IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF MANUFACTURERS, et al., Plaintiffs, v. NATIONAL LABOR RELATIONS BOARD, et al., Defendants	Case No. 11-cv-01629 Judge Amy Berman Jackson

DEFENDANTS' MEMORANDUM IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS PLAINTIFFS NAM/CDW'S AMENDED COMPLAINT'S FIFTH CAUSE OF ACTION

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INTRODUCTION

In this consolidated proceeding, the National Association of Manufacturers, *et al*. ("NAM"), are challenging a rule issued by the National Labor Relations Board ("NLRB" or "the Board"), which imposes a duty on employers subject to its jurisdiction to post a designated notice entitled, "Employee Rights Under the National Labor Relations Act," ("NLRA" or "the Act").[1] The publication of this rule corrects a long-standing anomaly; until now, the Board has been almost unique among agencies and departments administering major Federal labor and employment laws in not requiring covered employers to routinely post notices at their workplaces informing employees of their statutory rights and the means by which to remedy violations of those rights.

As demonstrated by the Board's arguments below and the comprehensive Administrative Record[2] and Final Rule, the Board is entitled to summary judgment on Plaintiffs' Administrative Procedure Act ("APA") claims. The Board is also entitled to dismissal under Federal Rule of Civil Procedure 12(b)(1) of NAM's and the Coalition for a Democratic Workplace's (referred to collectively as "NAM") Fifth Cause of Action in its Amended Complaint (Docket #11). As shown below, no jurisdiction exists to hear NAM's allegations based on *Leedom v. Kyne*.[3]

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[1] Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006 (August 30, 2011) (to be codified at 29 C.F.R. pt. 104) ("Final Rule").

[2] Due to technical difficulties, preparation of the administrative record has been delayed but we anticipate filing the record shortly.

[3] 358 U.S. 184 (1958); *see* NAM's Amended Complaint (Docket # 11), Fifth Cause of Action.

STATEMENT OF FACTS

On December 22, 2010, the Board (Member Hayes, dissenting) issued a Notice of Proposed Rulemaking in which it sought comment on a regulation that would require employers subject to the National Labor Relations Act,[4] to "post notices informing their employees of their rights as employees under the NLRA."[5] In response, the Board received approximately 7,000 public comments.[6] On August 30, 2011, the Board published the Final Rule (Member Hayes, dissenting) setting forth the Board's review of and response to comments on the proposal and incorporating some changes suggested by commenters.[7] Thereafter, on October 12, 2011, the Board amended the Final Rule to change the effective date from November 14, 2011 to January 31, 2012.[8]

In the interim, challenges to the Final Rule were filed by Plaintiff NAM by complaint and amended complaint on September 8 and 23, 2011, and by Plaintiffs National Right to Work Legal Defense and Education Foundation, Inc. *et al.* (collectively referred to as "NRTW") by complaint on September 16, 2011 (in Case No. 1:11-cv-01683), including for declaratory and injunctive relief. Thereafter, on September 27, 2011, Plaintiffs NAM/CDW filed a motion for preliminary injunction, and, on September 28, 2011, Plaintiffs NRTW/NFIB filed its motion for preliminary injunction and a separate motion to consolidate (to which all the parties concurred). After a status conference, the cases were consolidated on October 4, 2011. On October 5, 2011,

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[4] 29 U.S.C. § 151 et seq.

[5] Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act, 75 Fed. Reg. 80,410 (December 22, 2010).

[6] 76 Fed. Reg. 54,006, 54,007 (August 30, 2011).

[7] *Id.* at 54,006, 54,046 – 54,050.

[8] 76 Fed. Reg. 63188 (October 12, 2011).

based on the delay of the effective date of the Final Rule, the Plaintiffs' motions for preliminary injunction were denied as moot. On October 7, 2011, the Court approved the parties' agreed-upon proposed summary judgment briefing schedule, providing for cross-motions for summary judgment to be filed on or before October 26, 2011 and oppositions to those motions to be due on or before November 22, 2011. Hearing on these motions is scheduled for December 19, 2011.

ARGUMENT

I. Standard of Review

Where, as here, Plaintiffs' claims involve a review of a final agency action under the APA, the governing summary judgment standard reflects the limited role this Court has in reviewing the agency's administrative record.[9] "Under the APA, it is the role of the agency to resolve factual issues to arrive at a decision that is supported by the administrative record," and "'the function of the district court is to determine whether, as a matter of law, the evidence in the administrative record permitted the agency to make the decision it did.'"[10] Under the APA sections cited to herein, a court may set aside agency action where it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,"[11] and where it is "in excess of statutory jurisdiction, authority, or limitations or short of statutory right."[12] The Supreme Court has emphasized that, "The scope of review under the 'arbitrary and capricious' standard is

[9] *See Cottage Health Sys v. Sebelius*, 631 F. Supp. 2d 80, 89-90 (D.D.C. 2009).

[10] *Id.* (internal quotations omitted); s*ee Richard v. INS*, 554 F.2d 1173, 1174 & n.28 (D.C. Cir. 1977).

[11] 5 U.S.C. § 706(2)(A) (NAM Amended Complaint ¶¶ 20, 56).

[12] 5 U.S.C. § 706(2)(C) (NAM Amended Complaint ¶¶ 20, 27, 34, 44, 56; NRTW Complaint ¶ 16).

narrow and a court is not to substitute its judgment for that of the agency."[13] Similarly, the D.C. Circuit has explained that the arbitrary and capricious standard is "highly deferential" and that it "'presumes the validity of agency action.' "[14] Thus, a court "must uphold an agency's action where it has considered the relevant factors and articulated a rational connection between the facts found and the choice made."[15] Where the agency has articulated such a rational connection, a court will not substitute its judgment for that of the agency.[16] See also discussion in Section II, regarding the substantial deference owed to an agency's exercise of its statutory authority.

A Rule 12(b)(1) motion for dismissal presents a threshold challenge to a court's jurisdiction.[17] On a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), the plaintiff bears the burden of establishing that the court has jurisdiction.[18] And in evaluating a motion to dismiss, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."[19]

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[13] *Motor Vehicles Mfrs. Ass'n of U.S., Inc., v. State Farm Mut. Ins. Co*., 463 U.S. 29, 43 (1983) ("*State Farm*").

[14] *City of Portland v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007) (quoting *Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1228 (D.C.Cir.2007)).

[15] *City of Portland*, 507 F.3d at 713 (internal quotation marks omitted).

[16] *State Farm*, 463 U.S. 29, 43 (1983).

[17] *Haase v. Sessions*, 835 F.2d 902, 906 (D.C.Cir.1987).

[18] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

[19] *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009); *see also National Postal Prof. Nurses v. U.S. Postal Serv*., 461 F. Supp. 2d 24, 28 (D.D.C. 2006).

II. The Board's Rule Requiring Employers to Post a Notice of Employee Rights Is a Reasonable Exercise of the Board's Statutory Authority

Plaintiffs' APA challenge to the Board's notice-posting rule should be rejected because the Final Rule is a proper exercise of the Board's substantive rulemaking authority under Section 6 of the NLRA,[20] and alternatively, is a valid exercise of the Board's authority under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[21] to fill a statutory gap. The Final Rule is accompanied by a well-reasoned and comprehensive explanation that provides a rational connection between the facts found by the Board and the regulatory choices it made. In particular, the Board's conclusion that employers have a duty to post an official government notice outlining basic NLRA rights and that the failure to perform that duty is an interference with NLRA rights under Section 8(a)(1)[22] is a reasoned exercise of the Board's recognized authority to adapt the Act "to changing patterns of industrial life."[23] In addition, the Board's conclusion that an employer's failure to post the required notice may, in appropriate circumstances, warrant the equitable tolling of the NLRA's six-month statute of limitations is in accord with equitable tolling principles long applied by courts and agencies.

A. The Final Rule Is Within the Board's Substantive Rulemaking And Statutory Gap-Filling Powers.

Section 6 of the NLRA gives the Board "broad rulemaking authority,"[24] to promulgate regulations that the Board deems "necessary to carry out the provisions of [the Act]."[25] "Where

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[20] 29 U.S.C. § 156.

[21] 467 U.S. 837 (1984).

[22] 29 U.S.C. § 158(a)(1). *See* discussion *infra*, pp. 33-36.

[23] *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975*) ("Weingarten").*

[24] *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 613 (1991)("*AHA*").

the empowering provision of a statute states simply that the agency may 'make. . . such rules and regulations as may be necessary to carry out the provisions of this Act,' . . . the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'"[26] In light of Congress's express conferral of legislative rulemaking authority in Section 6 and the substantial deference owed to the Board's determination of necessity under that provision,[27] the Board's regulations must be upheld under *Mourning* because they are "reasonably related" to the purposes of the NLRA. Alternatively, this Court may review the Board's regulations under the equally deferential standard established in *Chevron.*[28] The Supreme Court has remarked that "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[29] Under the familiar test articulated by the Supreme Court in *Chevron*, this Court must defer to the Board's permissible and reasonable interpretation of a statutory gap left by Congress in the NLRA.

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[25] 29 U.S.C. § 156.

