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

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

In this proceeding, the Chamber of Commerce of the United States of America and the South Carolina Chamber of Commerce ("the Chamber") are challenging a rule issued by the National Labor Relations Board ("NLRB" or "the Board") entitled 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) ("Rule"). The Rule imposes a duty on employers within the Board's jurisdiction to post an official government notice entitled, "Employee Rights Under the National Labor Relations Act." The Rule corrects the long-standing anomaly that, 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. The prevailing practice reflects a common understanding that such notices are a minimal necessity to ensure that employees are informed of their workplace rights.

As demonstrated below, this Rule is both within the Board's statutory authority and reasonable, and consequently, the Board is entitled to summary judgment.[1]

STATEMENT OF FACTS

On December 22, 2010, the Board issued a Notice of Proposed Rulemaking seeking comment on a regulation that would require employers subject to the National Labor Relations Act ("NLRA" or "the Act"), 29 U.S.C. §§ 151-169, to "post notices informing their employees of their rights as employees under the NLRA." Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act, 75 Fed. Reg. 80,410 (December 22, 2010) (Member Brian Hayes, dissenting at 80,415). After a notice-and-comment period, on August 30, 2011, the Board published the Rule setting forth the Board's review of these comments on the proposal and incorporating some changes suggested by commenters. 76 Fed. Reg. 54,006, 54,046–50 (August 30, 2011) (Member Hayes, dissenting at 54,037-42). Thereafter, the Board amended the Rule to change the effective date from November 14, 2011 to January 31, 2012. 76 Fed. Reg. 63,188 (October 12, 2011).

In the interim, on September 19, 2011, the Chamber filed a complaint challenging the Rule, seeking declaratory and injunctive relief. On October 14, 2011, the Court approved the parties' agreed-upon proposed summary judgment briefing schedule, providing for Cross-Motions for summary judgment to be filed by November 9, 2011, and Responses in opposition by December 7, 2011. A hearing on these motions is scheduled for January 11, 2012.

[1] Citations to the administrative record, filed in conjunction with the Board's motion for summary judgment and memorandum in support, are in the following format: "A.R. NLRB-000000."

ARGUMENT

I. Standard of Review

Where, as here, the Chamber's claims involve a review of a final agency action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, the District Court must determine, "whether on the administrative record, the agency's action was in violation of the APA's provisions." *Shipbuilders Council of Am. v. U.S. Coast Guard*, 578 F.3d 234, 241 (4th Cir. 2009) (internal quotations omitted). Under the APA sections at issue, a court may set aside agency action where it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A) (Compl. ¶¶ 18, 34, 43, 47, 72) and where it is "in excess of statutory jurisdiction, authority, or limitations or short of statutory right." 5 U.S.C. § 706(2)(C) (Compl. ¶ 27). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicles Mfrs. Ass'n of U.S., Inc., v. State Farm Mut. Ins. Co*., 463 U.S. 29, 43 (1983) ("*State Farm*").

The Fourth Circuit has explained that, under the "highly deferential" arbitrary and capricious standard, it "'presumes the validity of agency action.'" *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009). A court must uphold an agency's action where the agency has considered the relevant factors and articulated "a rational connection between the facts found and the choice made." *Id.* (quoting *State Farm*, 463 U.S. at 43).

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

The Chamber's APA challenge to the Board's notice-posting rule should be rejected because the Rule is a proper exercise of the Board's substantive rulemaking authority under Section 6 of the NLRA, 29 U.S.C. § 156, and alternatively, is a valid exercise of the Board's

authority under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to fill a statutory gap. The 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.

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

Section 6 of the NLRA gives the Board "broad rulemaking authority," to promulgate regulations that the Board deems "necessary to carry out the provisions of [the Act]." *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 613 (1991) ("*AHA*") (quoting 29 U.S.C. § 156). "Where 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.'" *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 369 (1973) (citation and footnote omitted; first ellipsis in original). 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, the Board's regulations must be upheld under *Mourning* because they are "reasonably related" to the purposes of the NLRA. *See Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 86 (2002); *see also NLRB v. J. Weingarten*, 420 U.S. 251, 266 (1975) ("*Weingarten*").

