a notice. However, this is the absurd proposition one would have to accept in order for the Notice Posting Rule to pass muster under Section 8(c). Instead, the Board attempts to sidestep Section 8(c)’s limitations on its statutory authority in two ways, neither of which is persuasive.

First, the Board contends that employers, in posting a notice, will not be forced to “express[ ] any views, argument, or opinion” under Section 8(c), because they will merely be stating what the law requires. 76 Fed. Reg. at 54,012. This is both a *non sequitur* and incorrect. Foremost, the issue is not whether employers will violate Section 8(c) if they post the notice, but whether the Board can make it an unfair labor practice under Section 8(c) for employers *not* to express the views stated in the Notice. By sanctioning employers for not expressing themselves in the manner required by the Notice Posting Rule, the Board clearly implicates Section 8(c), because the right to speak and express opinions inherently connotes the right not to speak. *Cf. Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 797 (1988).

It is well-established that Section 8(c) covers and protects employers’ elective

statements regarding employee legal rights under the NLRA.<sup>16</sup> The Notice Posting Rule requires employers to express views and opinions regarding the NLRA that they otherwise would choose not to express. As the Board acknowledges, Plaintiffs and most other employers sharply disagree with its view about the issues they are compelled to communicate in the notice. *See* 76 Fed. Reg. at 54,018-54,026. This includes disagreement about which rights and unfair labor practices should be communicated to employees (if any), the proper scope of those rights and practices, and how to accurately describe them. *Id.* Plaintiffs and other employers also oppose the one-sided tenor of the notice. *See* 76 Fed. Reg. at 54,019 (“A significant number of comments, including those from many individuals, employers, and employer industry and interest groups, argue that the content of the notice is not balanced, and appears to promote unionization instead of employee freedom of association.”)

The Board itself recognizes the expressive nature of its mandatory notice by proclaiming that an employer’s refusal to post it constitutes an expression of anti-union animus in unfair labor practice proceedings, 76 Fed. Reg. at 54,036-54,037, and interferes with employees’ rights in violation of Section 8(a)(1) of the NLRA. 76 Fed. Reg. 54,031-54,033. This proclamation directly contradicts the Board’s assertions that its Rule is neutral and not a ruse “to encourage and spread unionism.” 76 Fed. Reg. at 54,007 n.9. If

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<sup>16</sup> *See, e.g., Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 974-76 (D.C. Cir. 1998) (employer informing employees how to exercise their right to decertification under the NLRA protected by Section 8(c)); *NLRB v. Transpersonnel, Inc.*, 349 F.3d 175, 184 (4th Cir. 2003) (same); *Lee Lumber & Bldg. Material Corp.*, 306 NLRB 408, 409-10 (1992) (same).

the Notice were truly balanced and neutral, as the Board proclaims, then why does a refusal to post it become an act of hostility to unions? The Board's notion that its Rule does not implicate the statutory limitations of Section 8(c) is baseless.

Second, the Board contends that Section 8(c) limits its authority no more than does the First Amendment, and thus the Notice Posting Rule satisfies Section 8(c) if it is constitutional. 76 Fed. Reg. at 54,013. The notion that Section 8(c) is equivalent to the First Amendment is belied by the statute's express terms, which preclude the Board from sanctioning "expression [that] contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). This limit is not identical to that imposed by the Constitution. To the extent that Section 8(c) was enacted to protect First Amendment values, the manner in which Congress chose to accomplish this objective was to allow *all* speech but make the existence of a "threat" or "promise of benefit" the decisive factor.

In fact, the Board's theory that Section 8(c) turns on a constitutional inquiry inverts congressional intent. Section 8(c) is a prophylactic measure intended to obviate the need for such constitutional inquiries, and not to require them, as the Board would have it. *Cf. U.S. Chamber of Commerce v. Brown*, 554 U.S. 60, 67-69 (2008).

*Brown* discusses at length Section 8(c)'s legislative history. As the Supreme Court explained, prior to the enactment of Section 8(c), whether Board orders offended the First Amendment was determined on a case-by-case basis by the courts. *Id.* at 67.

"Notwithstanding these decisions, the NLRB continued to regulate employer speech too

restrictively in the eyes of Congress.” *Id.* Consequently, Congress enacted Section 8(c) to ensure robust speech in labor relations and eliminate the need for constitutional determinations.

From one vantage, § 8(c) merely implements the First Amendment, in that it responded to particular constitutional rulings of the NLRB. But its enactment also manifested a congressional intent to encourage free debate on issues dividing labor and management. It is indicative of how important Congress deemed such free debate that Congress amended the NLRA rather than leaving to the courts the task of correcting the NLRB’s decisions on a case-by-case basis.

*Id.* at 67-68 (internal quotation and citations omitted).<sup>17</sup>

The Board’s theory that the First Amendment dictates the scope of Section 8(c) turns this legislative purpose on its head, as the theory *requires* the Board and courts to perform a constitutional analysis in each case to determine compliance with Section 8(c). This defies Congress’ desire to impose limits on the Board’s authority *greater* than the constitutional minimums, in order to preclude such “case-by-case” constitutional analyses and ensure “uninhibited, robust, and wide-open debate in labor disputes.” *Id.* (citation omitted). Most importantly, the Board’s theory defies the plain language of Section 8(c), which makes the existence of “a threat of reprisal or force or promise of benefit” the dispositive matter. “There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its

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<sup>17</sup> The Board misrepresents *Brown* by quoting only its statement that “§ 8(c) merely implements the First Amendment,” 76 Fed. Reg. at 54,013 (*Brown*, 554 U.S. at 69), while conveniently omitting the qualifier “in that it responded to particular constitutional rulings of the NLRB.” Taken in context, the Court was not stating that Section 8(c) bars no more than the First Amendment.

wishes.” *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (citation omitted).