[26] *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 369 (1973) (citation and footnote omitted; first omission in original); *cf. U.S. v. Comstock*, 130 S. Ct. 1949, 1956-57 (2010) (noting the breadth of the Constitution's Necessary and Proper Clause, which grants Congress the authority to enact a statute if it is "a means that is rationally related to the implementation of a constitutionally enumerated power.")

[27] *See Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 86 (2002); *see also Weingarten*, 420 U.S. at 266.

[28] 467 U.S. 837 (1984); *see Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 714 (2011) (explaining that the Court has applied *Chevron* deference to rules promulgated by administrative agencies with rulemaking authority expressed in general terms like Section 6).

[29] *Morton v. Ruiz*, 415 U.S. 199, 231 (1974), *quoted in Chevron*, 467 U.S. at 843.

Because the Board's rule here reasonably fills such a gap, the regulation also passes muster under *Chevron*.

We show below that the Board's notice-posting rule is a legitimate exercise of both legislative rulemaking authority under *Mourning* and implied gap-filling authority under *Chevron*.

1. The Regulation at Issue in This Case is Reasonably Related to the Purposes of the Act.

The National Labor Relations Act reflects Congress's determination that substantial burdens on commerce are caused by certain employer and labor union practices as well as by the inherent "inequality of bargaining power between employees . . . and employers."[30] To address these problems, Congress chose to "encourag[e] the practice and procedure of collective bargaining" and to "protect[] the exercise of workers of full freedom of association, self-organization, and designation of representatives of their own choosing."[31] The operative provisions of the Act give effect to these dual purposes. Thus, Section 7 sets forth the core rights of employees "to self-organization"; "to form, join, or assist labor organizations"; "to bargain collectively"; and "to engage in other concerted activities," even in the nonunion setting; as well as the right "to refrain from any or all such activities."[32] Section 8, in turn, defines and prohibits

[30] 29 U.S.C. § 151.

[31] *Id.*

[32] *Id.* § 157. More completely, Section 7 states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities . . . .

union and employer "unfair labor practices" that infringe on employees' Section 7 rights,[33] while Section 10 authorizes the Board to adjudicate unfair labor practice claims, subject to a six-month statute of limitations.[34] Finally, Section 9 authorizes the Board to conduct representation elections and issue certifications.[35]

The Final Rule gives effect to the Board's reasonable judgment that the full and free exercise of NLRA rights depends on employees knowing that those rights exist and that the Board protects those rights. That need arises in part because the NLRA does not give the Board or its General Counsel roving investigatory powers. Although Section 10 of the Act specifically empowers the Board to "prevent" unfair labor practices,[36] "[t]he Board may not act until an unfair labor practice charge is filed . . . alleging a violation of the Act."[37] In addition, union election "procedures are set in motion with the filing of a representation petition."[38] In both instances, the initiating document is filed by a private party.[39] Therefore, the existence of statutory employees who are not only aware of their rights but also know where they may seek to vindicate them within appropriate timeframes is crucial to enforcement of the Act and effectuation of Congress's national labor policy.

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[33] *Id.* § 158.

[34] *Id.* § 160.

[35] *Id.* § 159.

[36] *Id.* § 160(a).

[37] 2 The Developing Labor Law 2683 (John E. Higgins, Jr. ed., 5th ed. 2006).

[38] *Id.* at 2662.

[39] *Id.* at 2683 (citing 29 C.F.R. §102.9); *id.* at 2662-63 (citing 29 U.S.C. § 159(c)(1)(A), (B), and (e)(1)).

The regulation at issue in this case furthers the Act's purposes by informing employees of both the Act's core protections and the Board's processes. As the Board noted, notices of workplace rights are commonly required to be posted in the workplace and the Board stands almost alone in not having a similar requirement. The Final Rule addresses this anomaly by requiring employers to post in the workplace an official Board notice reciting employee rights under Section 7 and examples of employer and labor union misconduct prohibited by Section 8. The notice also informs employees how to contact the Board for additional information or to report a violation of the Act. The regulatory mandate to post this notice reflects the Board's sensible determination that the NLRA's twin purposes of "encouraging the practice and procedure of collective bargaining" and "protecting the exercise of workers of full freedom of association, self-organization, and designation of representatives of their own choosing,"[40] are furthered by this new requirement. As the Board noted, a similar conclusion was reached by the Department of Labor over sixty years ago when it promulgated a regulation requiring employers to post a workplace notice pursuant to the Fair Labor Standards Act ("FLSA").[41] Consistent with the views of the scholars who first urged the Board to consider adopting this kind of posting requirement,[42] the administrative record contains unrebutted studies and numerous comments

[40] 29 U.S.C. § 151.

[41] *See* 14 Fed. Reg. 7516, 7516 (Dec. 16, 1949) (finding that "effective enforcement of the [FLSA] depends to a great extent upon knowledge on the part of covered employees of the provisions of the act and the applicability of such provisions to them").

[42] *See* 76 Fed. Reg. at 54,006 (citing Peter D. 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, 433-34 (1995); Charles J. Morris, *Renaissance at the NLRB—Opportunity and Prospect for Non-Legislative Procedural Reform at the Labor Board*, 23 Stetson L. Rev. 101, 107 (1993); and Charles J. 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)).

(discussed below at pp. 30-31) confirming the reasonableness of the Board's conclusion that there is a significant lack of public awareness of the NLRA's protections and procedures. Therefore, given the critical link between employees' timely awareness of their NLRA rights and the fulfillment of the Act's objectives, the Board's decision to require the posting of an informational notice in the workplace is, at the very least, "reasonably related" to the purposes of the Act as required by *Mourning*.

The notice-posting requirement imposes no onerous burden on employers, many of whom are already subject to similar requirements under various federal, state, and local workplace laws.[43] The Board emphasizes that all an employer must do to comply with the regulation is simply post copies of the notice, which the Board provides free of charge, "in conspicuous places where they are readily seen by employees,"[44] and "on an intranet or internet site if the employer customarily communicates with its employees about personnel rules or policies by such means."[45] In light of the minimal obligations imposed by the rule, the Board has estimated that the average employer will incur compliance costs of less than $70 during the first year the rule is in effect and that these costs "will decrease dramatically in subsequent

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[43] *See Mourning*, 411 U.S. at 371 (measuring the benefits and burdens of a challenged regulation). In prior litigation involving a Department of Labor regulation requiring federal contractors to post a notice highlighting to employees' their right to refrain from certain NLRA conduct, Plaintiff NRTW agreed that "[n]o 'burden' is imposed upon employers by requiring a notice posting"). Brief for NRTW as Amicus Curiae Supporting Appellants, *UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003) (No. 02-5080), 2002 WL 34244401 at *4. Indeed, NRTW heralded the regulation because it "guarantee[d] that employees are provided with the basic information to exercise their rights under the Act. This outcome is not only permissible under the Act but will substantially advance the policies of the Act." *Id.* at ** 11-12 (citation omitted). NRTW's forceful support for the DOL regulation makes its opposition to the current rule puzzling.

[44] 76 Fed. Reg. at 54,046 (to be codified at 29 C.F.R. § 104.202(d)).

[45] *Id.* at 54,047 (to be codified at § 104.202(f)).

years."[46] Placing the principal responsibility for disseminating relevant information on the employer, rather than leaving to each employee the task of familiarizing herself with the Act's provisions, is especially reasonable in light of these minimal compliance costs. Furthermore, this requirement is made all the more reasonable by the fact that the workplace is "the location where [employees] are most likely to hear about their other employment rights."[47]

Therefore, because the Board's regulation is "reasonably related to the purposes of the enabling legislation,"[48] and does not unduly burden the targets of the regulation, this Court should uphold the rule as a valid exercise of the NLRB's "broad rulemaking authority,"[49] under Section 6.

2. The Regulation at Issue in This Case Reasonably Fills a Statutory Gap Left by Congress in the NLRA.

Besides the rule's reasonable relationship to the purposes of the Act, which alone is sufficient to uphold the regulations under *Mourning*, the notice posting requirement also properly fills a *Chevron*-type gap in the NLRA's statutory scheme. *Chevron* instructs courts to conduct a two-step inquiry when "review[ing] an agency's construction of the statute which it administers."[50] Under the first step, the court's task is to "employ[] traditional tools of statutory

[46] *See* 76 Fed. Reg. at 54,042 & n.190.

[47] *Id.* at 54,017; *see also Lake Butler Apparel Co. v. Sec'y of Labor*, 519 F.2d 84, 89 (5th Cir. 1975) (declaring it "obvious" that an administrative agency may "require that [a notice of employee rights] be posted in a place that would be obvious to the intended beneficiaries"); *cf. Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978) ("[T]he plant is a particularly appropriate place for the distribution of [NLRA] material.").

[48] *Mourning*, 411 U.S. at 369.

[49] *AHA*, 499 U.S. at 613.

[50] 467 U.S. at 842.

construction" to determine "whether Congress has directly spoken to the precise question at issue."[51] And where "the statute is silent or ambiguous with respect to the specific issue, the [next] question for the court is whether the agency's answer is based on a permissible construction of the statute."[52] As shown below, Congress has not "directly spoken to the precise question at issue"—that is, notification of employee rights under the NLRA—and the Board has adopted a reasonable construction that fills this important gap in the Act's statutory scheme.