Alternatively, this Court may uphold the Board's regulations under the equally deferential standard established in *Chevron.* 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). 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." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974), *quoted in Chevron*, 467 U.S. at 843. 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. Because the Board's Rule here reasonably fills such a gap, the regulation also passes muster under *Chevron*.

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

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." 29 U.S.C. § 151. 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." *Id.* To those ends, Section 7 of the NLRA 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," including in the nonunion setting; as well as the right "to refrain from any or all such activities." *Id.* § 157. Section 8, in turn, defines and prohibits union and employer "unfair labor practices" that infringe on employees' Section 7 rights, *id.* § 158, while Section 10 authorizes the Board to adjudicate unfair labor practice claims, subject to a six-month statute of limitations. *Id.* § 160. Finally, Section 9 authorizes the Board to conduct representation elections and issue certifications. *Id.* § 159.

The 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, *id.* § 160(a), the Board may not investigate an unfair labor practice until a charge is filed. 2 The Developing Labor Law 2683 (John E. Higgins, Jr. ed., 5th ed. 2006); A.R. NLRB-000102. In addition, union election "procedures are set in motion with the filing of a representation petition." *Id.* at 2662; A.R. NLRB-000100. In both instances, the initiating document is filed by a private party. *Id.* at 2683 (citing 29 C.F.R. §102.9), A.R. NLRB-000102; *id.* at 2662-63 (citing 29 U.S.C. § 159(c)(1)(A), (B), and (e)(1), A.R. NLRB-000100-000101). Therefore, employee knowledge of NLRA rights and how to enforce them within statutory timeframes is crucial to effectuation of Congress's national labor policy.

The Rule furthers the Act's purposes by informing employees of both the Act's core protections and the Board's processes. As the Board stated, 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. 76 Fed. Reg. at 54,007-07. The 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 objectives 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," 29 U.S.C. § 151, are furthered by this new requirement. As the Board noted, 76 Fed. Reg. at 54,010, 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).[2] Consistent with the views of the scholars who first urged the Board to consider adopting the same kind of posting requirement,[3] the administrative record contains unrebutted studies and numerous comments (discussed below at pp. 24-27) 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. *See Mourning*, 411 U.S. at 371 (measuring the benefits and burdens of a challenged regulation). The Board emphasizes that all an employer must do to comply with the

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[2] *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").

[3] *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), A.R. NLRB-000066-000067; 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), A.R. NLRB- NLRB-000584, 000586; 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), A.R. NLRB-000513, 000515-16.

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," 76 Fed. Reg. at 54,046 (to be codified at 29 C.F.R. § 104.202(d)), and "on an intranet or internet site if the employer customarily communicates with its employees about personnel rules or policies by such means." *Id.* at 54,047 (to be codified at § 104.202(f)). In light of these minimal obligations, 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 years." *See* 76 Fed. Reg. at 54,042 & n.190. 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. Further, this requirement is all the more sensible because the workplace is "the location where [employees] are most likely to hear about their other employment rights."[4]

The Board rejected arguments that the silence of Section 6—and indeed, the entire NLRA—with respect to notice posting precluded such a rule. The Board pointed out in response that it has "broad rulemaking authority," as described by the Supreme Court in *AHA*. 76 Fed. Reg. at 54,008 (quoting 499 U.S. at 613). 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.

[4] *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.").

Id. (emphasis added). 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]." 29 U.S.C. § 156. No such limitation was found in *AHA*, and no such limitation exists here. By basing their argument on the silence of Section 6, the opponents turn *AHA* completely on its head.