Finally, the Board’s reliance on *UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003) is misplaced, as that decision supports Plaintiffs’ position. 76 Fed. Reg. at 54,013. The issue in *Chao* was whether an Executive Order requiring notice postings by federal contractors was preempted by the NLRA. Unions challenging the Executive Order argued that employers had a protected right under Section 8(c) to not post the notice. *Id.* at 364-65. The D.C. Circuit correctly rejected that argument because Section 8(c) limits the scope of only the NLRA. *Id.* at 365. “[T]he activities described in § 8(c) do not ‘constitute an unfair labor practice,’ except by negation, and are not ‘protected by’ the NLRA, *except from the NLRA itself.*” *Id.* (citation omitted, emphasis added). Thus, Section 8(c) does not give employers a right to refrain from posting notices required by laws *other than* the NLRA. *Id.*

*Chao* supports Plaintiffs’ position that Section 8(c) precludes the Board from making it an unfair labor practice to refrain from posting a notice. As the Court stated, “§ 8(c) works to *negate* an unfair labor practice claim against an employer posting a notice.” *Id.* (emphasis in original).<sup>18</sup> So too here, Section 8(c) serves to negate the Board’s proclamation in its Notice Posting Rule that it is an unfair labor practice and proof of anti-union animus for an employer to not communicate the message contained in the notice.

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<sup>18</sup> *Chao* also recognized that Section 8(c) may include the “right not to speak,” given that “the First Amendment includes not only the right to speak, but also the right not to speak.” *Id.*

F. The Notice Posting Rule Violates the First Amendment.

It is well-established that the government infringes on First Amendment rights when it compels entities to disseminate a message on their property against their will. *See Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1 (1986) (unconstitutional for state agency to require that a utility company include a third-party newsletter in its billing envelope); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (unconstitutional to compel newspapers to publish articles by certain candidates); *Wooley*, 430 U.S. at 714 (unconstitutional to require that citizens display a certain slogan on their vehicles' license plates); *cf. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 577-78 (1995) (unconstitutional for state law to require that parade organizers include group whose message the parade organizers do not wish to associate with). “For corporations as for individuals, the choice to speak includes within it the choice of what not to say.” *Pacific Gas*, 475 U.S. at 16 (quoting *Tornillo*, 418 U.S. at 258).

The Notice Posting Rule compels Plaintiffs to post on their properties a notice that contains certain views about the NLRA with which Plaintiffs and other employers disagree. *See* 76 Fed. Reg. at 54,018-54,026 (numerous employer objections to the content and accuracy of the notice). Indeed, the Board itself recognizes the expressive nature of its mandatory notice by finding that a refusal to post it constitutes anti-union animus, 76 Fed. Reg. at 54,036-54,037, which, of necessity, makes posting the notice a tacit expression of support for unionization. By forcing Plaintiffs to disseminate these messages on their

property and against their will, the Board infringes on their First Amendment rights to refrain from supporting and associating with that message.<sup>19</sup>

The Notice Posting Rule can only survive constitutional scrutiny if it is “a narrowly tailored means of serving a compelling state interest.” *Pacific Gas*, 475 U.S. at 19. This Rule cannot survive strict scrutiny, or even rational-basis review, because no government interest whatsoever supports it. The Board lacks the statutory authority to issue the Rule, and thus has no cognizable grounds for impairing Plaintiffs’ First Amendment rights.<sup>20</sup>

The Rule is therefore unconstitutional.

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<sup>19</sup> If the NLRB believes that millions of workers are ignorant of their rights and are thereby disenfranchised, it should redirect and refocus its existing public outreach activities to them. See [www.nlr.gov](http://www.nlr.gov), the NLRB’s official website. Indeed, in suspending the effective date of the Notice Posting Rule from November 14, 2011 until January 31, 2012, the NLRB claims to be doing “education and public outreach,” to teach employers about their obligation to post the notice. <http://www.nlr.gov/news/posting-employee-rights-notice-now-required-jan-31-board-postpones-deadline-allow-further-educa> (last accessed Oct. 5, 2011). Yet the Board has done no “education and public outreach” to teach employees about the rights which their employers are now ordered to post on behalf of the NLRB.

<sup>20</sup> The Board contends that its rule is constitutional because a mandatory notice required by the Secretary of Labor was upheld. 76 Fed. Reg. 54,012 (citing *Lake Butler Apparel Co. v. Sec’ of Labor*, 519 F.2d 84, 89 (5th Cir. 1984)). But that notice posting, unlike here, was lawfully required pursuant to the Occupational Safety and Health Act, and thus was supported by a cognizable government interest. See *Lake Butler*, 519 F.2d at 89 (employer’s objection “cannot justify his refusal to post a notice Congress thought to be essential”). Here, the Board lacks the statutory authority under the NLRA to require the notice posting. Accordingly, no cognizable government interest justifies the infringement on Plaintiffs’ First Amendment rights caused by the Notice Posting Rule.

## CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment should be granted.

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