The traditional tools of statutory construction, which operate at *Chevron* step one, call for an examination of "the language of the statute" in light of the "provisions of the whole law, . . . [including its] object and policy."[53] As discussed above, fulfillment of the Act's objectives and policies depends in large measure on the private initiative of employees to exercise their rights under Section 7 and to commence Board representation proceedings pursuant to Section 9 and Board unfair labor practice proceedings pursuant to Sections 8 and 10. The effective working of the NLRA's administrative machinery therefore presupposes that workers have knowledge of the rights afforded by the statute and the means for their timely enforcement. The statute, however, has no provision with respect to making that knowledge available, a subject about which the statute is completely silent. In addition, as the Board noted in the Final Rule, there is no suggestion in the legislative history of the NLRA or any of the subsequent amendments thereto that Congress "had considered and rejected inserting such a requirement into the Act."[54] In

[51] *Id.*

[52] *Id.* at 843.

[53] *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 35 (1990).

[54] 76 Fed. Reg. 54,013. In this respect, the *Chevron* issue presented to the Court here is unlike that presented in *NLRB v. Financial Institution Employees of America*, 475 U.S. 192 (1986) and *Railway Labor Executives Ass'n v. NMB*, 29 F.3d 655 (D.C. Cir. 1994) (en banc). In both cases,

short, the tools of statutory construction reveal that "Congress has not directly addressed the precise question at issue."[55]

Because "the statute is silent . . . with respect to the specific issue," it is necessary to proceed to *Chevron* step two, which requires this Court to uphold the Board's rule so long as it is "based on a permissible construction of the statute."[56] In circumstances where, as here, "the legislative delegation to an agency on a particular question is implicit rather than explicit,"[57] then "all [a court] must decide is whether . . . the agency empowered to administer the [statute] has filled the statutory gap 'in a way that is *reasonable* in light of the legislature's revealed design.'"[58] Indeed, this Court "need not conclude that the agency construction was the only one it permissibly could have adopted."[59] Nor does this Court need to conclude that it is "the best

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relevant legislative history showed that "Congress ha[d] expressly declined to prescribe" measures like those ultimately adopted by the agencies. 475 U.S. at 204 n.11; *see* 29 F.3d at 667-68.

[55] *Chevron*, 467 U.S. at 842.

[56] *Id.* at 843.

[57] *Id.* at 844.

[58] *Lopez v. Davis*, 531 U.S. 230, 242 (2001) (emphasis added) (quoting *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995)).

[59] *Rust v. Sullivan*, 500 U.S. 173, 184 (1991) (quoting *Chevron*, 467 U.S. at 843 n. 11); *see also Northpoint Technology v. Fed. Commc'n Comm'n*, 414 F.3d 61, 69 (D.C. Cir. 2005).

interpretation of the statute,"[60] nor even that it is the "most natural one."[61] The agency's view is deemed to be reasonable so long as it is not "flatly contradicted" by plain language.[62]

Plaintiffs, on the other hand, bear a daunting burden in showing that the Board's interpretation of the NLRA is not entitled to deference. It is not enough for the Plaintiffs to argue that the words of the statute "support" their view,[63] or that their interpretation is a "plausible" one,[64] or that their view is "consistent with accepted cannons of construction."[65] Rather, they must show that its reading of the statute is the "inevitable one,"[66] because Congress made a deliberate decision to "compel" the result they urge,[67] in terms so "unambiguously manifest,"[68] that the statutory language "cannot bear the interpretation adopted by the [agency]."[69] Plaintiffs have not—and can not—satisfy this exacting standard because, as shown below, the Board's rule constitutes an entirely "reasonable" construction of the Act.

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[60] *United States v. Haggar Apparel Co.*, 526 U.S. 380, 394 (1999) (quoting *Atl. Mut. Ins. Co. v. Comm'r of Internal Revenue*, 523 U.S. 382, 389 (1998)).

[61] *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 702 (1991).

[62] *Dep't of the Treasury v. Fed. Labor Relations Auth.*, 494 U.S. 922, 928 (1990).

[63] *Auer v. Robbins*, 519 U.S. 452, 457 (1997).

[64] *Reno v. Koray*, 515 U.S. 50, 62 (1995).

[65] *Pauley*, 501 U.S. at 702.

[66] *Regions Hosp. v. Shalala*, 522 U.S. 450, 460 (1998).

[67] *Auer*, 519 U.S. at 458.

[68] *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 703 (1995).

[69] *Sullivan v. Everhart*, 494 U.S. 83, 92 (1990).

In *Continental Air Lines, Inc. v. Department of Transportation*,[70] the D.C. Circuit specifically explained how to measure whether an agency's interpretation is reasonable within the meaning of *Chevron* step two:

> "Reasonableness" in this context means . . . the compatibility of the agency's interpretation with the policy goals . . . or objectives of Congress. To say, however, that the agency's interpretation must be "compatible" with Congressional purposes is, again, not to say that the agency must identify a single, overarching statutory purpose and strive to interpret the statute in such a way that best promotes that purpose. To state the obvious, "compatibility" is a considerably less exacting standard.[71]

The Court of Appeals further elaborated, explaining that an agency interpretation that is "'not particularly compelling'" is still reasonable if, "at the same time it [is] 'not patently inconsistent with the statutory scheme.'"[72]

Given the close nexus between employees' awareness of their NLRA rights and the realization of the Act's objectives through the exercise of its various provisions, the Board's rule requiring employers to post the informational notice at issue in this case satisfies *Chevron*'s "reasonableness" standard because such a gap-filling requirement is wholly "compatible . . . with the policy goals . . . or objectives" of the NLRA.[73] At the very least, the rule is "'not patently inconsistent with the statutory scheme.'"[74] Therefore, because the Board's regulation constitutes

[70] 843 F.2d 1444 (D.C. Cir. 1988).

[71] *Id.* at 1452.

[72] *Id.* (quoting *Rettig v. PBGC*, 744 F.2d 133, 152 (D.C. Cir. 1984)).

[73] *Id.*

[74] *Id.* (quoting *Rettig*, 744 F.2d at 152).

a "'reasonable interpretation' of the enacted text,"[75] *Chevron* supplies an additional basis on which this Court may uphold the rule.[76]

B. The Board Reasonably Rejected Arguments of the Opponents of the Rule that the Board Lacks Authority to Impose and Enforce a Notice-Posting Requirement.

During the rulemaking proceeding, opponents of the Board's proposed rule advanced a number of arguments challenging the Board's statutory authority to promulgate the notice-posting rule. The Board reasonably rejected those arguments.

1. The Board Reasonably Concluded That the Final Rule is Permissible Notwithstanding the Lack of Express Statutory Authorization for the New Notice-Posting Requirement.

One of the major arguments advanced against the rule at issue was that the Board is statutorily prohibited from promulgating the rule under review simply because the Act does not expressly authorize an informational notice-posting requirement. Opponents of the rule pointed to the Railway Labor Act as an example of a federal statute that contains an express notice-

[75] *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 714 (2011) (quoting *Chevron*, 467 U.S. at 844).

[76] NAM makes a cursory claim that the Board is without the statutory authority to order the notice to be electronically posted if employers customarily communicate with their employees about personnel issues in that manner. NAM Amended Complaint at 10 (Prayer for Relief, § D). However, in their amended complaint, NAM cites no statutory basis which would prohibit the Board, assuming that it has the statutory authority to order the posting in the first instance, from ordering that the notice be posted electronically. *See* 76 Fed. Reg. at 54,047 (to be codified at 29 C.F.R. § 104.202(f)). The Board already requires its remedial notices to be posted electronically, noting the "increasing reliance on electronic communication and the attendant decrease in the prominence of paper notices and physical bulletin boards." *J. Picini Flooring*, 356 NLRB No. 9, slip op. at 3 (2010). And as explained in the preamble to the Final Rule, although other notice-posting statutes and regulations do not require electronic notice, they generally predate the routine use of electronic communications in the workplace. 76 Fed. Reg. at 54,029. Nor do the choices of other agencies regarding electronic posting restrict this Agency's statutory authority to adapt the Act "to changing patterns of industrial life." *Weingarten*, 420 U.S. at 266.

posting requirement and argued that because such a provision is absent from the NLRA this must mean that Congress intended to deny the Board the power to implement one.[77]

In rejecting these arguments, the Board reasonably pointed out that they fail adequately to take account of the scope of the Board's "broad rulemaking authority," as described by the Supreme Court in *AHA*.[78] In that case, the Supreme Court examined "the structure and the policy of the NLRA" to reach the following conclusion:

> As a matter of statutory drafting, if Congress had intended to curtail in a particular area the broad rulemaking authority granted in § 6, we would have expected it to do so in language *expressly describing an exception from that section* or at least referring specifically to the section.[79]

The Court could not have been clearer that unless the Board has been "expressly" limited in some manner, Section 6 empowers the Board to make "such rules and regulations as may be necessary to carry out the provisions of [the Act]."[80] No such limitation was found in *AHA*, and there is no such limitation here. By attacking the Board's rule on the basis that the NLRA does not expressly authorize a notice-posting requirement, the opponents turn *AHA* completely on its head.

The opponents' argument also turns *Chevron* on its head. *Chevron* would be meaningless if a regulation's validity depended on whether the enabling statute expressly mandated the agency's regulatory choice. *Chevron* also supports the reasonableness of the Board's rejection of the argument that Congress' inclusion of a notice posting requirement in the Railway Labor Act,

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[77] 76 Fed. Reg. at 54,013.