The Board also reasonably rejected the argument of those who deny the Board's 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. 76 Fed. Reg. at 54,011. As the Board explained, Sections 9 and 10 obviously precludes the Board from "issu[ing] certifications or unfair labor practice orders via rulemaking proceedings." However, nothing in those sections otherwise limits the Board's broad legislative rulemaking authority under Section 6 to specify affirmative requirements that further the objectives of the NLRA and that are not contrary to any statutory provision. *Id*. As discussed, the Supreme Court so construed the Board's rulemaking authority in *AHA*.[5]

In this regard, the Board correctly observed that Sections 9 and 10 are not rigid restraints on the Board's ability to act. In addition to Section 6 rulemaking, and Section 9 and 10 proceedings, the Board has implied authority to take a variety of appropriate measures "to prevent frustration of the purposes of the Act." *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 142 (1971). For example, the Board has the implied authority to petition for writs of prohibition against premature invocation of the review jurisdiction of the courts of appeals; to institute

[5] *See also NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 763-66 (1969) (plurality opinion) (criticizing the Board for announcing a new, broadly applicable requirement for all election cases through adjudication rather than rulemaking pursuant to Section 6).

contempt proceedings for violation of enforced Board orders; and to file claims in bankruptcy for Board-awarded backpay. *See In re NLRB*, 304 U.S. 486, 496 (1938); *Amalgamated Util. Workers v. Con. Edison Co.*, 309 U.S. 261 (1940); *Nathanson v. NLRB*, 344 U.S. 25 (1952), respectively. Relying on that precedent in *Nash-Finch*, the Supreme Court concluded that the Board also has implied authority "to enjoin state action where [the Board's] federal power preempts the field." 404 U.S. at 142. As the Board reasonably inferred, if it can use implied powers to "prevent frustration of the purposes of the Act," *id.* at 142, it can surely use its express Section 6 rulemaking power to do so.[6]

Therefore, because the Board's regulation is "reasonably related to the purposes of the enabling legislation," and does not unduly burden the subjects of the regulation, this Court should uphold the Rule as a valid exercise of the NLRB's broad rulemaking authority under Section 6. *Mourning*, 411 U.S. at 369.

2. The Regulation at Issue in This Case is authorized under *Chevron* and *Republic Aviation*.

As an alternative basis for finding authority to issue this Rule, the Board concluded that—regardless of its power to issue legislative rules that are subject to limited judicial review under *Mourning*—the Rule is also authorized as an exercise of its *Chevron* authority. *Chevron* provides a two-step inquiry. Under the first step, the court's task is to "employ[] traditional tools of statutory construction" to determine "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 843. And, in step two, where "the statute is silent or ambiguous

[6] 76 Fed. Reg. at 54,011-12; *see Wyman Gordon Co.*, 394 U.S. at 762-66, 777-83, 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 all Board elections.

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." *Id.*

a. *Chevron* Step 1

Step one is simple enough: Congress clearly has not "directly spoken to the precise question at issue." *Id.* As the Chamber has noted, the Act does not mention notice posting. Compl. ¶¶ 19-27. In addition, as the Board noted in the 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." 76 Fed. Reg. 54,013.

In this statutory setting, *Chevron* supports the Board's rejection of the argument by the Chamber and other Rule opponents that the silence of the NLRA with respect to notice posting is an expression of a deliberate choice by Congress to preclude an NLRA notice-posting requirement. The opponents' argument overlooks that there are many possible reasons why Congress did not include an express notice-posting provision in the NLRA like the ones it included in the Railway Labor Act, which predates the NLRA, or in subsequently enacted employment statutes. 76 Fed. Reg. at 54,013. As the Supreme Court suggested with respect to legislative silences like the one at issue, "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 . . . ." *Chevron*, 467 U.S. at 865. But, "[f]or judicial purposes, it matters not which of these things occurred." *Id.* 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."[7]

For similar reasons, the Board reasonably rejected the argument of the opponents (including the Chamber) that the Supreme Court's construction of the NLRA in *Local 357, Teamsters v. NLRB*, 365 U.S. 667, 675 (1961), requires the conclusion that the Board lacks the statutory authority to create a "regulatory scheme" where the Act is silent. *See* 76 Fed. Reg. at 54,014; Comment of U.S. Chamber of Commerce, A.R. NLRB-004098-99. In *Local 357*, the Court struck down a Board decision requiring certain "protective provisions" to appear in every hiring hall arrangement. 365 U.S. at 671-72. The Court explained that the Board had failed to give due regard to the first two words of the NLRA provision at issue in that case, Section 8(a)(3)—"by discrimination." *Id.* at 674-75 (quoting *Radio Officers v. NLRB (A.H. Bull Steamship Co.)*, 347 U.S. 17, 42-43 (1954)). The Court then detailed the extensive legislative history concerning hiring halls and concluded that Congress deliberately chose a "selective system for dealing with [the] evils" of hiring halls. Thus, the Board lacked statutory authority to require broader regulation of hiring halls than what Congress had specifically chosen. Here, by contrast, Congress has not directly spoken to the subject of NLRA notice-posting, either in statutory language or in legislative history. Thus, unlike in *Local 357* where Congressional