[78] *See supra*, n. 24, 499 U.S. at 613.

[79] *Id.* (emphasis added).

[80] 29 U.S.C. § 156.

which predates the NLRA, compels an inference that the omission of a similar requirement in the NLRA was an expression of a deliberate choice by Congress that the Board is not free to alter. As the Board noted in the Final Rule, there are many possible reasons why Congress did not include an express notice-posting provision in the NLRA.[81] "Perhaps that body consciously desired the [agency] to strike the balance at this level . . . ; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question . . . ."[82] But, "[f]or judicial purposes, it matters not which of these things occurred."[83] Indeed, the central premise behind *Chevron* and its progeny is that agencies should be allowed reasonable latitude to fill gaps arising from congressional silence or ambiguity.[84] Accordingly, "the contrast between Congress's mandate in one context with its silence in another suggests not a prohibition but simply a decision *not to mandate* any solution in the second context, i.e., to leave the question to agency discretion."[85]

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[81] 76 Fed. Reg. at 54,013.

[82] *Chevron*, 467 U.S. at 865.

[83] *Id.*

[84] *See Tex. Mun. Power Agency v. EPA*, 89 F.3d 858, 569 (D.C. Cir 1996) (noting that, under *Chevron*, "a silent statute cannot preclude its reasonable interpretation by the agency that administers it").

[85] *Cheney R.R. Co. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990) (labeling the *expressio unius est exclusio alterius* canon "an especially feeble helper" in *Chevron* cases). In addition, as the Board observed, given that "[t]he fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis of the National Labor Relations Act," it is no surprise that provisions and concepts contained in the RLA are not mirrored in the NLRA. *Bhd. of R.R. Trainmen v. Chi. River & Ind. R.R. Co.*, 353 U.S. 30, 31 n.2 (1957) (noting that "[t]he relationship of labor and management in the railroad industry has developed on a pattern different from other industries"); *see also Trans World Airlines v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426, 439 (1989) (noting "the many differences between the statutory schemes" of the NLRA and the Railway Labor Act).

In concluding it possessed the requisite authority to mandate the same kind of workplace notice common under other workplace statutes, the Board reasonably relied on the longstanding administrative precedent of the Department of Labor's promulgation of a notice-posting requirement through rulemaking despite Congress's failure to mandate such a requirement in the enabling act. Like the NLRA, the Fair Labor Standards Act ("FLSA") does not contain a provision expressly requiring employers to post a notice of pertinent employee rights. Yet, the Department of Labor, pursuant to the FLSA's recordkeeping requirements and its authority to promulgate regulations to enforce those requirements (29 U.S.C. § 211(c)), adopted a notice requirement that employers must follow.[86] The Board is unaware of any challenge to the Labor Department's authority to promulgate or enforce the FLSA notice requirement, which has been in effect for over 60 years.[87] A statute's lack of an express provision requiring employers to post a notice in their workplaces does not prevent the administering agency from promulgating such a requirement through regulation when there is other statutory authority.[88]

Nor was the Board arbitrary or capricious in rejecting the argument that it has no authority to administer the Act or promote its purposes unless a representation petition or unfair labor practice charge has been filed under Sections 9 or 10, respectively. As the Board explained, that view ignores the breadth of the Board's rulemaking authority under Section 6.

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[86] *See* 29 C.F.R. § 516.4 (2010).

[87] *See* 14 Fed. Reg. 7516 (Dec. 16, 1949) (promulgating 29 C.F.R. § 516.18, the predecessor to 29 C.F.R. § 516.4). Opponents of the rule attempted to distinguish the FLSA notice-posting requirement on the basis that the FLSA contains a "mandatory recordkeeping provision," *see* 29 U.S.C. § 211(c), whereas the NLRA does not. 76 Fed. Reg. at 54,013. Why the opponents assumed that the absence of a similar record keeping requirement in the NLRA is a bar to the Board's new rule is not apparent.

[88] *See, e.g.*, 29 U.S.C. § 156 (NLRA); *id.* at § 211(c) (FLSA).

Obviously, the Board cannot issue certifications or unfair labor practice orders via rulemaking proceedings. But that is not what this rule does. As the Board explained, by promulgating the notice-posting rule, the Board is taking a modest step, authorized by Section 6, that is "necessary to carry out the provisions of [the Act]," and that also properly fills a statutory gap left by Congress in the NLRA.[89]

In this regard, the Board correctly observed that Sections 9 and 10 are not rigid restraints on the Board's ability to act and indeed that its authority to administer the Act is not strictly limited to those means specifically set forth in the NLRA. Rather, as the Supreme Court has recognized, the NLRA impliedly authorizes the Board to take a variety of appropriate measures "to prevent frustration of the purposes of the Act."[90] By way of example, the Supreme Court pointed out that its decisions had recognized the Board's implied authority to petition for writs of prohibition against premature invocation of the review jurisdiction of the courts of appeals;[91] to institute contempt proceedings for violation of enforced Board orders;[92] and to file claims in

[89] 76 Fed. Reg. at 54,010-11. The Board likewise acted reasonably in rejecting opponents' arguments that the new rule is inconsistent with *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940). 76 Fed. Reg. at 54,031. The case did not involve the Board's exercise of its broad rulemaking authority under Section 6. Rather, the central focus of *Republic Steel* was the Board's inability under its Section 10 adjudicatory authority to impose "penalties" on those who commit unfair labor practices. The Board's Final Rule does not penalize employers. If anything, it is consistent with *Republic Steel*'s standard for judging the propriety of the Board's exercise of its Section 10 powers because the rule "relates to the protection of employees," 311 U.S. at 11, and it is designed to "assure" employees that they can exercise and vindicate their Section 7 rights, *id.* at 12-13.

[90] *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 142 (1971).

[91] *See In re NLRB*, 304 U.S. 486, 496 (1938).

[92] *See Amalgamated Util. Workers v. Con. Edison Co.*, 309 U.S. 261 (1940).

bankruptcy for Board-awarded backpay.[93] Relying on that precedent in *Nash-Finch Co.*, the Supreme Court concluded that the Board also had implied authority "to enjoin state action where [the Board's] federal power preempts the field."[94] As the Board reasonably inferred,[95] if the Board can use implied powers to "prevent frustration of the purposes of the Act,"[96] it can surely use its express rulemaking power to do so.[97]

2. The Board Reasonably Concluded that its Notice-Posting Rule Does Not Impair First Amendment Rights.

A number of the Final Rule's opponents advanced the claim that the proposed rule impaired their free speech rights under the First Amendment. The Board was well-warranted in rejecting that claim.[98] As an initial matter, the notice does not involve employer speech at all, but rather governmental speech, which is "not subject to scrutiny under the Free Speech Clause."[99] The Board, not the employer, will produce and supply posters informing employees of their legal rights. The Board has sole responsibility for the content of these posters, and the poster, which carries the Board's seal and contains Agency contact information, explicitly states

[93] *See Nathanson v. NLRB*, 344 U.S. 25 (1952).

[94] *Nash-Finch*, 404 U.S. at 144.

[95] 76 Fed. Reg. at 54,011-12.

[96] *Nash-Finch*, 404 U.S. at 142.

[97] *See NLRB v. Wyman Gordon Co.*, 394 U.S. 759, 762-66, 777-83 (1969), where a majority of the justices were in agreement that the Board's rulemaking power included the authority to resolve the question whether the goal of an informed employee electorate would be advanced if employers were required to provide the names and addresses of all eligible voters in advance of Board elections.

[98] 76 Fed. Reg. at 54,012.

[99] *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1129 (2009).

in bold typeface that it is an "**official Government Notice**." Nothing in the poster is attributed to the employer, and the rule does not require an employer representative to sign the poster or otherwise indicate approval of its content.[100] These several features confirm that the Board's notice implicates only government speech under controlling precedents.[101]

Moreover, this case is virtually indistinguishable from *Lake Butler Apparel Co. v. Secretary of Labor*,[102] where the Fifth Circuit rejected as "nonsensical" an employer's First Amendment challenge to the Occupational Safety and Health Act requirement that it post an "information sign" similar to the one at issue here. As in *Lake Butler*, an employer subject to the Board's rule retains the right to "differ with the wisdom of . . . this requirement even to the point . . . of challenging its validity. . . . But the First Amendment which gives him the full right to contest validity to the bitter end cannot justify his refusal to post a notice . . . thought to be essential."[103]

But even assuming arguendo that the notice-posting requirement implicates employer speech interests, the Supreme Court has recognized that governments have "substantial leeway in

[100] By way of contrast, NLRA remedial notices, which must be posted for a limited time by employers and unions who have been found to have committed unfair labor practices prohibited by Section 8 of the Act, must be signed by a representative. *See, e.g., Kiewit Power Constructors Co.*, 355 N.L.R.B. No. 150 app. (2010)]") ("WE WILL NOT discharge or otherwise discriminate against any of you . . ."; "WE WILL[] . . . offer Brian Judd and William Bond full reinstatement . . ."), *enforced*, 2011 WL 3332229 (D.C. Cir. Aug 3, 2011).

[101] *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560, 565-67 (2005).

[102] 519 F.2d 84, 89 (5th Cir. 1975).

[103] *Id.*; *see also Stockwell Mfg. Co. v. Usery*, 536 F.2d 1306, 1309-10 (10th Cir. 1976) (dicta) (rejecting a constitutional challenge to a requirement that an employer post a copy of an OSHA citation).

determining appropriate information disclosure requirements for business corporations."[104] This discretion is particularly wide when the government requires information disclosures relevant to the employment relationship. Thus, as the D.C. Circuit has observed in upholding a Department of Labor regulation requiring federal contractors to post a notice informing employees of certain NLRA rights, "an employer's right to silence is sharply constrained in the labor context, and leaves it subject to a variety of burdens to post notices of rights and risks."[105] For these reasons, the Board's notice-posting requirement is not in conflict with the First Amendment.

3. The Board Reasonably Concluded that its Notice-Posting Rule Does not Impair Section 8(c) Rights.

Section 8(c) of the Act[106] shields from unfair labor practice liability "[t]he expressing of any *views*, argument or opinion," provided that "such expression contains no threat of reprisal or force or promise of benefit."[107] The purpose of this provision is to encourage the free flow of information from both unions and employers to employees.[108]

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[104] *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 15 n.12 (1985); *see also Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (mandated disclosures of factual and uncontroversial information that further a legitimate state interest, such as preventing consumer deception, are constitutional as long as they are not "unjustified or unduly burdensome"); *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 133 n.21 (2d Cir. 2009) ("*NYSRA*") (explaining that *Zauderer* applies "even if [disclosure requirements] address non-deceptive speech").

[105] *UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360, 365 (D.C. Cir. 2003) (citing *Lake Butler*, 519 F.2d at 89).

[106] 29 U.S.C. § 158(c).

[107] *Id.* (emphasis added).

[108] *See Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 62 (1966) (explaining that Section 8(c) "manifests a congressional intent to encourage free debate on issues dividing labor and management"); *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008) (same).

The Board reasonably concluded that the requirement that employers post an official government notice summarizing employees' rights under the NLRA is fully in accord with the language and policy of Section 8(c). First, the posting of a government supplied notice setting forth the government's view of what the law requires "does not by any stretch of the imagination reflect one way or the other on the *views* of the employer."[109] Thus, the rule simply does not involve activity within the purview of Section 8(c). Second, as the Board repeatedly emphasized, the notice-posting requirement does not trench upon employers' ability to express their own "views" by any stretch. "[E]mployers 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."[110] And finally, the Board's posters are in complete harmony with Congress' judgment to encourage the free flow of information because they communicate to employees essential information concerning their rights under the NLRA and the means available for their enforcement.

4. The Notice of Employee Rights Under the NLRA Is Neutral.

The mandated notice is both even-handed and factual. The Board's essential challenge in this rulemaking was in attempting to construct a user-friendly notice that succinctly conveys the necessary information to employees about NLRA rights and obligations. The Board recognized that by its very nature, such a notice, meant to be read quickly by tens of millions of employees, can not convey all the information that might be, for example, in a treatise, or on a website. The Board repeatedly explained that this goal of conciseness and readability did not permit inclusion

[109] *Lake Butler*, 519 F.2d at 89.

[110] 76 Fed. Reg. at 54,012 n.44.

of an exhaustive list of exceptions, limitations, and qualifications; instead, at the top and bottom of the notice the reader is directed to contact the Board, to obtain more detailed information.[111]

In response to public comments, the Board chose to revise the notice's introduction to emphasize the right both to engage in protected activity and the right to refrain from such activity. "The Board believes that adding the right to refrain to the introduction will aid in the Board's approach to present a balanced and neutral statement of rights."[112] Thus, the very first paragraph of the notice explains to employees that the NLRA:

> guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity or *to refrain from engaging in any of the above activity*. Employees covered by the NLRA are protected from certain types of employer *and union misconduct.* This Notice gives you general information about your rights, and about the obligations of employers *and unions under the NLRA.*[113]

And so, employees' Section 7 rights to engage in or refrain from engaging in protected, concerted activity, as well as the fact that both employers and unions possess legal obligations under the NLRA are highlighted. The Board further explained that the right to refrain is listed last, because it is patterned after the list of rights contained in Section 7 of the NLRA.[114] "Section 7 lists the right to refrain last, after stating several other affirmative rights before it."[115]

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[111] As the Board explained, its primary goal in the Notice was to explain "employee rights accurately and effectively without going into excessive or confusing detail." 76 Fed. Reg. at 54,018. Thus, it specifically wished to provide "employees with more than a rudimentary overview of their rights under the NLRA, in a user-friendly format, while simultaneously not overwhelming employees with information that is unnecessary and distracting in the limited format of a notice." *Id.*

[112] Id. at 54,020.

[113] 76 Fed. Reg. at 54,048 (footnote omitted and emphasis added).

[114] 29 U.S.C. § 157.

[115] 76 Fed. Reg. at 54,022.

The notice format then contains three different lists: examples of Section 7 employee rights, with the final item being that employees may "[c]hoose not to do any of these activities, including joining or remaining a member of a union;"[116] another, giving examples of employer misconduct; and a third, corresponding list of examples of union misconduct.[117] The notice proceeds to explain that if a union is selected by the employees, both the employer and the union must bargain in good faith, and that the union must represent the employees fairly in bargaining and enforcing the agreement.[118] Thus, it is clear that the Board has made extensive efforts to produce a "balanced and neutral statement of rights."[119]

Given the Board's objectives of clarity, conciseness, and overall readability, it was not unreasonable for the Board to reject various employer-suggested additions to the rule, such as the right to decertify a union and rights under *Communications Workers v. Beck.*[120] In omitting the right to decertify a union from the notice, the Board has not tipped the balance one way or the other. The notice explains that employees 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

[116] 76 Fed. Reg. at 54,048. This notice language "reflects the language of the NLRA itself, which specifically grants affirmative rights." *Id.* at 54,020.

[117] *Id.*

[118] *Id.* at 54,048-49.

[119] *Id.* at 54,020.

[120] 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. *California Saw & Knife Works,* 320 NLRB 224, 233 (1995), *enf'd. sub nom. Machinists* v. *NLRB,* 133 F.3d 1012 (7th Cir. 1998).

remaining a member of a union.''[121] The notice does not include either the right to decertify or the corresponding right to seek Board certification of a union. The Board explained in the Final Rule that, "[t]o include instructions for exercising one right and not the other would upset the balanced recitation of rights."[122] To be informative, it is not necessary for the intentionally brief notice to include every NLRA right imaginable, including the rights to certify or decertify a union.

As to *Beck* rights, the Board's determination to exclude references to those rights was similarly reasonable. As explained in footnote 120 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.[123] The Board explained in the preamble to the Final Rule that no commenter presented any evidence suggesting that unions are failing to comply with these notice obligations.[124] Second, employees receive an explanation of *Beck* rights in the Notice of Election that is posted days before the employees vote in a union representation election. Third, there are currently very few private sector employees with *Beck* rights: 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

[121] *Id.* at 54,048.

[122] *Id.* at 54,022-23.

[123] *See California Saw & Knife Works*, 320 NLRB at 233.

[124] 76 Fed. Reg. at 54,023.

security clauses.[125] Accordingly, the Board concluded that because employees with *Beck* rights already receive notice of such rights, and because these rights do not apply to the "overwhelming majority of employees in today's private sector workplace,"[126] the Board reasonably chose to leave *Beck* rights out of the notice.

5. The Board's Final Rule Offered Sufficient Explanation For its Finding That Employees Have Insufficient Knowledge of Their NLRA Rights.

In its Final Rule, the Board presented a thorough, reasoned explanation for the new rule and set forth its supporting findings in detail. The Board stressed that its "greatest concern" was the absence of any general requirement that all employees covered by the NLRA be notified of their rights.[127] Given the common practice of workplace notice-posting under comparable workplace statutes, the Board reasonably concluded that a posting requirement will increase employees' awareness of their rights under the NLRA.[128] Thus, the Board explained that despite the fact that the percentage of employees who are knowledgeable about their Section 7 rights is unknown, it still believed the rule to be justified: "To the extent that employees' general level of knowledge is uncertain, the Board found that the potential benefit of a notice posting requirement outweighs the modest cost to employers."[129] After all, even "if only 10 percent of

[125] The only exception in these states is for employees who work in a federal enclave where state laws do not apply. *Id.*

[126] *Id.*

[127] 76 Fed. Reg. at 54,006.

[128] *Id.* at 54006-07, 54014-15.

[129] *Id.* at 54,015.

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."[130]

The Board further concluded that it was necessary to fill this gap in the NLRA's protections as part of its responsibility to adapt the Act to "the changing patterns of industrial life."[131] No one disputes that the rates of unionization have decreased dramatically since their high point in the 1950s. As the Board noted, there is currently a high percentage of private sector employees who are unrepresented by unions and thus without ready access to information about the NLRA. "Fewer employees today have direct, everyday access to an important source of information regarding NLRA rights and the Board's ability to enforce those rights."[132] Consequently, the mechanisms that may have made that gap tolerable previously are no longer working in an employment environment where the traditions of collective bargaining are far less visible than in the past, and Section 7 rights are less well known. Taking the fact of these other workplace notice postings together with the sharp decrease in employees' direct connection to sources of NLRA information helped convince the Board to issue the Final Rule. Thus, giving employees the same kind of notice of their NLRA rights that is the norm with respect to other employee protection regimes is a reasonable means by which to further the provisions of the Act.

The Board also determined that other factors justified the need to impose the notice requirement, including the high percentage of immigrants in the labor force who are unlikely to be familiar with the Act, and studies indicating that employees and high school students about to

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[130] *Id.* at 54,018 n. 96.

[131] 76 Fed. Reg. at 54013 citing to *Weingarten.,* 420 U.S. at 266 .

[132] 76 Fed. Reg. at 54,013.

enter the workforce are mostly uninformed about labor law.[133] And in the notice and comment process, numerous comments from individuals, union officials and worker assistance organizations confirmed that most employees are ignorant of their NLRA rights.[134] As one commenter put it: "I had no idea that I had the right to join a union, and was often told by my employer that I could not do so," and another said, "it is my experience that most workers are almost totally unaware of their rights under the NLRA." Moreover, many opponents of the rule asserted that the rule will result in increased unionization, thus indicating their agreement that the notice will in fact increase employees' level of knowledge about their rights.[135] Many other comments were received from rule opponents which demonstrated precisely the lack of knowledge that the Board seeks to remedy: "Belonging to a union is a privilege and a preference – not a right," and "If my employees want to join a union they need to look for a job in a union company." Thus, the Board explained that despite the fact that the percentage of employees who are knowledgeable about their Section 7 rights is unknown, it still believed the rule to be justified: "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."[136] Significantly, as the Board noted in the Final Rule, the rule's opponents put in no empirical evidence or scholarly analyses of their own indicating that many employees do

[133] 76 Fed. Reg. at 54,014-015.

[134] *Id.* at 54,015-016.

[135] *Id.* at 54,016.

[136] *Id.* at 54,015.

understand their Section 7 rights.[137] Although of course, the Agency maintains the burden of demonstrating the reasonableness of its position, its opponents have posited no serious reason to disbelieve the evidence relied upon or received in the course of the notice and comment rulemaking. The Board's reasons meet the deferential arbitrary and capricious standard of review.

The Final Rule also explains why it was necessary to promulgate this rule 75 years after the enactment of the NLRA.[138] As the Supreme Court has recently held, "neither antiquity nor contemporaneity with a statute is a condition of a regulation's validity.''[139] The Agency's responsibility "to adapt the Act to changing patterns of industrial life," [140] meant that it could reasonably choose to attempt to rectify the perceived harms caused by the undisputed decrease in the percentage of employees with a ready source of information regarding NLRA rights. The Final Rule therefore found that it would be an "abdication of that responsibility for the Board to decline to adopt this rule simply because of its recent vintage."[141]

The Board further explained why the existence of the Internet is not sufficient to conclude that American employees must be aware of their NLRA rights. Not only do many employees fail to have easy access to the Internet, but the Board found it reasonable to assume

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[137] *Id.* ("Certainly, the Board has been presented with no evidence persuasively demonstrating that knowledge of NLRA rights is widespread among employees.")

[138] NAM Amended Complaint, ¶ 2.

[139] *Mayo*, 131 S. Ct. at 712 (internal quotations omitted); *see also Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740 (1996) (deferring to a regulation ''issued more than 100 years after the enactment'' of the statutory provision that the regulation construed).

[140] *Weingarten*, 420 U.S. at 266.

[141] 76 Fed. Reg. at 54,013.

that employees who are ignorant of their rights are much less likely to seek out such information than those who are aware of such rights and want to learn more about those rights.[142] The Board also noted that the Section 7 right of employees (including non-unionized ones) to engage in "concerted activities" for the purpose of "mutual aid and protection" is "the most misunderstood" of the Section 7 rights, and "not subject to an easy Internet search by employees who may have no ideas what terms to use, or even that such a right might be protected at all."[143]

Thus, the Board's detailed, cogent reasoning for promulgating the notice-posting rule demonstrates that it "considered the relevant factors and articulated a rational connection between the facts found and the choice made."[144] The Board's reasons meet the deferential arbitrary and capricious standard of review, and consequently, the notice-posting rule is entitled to be upheld.

6. The Enforcement Mechanisms Are Designed to Remedy Violations of the Rule and Are a Reasonable Implementation of the NLRA.

In the Final Rule, the Board was "mindful of the need to identify an effective remedy for non-compliance with the notice-posting requirement," and to explain to employers under NLRA jurisdiction the consequences that failure to post may have in other proceedings. The two enforcement mechanisms challenged here are "(1) [f]inding the failure to post the required notices to be an unfair labor practice and (2) tolling the statute of limitations for filing unfair labor practice charges against employers that fail to post the notices."[145]

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[142] 76 Fed. Reg. at 54,017.

[143] *Id.*

[144] *City of Portland*, 507 F.3d at 713.

[145] 76 Fed. Reg. at 54,031; *see* NAM Amended Complaint ¶¶ 33-34, 42; NRTW Complaint ¶ 16(c) & (d). The third alternative of "considering the willful failure to post the notices as

a. The Final Rule's Section 8(a)(1) Remedy is Within the Board's Authority.

In devising an enforcement mechanism, the Board relied on Section 8(a)(1) of the NLRA (29 U.S.C. 158(a)(1)) which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."[146] The Supreme Court early recognized that Section 8(a)(1) grants the Board authority to address issues of interference with employee rights that Congress did not specifically consider:

> The Wagner Act did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice. On the contrary, *that Act 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. [147]

In the exercise of this authority, for example, the Board has interpreted Section 8(a)(1) to find unlawful certain no-solicitation rules,[148] the systematic polling of employees,[149] and an employer's insistence on conducting an investigatory interview with an employee who has requested to be accompanied by a representative,[150] notwithstanding that none of this conduct which the Board found to be an unfair labor practice is mentioned in the text of the NLRA. Consequently, the argument of the Final Rule's opponents that the Section 8(a)(1) enforcement

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evidence of unlawful motive in unfair labor practice cases" has not been specifically challenged. (Section 102.214(b) of the Final Rule, 76 Fed. Reg. at 54,035-36, 54,049).

[146] *See* fn. 32, *supra*, for the full text of Section 7.

[147] *Republic Aviation v. NLRB*, 324 U.S. 793, 798 (1945) (emphasis added) cited by *Chevron*, 467 U.S. at 844-45.

[148] *Republic Aviation*, 324 U.S. at 803.

[149] *Allegheny Ludlum v. NLRB*, 301 F.3d 167 (3d Cir. 2002); *Strucknes Constr. Co.*, 165 NLRB 1062 (1967).

[150] *Weingarten*, 420 U.S. at 260-267.

mechanism is beyond the Board's authority because it constitutes the impermissible Board creation of a "new" unfair labor practice is inconsistent with the teaching of *Republic Aviation*, as well as that of *Chevron*, discussed above, pp. 12-14.[151]

As previously discussed, in the Final Rule, the Board took note of the almost universal recognition that posting workplace notices of workplace rights is a minimal necessity to ensure that employees are informed of their rights.[152] The Board then determined that imposing a similar posting duty under the NLRA is necessary to ensure that employees enjoy full freedom to exercise and enforce their Section 7 rights to join or refrain from union and concerted activity.[153] Given that conclusion, it is a small step also to conclude that an employer's failure to perform that duty is an interference with those rights within the meaning of Section 8(a)(1).[154] In taking that small step, the Board considered and rejected the argument that "interference" in Section 8(a)(1) is limited to proscribing action, rather than failure to act.[155] The Board noted numerous instances where the violation of an obligation may interfere with employee rights just as affirmative misconduct does. For example, in *Truitt*, the Board held that employers have an obligation to provide factual support for certain claims in bargaining, and that failure to do so

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[151] *See* NAM Amended Complaint ¶ 33; NRTW Complaint ¶ 16.

[152] 76 Fed. Reg. at 54,006-07, *see also* 54,032 ("notice posting is necessary to ensure effective exercise of Section 7 rights").

[153] *See id.* at 54,007, 54010-11, 54,032.

[154] *Id.* at 54,032 ("It therefore follows that an employer's failure to post this notice, which informs employees of their Section 7 rights, reasonably tends to interfere with the exercise of such rights.")

[155] *Id.*

violates *both* 8(a)(5) and 8(a)(1).[156] This is so because "[i]t 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."[157] Whereas in *Truitt*, the Board found that the employer's failure to perform its duty to bargain under Section 8(a)(5) is also an interference within the meaning of Section 8(a)(1), here, as explained in the Final Rule, the Board concluded that an employer's refusal to post a required notice is an interference with Section 7 rights within the meaning of Section 8(a)(1). In both instances, the Board's conclusion that Section 8(a)(1) interference is established where there has been a breach of an employer obligation to employees reflects a reasonable interpretation of the statutory language that easily passes muster under *Republic Aviation* and *Chevron*.

The Board's conclusion that an employer's breach of the duty to post is reasonably considered an interference with employee rights within the meaning of Section 8(a)(1) also finds support in the interpretation of other notice-posting regulations. The Family and Medical Leave Act ("FMLA") includes a provision prohibiting interference with its rights that "largely mimics th[e language of § 8(a)(1) of the NLRA."[158] The FMLA provision states that "[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to

[156] *Truitt Mfg. Co.*, 110 NLRB 856, 857, 870 (1954), *enf'd NLRB v. Truitt*, 351 U.S. 149 (1956) ("*Truitt*").

[157] *Standard Oil Co. of Ca., Western Operations, Inc. v. NLRB*, 399 F. 2d 639, 642 (9th Cir. 1967).

[158] *Bachelder v. Am. W. Airlines*, 259 F. 3d 1112, 1123 (9th Cir. 2001) (interpreting 29 U.S.C. § 2615(a)(1)).

exercise, any right provided under this title."[159] The statute, however, is "silent" regarding whether a violation of its notice posting requirement, 29 U.S.C. § 2619(a), is a violation of its prohibition against interference with FMLA rights.[160] But, like the NLRB rule, the Department of Labor's regulations specifically state that failure to post the FMLA notice "may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights."[161] In causes of action under FMLA Section 105(a)(1), the courts expressly rely upon this regulatory interpretation of "interference," in noting that the failure to provide the required notice may constitute a violation of the FMLA.[162]

For these reasons, the Board's choice to find a violation of Section 8(a)(1) for the failure to post the notice is reasonable under *Republic Aviation* and *Chevron*.

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[159] 29 U.S.C. § 2615(a)(1).

[160] The FMLA does provide that an employer's willful violation of its notice posting requirement may result in civil monetary penalties. 29 U.S.C. § 2619(b).

[161] 29 C.F.R. § 825.300(e).
Under the specific remedial scheme for interferences with FMLA rights, the lack of notice must be prejudicial to the employee. 29 U.S.C. § 2617(a)(1)(A)(i); *see Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002); *Salas v. 3M Co.*, No. 08 C 1614, 2009 WL 2704580, *12 (N.D. Ill. August 25, 2009). No such concerns apply to interference with Section 7 rights under Section 8(a)(1) because, in contrast to the FMLA, Section 8(a)(1) violations may be found where, considering the totality of the circumstances, the conduct has a reasonable tendency to coerce or interfere with section 7 rights. *See, e.g., Venetian Casino Resort, LLC., v. NLRB*, 484 F.3d 601, 610 (D.C. Cir. 2007).

[162] *Greenwell v. Charles Machine Works, Inc.*, No. CIV–10–0313–HE, 2011 WL 1458565, **4-5 (W.D. Ok. April 15, 2011); *see Smith v. Westchester County*, 769 F.Supp.2d 448, 467-68 (S.D.N.Y. 2011).

b. The Board Reasonably Concluded that the Supreme Court's *Local 357, Teamsters* Decision Does Not Preclude the Board From Fashioning and Enforcing A New Notice-Posting Requirement.

As stated in the Final Rule, the Board considered and rejected the argument of some rule opponents that the Board's imposing a duty to post customary notices of workplace rights and enforcing that duty through Section 8(a)(1) of the Act was precluded by the Supreme Court's opinion in *Local 357, Teamsters v. NLRB*.[163] To the contrary, as the Board recognized, *Local 357* was based on specific statutory language and specific legislative history of the sort that the Board was not presented with here.[164] Properly understood, *Local 357* confirms the Board's judgment that the absence of any notice posting requirement in the NLRA is a statutory gap that the Board is authorized to fill.

Thus, the Court's reasoning in *Local 357* was that Congress had considered at length a particular problem — union hiring halls — and had specifically determined to subject such halls only to limited regulation. Because Congress deliberately chose a "selective system for dealing with [the] evils [of hiring halls]" the Board could not adopt a more comprehensive system.

In essence, *Local 357* rearticulates the familiar principle that where Congress speaks—such as by prohibiting regulation of a certain issue—the agency may do nothing to the contrary.[165] But here, by contrast, Congress has not considered the issue and has not codified its

[163] 365 U.S. 667 (1961).

[164] 76 Fed. Reg. at 54,014.

[165] *See also Chamber of Commerce v. Brown*, 554 U.S. 60 (2008) (under preemption analysis, Congress chose to leave speech about unions unregulated, and neither the Board nor the states may impose limitations on such speech).

views on this point in specific legislation addressing the issue. As stated above, Congress has deliberately left it to the Board to interpret Section 8(a)(1).

The Board also reasonably concluded that that *Local 357* is distinguishable because it did not involve a construction of the broad language of Section 8(a)(1) but was based on the narrower language of Section 8(a)(3). *Local 357*'s focus was on the first two words of Section 8(a)(3): "by discrimination." As the Supreme Court had earlier explained:

> The language of § 8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership [in a union] *by means of discrimination*. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination in employment is prohibited. [166]

Consistent with its earlier construction of Section 8(a)(3), the Supreme Court concluded in *Local 357* that "[w]here * * * Congress has aimed its sanctions only at *specific discriminatory practices*, the Board cannot go farther and establish a broader, more pervasive regulatory scheme."[167] Thus, because Section 8(a)(3) is aimed only at discrimination, it cannot be expanded to cover non-discrimination.

As the Board recognized in the Final Rule, the rule does not involve the specific statutory language that was at issue in *Local 357*. Instead, the rule is based on the much broader language of Section 8(a)(1), which, as stated above, forbids any interference, coercion or restraint. The Board reasonably declined to read *Local 357* as narrowing the Board's broad authority under Section 8(a)(1) to adapt the Act "to changing patterns of industrial life."[168]

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[166] *Radio Officers v. NLRB (A.H. Bull Steamship Co.)*, 347 U.S. 17, 42-43 (1954) (emphasis added).

[167] 365 U.S. at 676 (emphasis added).

[168] *Weingarten*, 420 U.S. at 266.

c. The NLRB's Interpretation Providing for Equitable Tolling of Section 10(b)'s Statute of Limitations is Within Its Authority.

The Board's Final Rule states:

> The Board may find it appropriate to excuse the employee from the requirement that charges be filed within six months after the occurrence of the allegedly unlawful conduct, if the employer has failed to post the required employee notice, unless the employee has received actual or constructive notice that the conduct complained of is unlawful.[169]

The NLRB explained that the intent of this provision is to ensure that failure to post the required notice does not prejudice innocent employees.[170] The Board's choice of this enforcement mechanism is supported by Supreme Court precedent interpreting Section 10(b) and circuit court precedent involving closely analogous equitable tolling decisions.

Statutes of limitations are presumed to include equitable tolling whenever the statute is silent or ambiguous on the issue.[171] Indeed, the Supreme Court expressly stated that Section 10(b) itself is subject to such equitable doctrines. In *Zipes*, the Supreme Court held that the timeliness provision of Title VII's EEOC charge filing requirement was "subject to waiver,

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[169] Section 102.214(a), 76 Fed. Reg. at 54,049.

[170] 76 Fed. Reg. 54, 031 at n. 137.

[171] *Id.* at 94-96; *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 392-98 (1982); *see Young v. United States*, 535 U.S. 43, 49 (2002) ("It is hornbook law that limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute." (quotations and citations omitted)); *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989) ("The running of such statutes is traditionally subject to equitable tolling."); *Honda v. Clark*, 386 U.S. 484, 501 (1967); *Glus v. Brooklyn E. D. Terminal*, 359 U.S. 231, 232-33 (1959) (equitable tolling of statutes of limitations is "[d]eeply rooted in our jurisprudence"); *Holmberg v. Armbrecht*, 327 U.S. 392, 396-97 (1946) (equitable tolling is "read into every federal statute of limitation"); *see also Henderson v. Shinseki*, 131 S.Ct. 1197, 1204-05 (2011) ("claim-processing rules" are generally not jurisdictional, no matter how "mandatory" or "emphatic" the statutory language); *Holland v. Florida*, 130 S.Ct. 2549, 2560 (2010); *Union Pacific v. Brotherhood of Locomotive Eng'rs*, 130 S.Ct. 584, 598-99 (2009); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006).

estoppel and equitable tolling."[172] The Supreme Court expressly analogized this EEOC requirement to that of the NLRA, and stated that § 10(b) was not jurisdictional:

> [T]he time requirement for filing an unfair labor practice charge under the National Labor Relations Act operates as a statute of limitations *subject to recognized equitable doctrines* and not as a restriction of the jurisdiction of the National Labor Relations Board.[173]

Zipes strongly supports the NLRB's notice-posting rule, because the analogy between Title VII and the NLRA is well-established, and neither the holding of *Zipes* regarding Title VII nor *Zipes'* characterization of § 10(b) has ever been called into doubt.[174]

Section 10(b) provides one express exception to the six-month statute of limitations for persons prevented from timely filing due to military service.[175] Any argument that this exception implicitly precludes other exceptions is directly foreclosed by *Zipes*. Moreover, the Supreme Court expressly rejected a very similar argument regarding exceptions to the statute of limitations in *Holland*.[176] There is no evidence that Congress specifically "contemplated" equitable tolling doctrine with respect to Section 10(b) one way or another; under well-

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[172] 455 U.S. at 392-98.

[173] *Id.* at n.11 (emphasis added).

[174] For example, in *Local Lodge No. 1424 (Bryan Mfg Co.) v. NLRB*, 362 U.S. 411, 429 n.19 (1960), the Court acknowledged that equitable exceptions, such as fraudulent concealment, apply to Section 10(b).

[175] Section 10(b) states: "Whenever it is charged that any person has engaged in . . . any such unfair labor practice, the Board . . . shall have power to issue . . . a complaint . . . : Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six- month period shall be computed from the day of his discharge.

[176] 130 S.Ct. at 2561-62.

established law, Congress is presumed to have permitted equitable tolling whenever the statute does not directly address it specifically.[177] Also, as previously noted, to imply statutory limits from Congressional silence would turn *Chevron* on its head. Indeed, deference to the Board is at its height in interpreting the application of equity to its unique statutory scheme in light of its considerable experience and expertise in processing unfair labor practices.[178]

The Board's rule is consistent with well-established equitable tolling doctrine.[179] As discussed below, a clear majority of the courts—including the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits support equitable tolling for failure to post required employee notices.[180] Even in the unlikely event that this Court would not favor the majority rule

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[177] *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990) ("such a principle is likely to be a realistic assessment of legislative intent").

[178] *Lodge 64, IAM v. NLRB*, 949 F.2d 441, 444 (D.C. Cir. 1991) (deferring to the Board's interpretation of § 10(b) fraudulent concealment doctrine); *see Chevron*, 467 U.S. at 842-44.

[179] *See contra*, NAM Amended Complaint, ¶¶ 42-44.

[180] *Mercado v. Ritz-Carlton San Juan Hotel, Spa & Casino*, 410 F.3d 41, 46-47 (1st Cir. 2005); *Kale v. Combined Ins. Co of America*, 861 F.2d 746, 751-53 (1st Cir. 1988); *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187, 193 (3d Cir. 1977); *Callowhill v. Allen-Sherman-Hoff Co.*, 832 F.2d 269, 272 (3d Cir. 1987); *Podobnik v. USPS*, 409 F.3d 584, 593 (3d Cir. 2005); *Vance v. Whirlpool Corp.*, 716 F.2d 1010,1012-13 (4th Cir. 1983); *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987); *Elliot v. Group Med. & Surgical Serv.*, 714 F.2d 556, 563-64 (5th Cir. 1983); *Charlier v. S.C. Johnson & Son, Inc.*, 556 F.2d 761, 764 (5th Cir. 1977); *EEOC v. Ky. State Police Dep't*, 80 F.3d 1086, 1094-95 (6th Cir. 1996); *Posey v. Skyline Corp.*, 702 F.2d 102, 105-06 (7th Cir. 1983); *Schroeder v. Copley Newspaper*, 879 F.2d 266, 271 (7th Cir. 1989); *Kephart v. Inst. Of Gas Tech.*, 581 F.2d 1287, 1289 (7th Cir. 1978); *Beshears v. Asbill*, 930 F.2d 1348, 1351-52 (8th Cir. 1991); *DeBrunner v. Midway Equipment Co.*, 803 F.2d 950, 952 (8th Cir. 1986); *McClinton v. Alabama By-Prods. Corp.*, 743 F.2d 1483, 1485-86 (11th Cir. 1984). The lone minority view appears to be contained in dicta in a single Tenth Circuit decision. *See Wilkerson v. Siegfried Ins. Agency, Inc.*, 683 F.2d 344, 347 (10th Cir. 1982) *also compare ASP v. Milardo Photography, Inc.*, 573 F.Supp.2d 677, 697-98 (D.Conn. 2008) (adopting tolling upon analyzing the caselaw and finding that majority view supports tolling where there has been a failure to post a notice); *with Krish v. Connecticut Ear, Nose & Throat, Sinus & Allergy Specialists, P.C.*, 607 F.Supp.2d 324, 328-29 (D. Conn. 2009) (discussing the lack of clear Second Circuit precedent on point and following *Wilkerson*).

if deciding the issue de novo, the substantial body of circuit court precedent supporting the tolling principles adopted by the Final Rule is sufficient to preclude any finding that the Board's choice is arbitrary or capricious.

The language of the rule is a succinct summary of the doctrine defined in the case law. The rule states that "the Board may find it appropriate" to toll Section 10(b) "if the employer has failed to post the required employee notice, unless the employee has received actual or constructive notice that the conduct complained of is unlawful." In a recent tolling case, the First Circuit used very similar language to that contained in the Board's rule, holding that "an employer's violation of the EEOC posting requirement may provide a . . . basis for an extended filing period where the employee had no other actual or constructive knowledge of the complaint procedures."[181] In *Bonham v. Dresser Industries, Inc.,* the Third Circuit provided a cogent explanation of the notice-posting tolling doctrine and its purpose:

> The posting requirement was undoubtedly created because Congress recognized that the very persons protected by the Act might be unaware of its existence. Failure to post the required notice will toll the running of the 180-day period, at least until such time as the aggrieved person seeks out an attorney or acquires actual knowledge of his rights under the Age Discrimination in Employment Act. . . . Any other result would place a duty upon the employer to comply without penalty for breach, and would grant to the employee a right to be informed without redress for violation.[182]

The *Wilkerson* case involved an employee who had *actual knowledge* of his rights, but language of the *Krish* opinion reached out beyond that question. *Id.* In any event, *Wilkerson* makes clear that equitable tolling may be interpreted and applied by administrative agencies in a number of different ways. Under that logic, the Board should be accorded deference in its choice of how to interpret and apply equitable tolling in the context of the NLRA.

[181] *Mercado*, 410 F.3d at 46-47 (citations and quotations omitted).

[182] 569 F.2d at 193.

The Fourth Circuit described the notice-posting tolling doctrine as "the prevailing view of the courts" and held that the statute "should be tolled by reason of [the defendant's] failure to post the statutory notice."[183] The Fifth Circuit has emphasized that the failure to post required notice "vitiates the normal assumption that an employee is aware of his rights."[184] In the Sixth Circuit, the court held that the district court abused its discretion in refusing to toll the statute for the full period during which ADEA notice had not been posted.[185] And as cases mentioned in footnote 180 demonstrate, the Seventh, Eighth, and Eleventh Circuits are in accord.

Just as in these cases, the Final Rule's use of the discretionary "may"—stating that "the Board may find it appropriate" to toll § 10(b)—emphasizes that the Board's tolling doctrine is likewise flexible, discretionary, and grounded in equitable practice, including the factors cited by the courts in *Mercado* and the other cases. For these reasons, the Board noted that if a lengthy tolling of the Section 10(b) period would prejudice an employer in a given case, it could properly consider that factor in determining whether to toll the statute of limitations in that case.[186] The Board's flexible doctrine is in line with the long tradition of equity practice, and the rule is nothing more than a brief summary, for the benefit of the public, of some of the equitable considerations that may be weighed by the Board in determining whether an "extraordinary circumstance" prevented timely filing.[187]

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[183] *Vance v. Whirlpool Corp.*, 716 F.2d 1010 (4th Cir. 1983).

[184] *Elliot v. Group Med. & Surgical Serv.*, 714 F.2d 556, 563-64 (5th Cir. 1983).

[185] *EEOC v. Ky. State Police Dep't*, 80 F.3d 1086 (6th Cir. 1996).

[186] 76 Fed. Reg. at 54,035.

[187] *Holland*, 130 S.Ct. at 2562.

Accordingly, in light of Supreme Court precedent on equitable tolling under Section 10(b) and the weight of authority in the circuit courts supporting equitable tolling for notice posting violations, the Board's interpretation of the equitable tolling doctrine of Section 10(b) in the notice-posting rule is a permissible statutory interpretation under *Chevron*.

III. *Leedom v. Kyne*'s Exception to the Prohibition of District Court Review of Agency Unfair Labor Practice and Representation Proceedings Does Not Provide a Basis for Jurisdiction in This Case

Where, as here, jurisdiction for a complaint is firmly established under the APA, NAM's attempt to supply an additional ground under *Leedom v. Kyne*,[188] the basis for NAM's Fifth Cause of Action, is at least unnecessary, and in any event, fails. *Leedom* is an "extremely narrow" exception[189] to the general principle that district courts are prohibited from reviewing the Board's unfair labor practice and representation proceedings.[190] Thus, any need for such an exception only exists where there is no jurisdiction for court review otherwise.[191] Here, jurisdiction to review the Board's Final Rule under the APA in this very district court case is uncontested, obviating the need for any exception.

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[188] 358 U.S. 184 (1958).

[189] *Goethe House N.Y., German Cultural Ctr. v. NLRB*, 869 F.2d 75, 77 (2d Cir. 1989).

[190] *See Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48, 51 (1938) (unfair labor practice cases); *Boire v. Greyhound Corp.*, 376 U.S. 473, 476-79 (1964) (representation proceedings).

[191] *Leedom*, 358 U.S. at 190. *See also Board of Governors of the Federal Reserve System v. MCorp Financial, Inc.*, 502 U.S. 32, 43 (1991) (finding "central" to *Leedom* "the fact that the Board's interpretation of the Act would wholly deprive the union of a meaningful and adequate means of vindicating its statutory rights").

CONCLUSION

For all the foregoing reasons, this Court should grant summary judgment in favor of the Board regarding Plaintiffs' APA claims and dismiss NAM's Fifth Cause of Action in its Amended Complaint.

RESPECTFULLY SUBMITTED,

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