[7] *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. 76 Fed. Reg. at 54,013 (citing *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).

intent was clear, and no statutory gap existed for the Board to fill, here, the statute is silent and under *Chevron* step one, the Chamber's argument that the Board is foreclosed from promulgating a notice-posting requirement must fail.

In concluding it possessed the requisite authority to mandate the same kind of workplace notice common under other workplace statutes, the Board also reasonably relied on the long-standing administrative precedent of the Department of Labor, which promulgated a notice-posting requirement through rulemaking despite Congress's silence on notice posting 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 in 1949 that employers to this day must still follow. *See* 29 C.F.R. § 516.4 (2010). 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.[8]

b. *Chevron* Step 2

Because the statute is silent on notice posting, the Court must uphold the Board's Rule so long as it is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. The Court "need not conclude that the agency construction was the only one it permissibly could have adopted." *Rust v. Sullivan*, 500 U.S. 173, 184 (1991). Nor does this Court need to conclude that it is "the best interpretation of the statute," *United States v. Haggar Apparel Co.*,

[8] *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. How this distinction could make any difference is not apparent.

526 U.S. 380, 394 (1999), nor even that it is the "most natural one." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 702 (1991). The agency's view is deemed to be reasonable so long as it is not "flatly contradicted" by plain language. *Dep't of the Treasury v. Fed. Labor Relations Auth.*, 494 U.S. 922, 928 (1990).

In exercising its gap-filling authority under *Chevron*, the Board reasonably interpreted Section 8(a)(1) of the Act to impose a duty on employers to post the notices of employee rights that the Board concluded are "necessary to ensure effective exercise of Section 7 rights." 76 Fed. Reg. at 54,032. Section 8(a)(1) prohibits an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." The Supreme Court recognized early on that Section 8(a)(1) grants the Board broad 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.

Republic Aviation v. NLRB, 324 U.S. 793, 798 (1945) (emphasis added) (cited by *Chevron*, 467 U.S. at 844-45). For example, in the exercise of its recognized authority to adapt the Act "to changing patterns of industrial life," the Board has interpreted Section 8(a)(1) to bar an employer from conducting an investigatory interview with an employee who has requested to be accompanied by a representative. *Weingarten*, 420 U.S. at 260-267. This interpretation was new, and the language of Section 8 does not mention any such right. And still this statutory

interpretation was upheld because of the Board's authority to explicate and adapt Section 8(a)(1).[9]

Similarly here, the Board construed Section 8(a)(1) in light of "the dominant purposes of the legislation." *Republic Aviation*, 324 U.S. at 798. In so doing, it concluded that, in view of the "strong nexus between knowledge of Section 7 rights and their free exercise," an employer's failure to post the notice that the Board has found necessary to ensure the "effective exercise of Section 7 rights" constitutes interference with those rights. 76 Fed. Reg. at 54,032. In reaching this conclusion, 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. 76 Fed. Reg. at 54,006-07.

In adopting this construction, the Board considered and rejected the argument that Section 8(a)(1) is limited to proscribing action, rather than failure to act. *Id.* The Board noted many ways that Section 8(a)(1) is violated by failure to perform a duty. 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 violates *both* 8(a)(5) and 8(a)(1). *Truitt Mfg. Co.*, 110 NLRB 856, 857, 870 (1954), *enf'd*, 351 U.S. 149 (1956). 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

[9] *Weingarten* makes clear that when the Board fills the statutory gaps of Section 8(a)(1), courts owe substantial deference to the Board's determinations: "It is the province of the Board, not the courts, to determine whether or not the 'need' [for a Board rule] exists in light of changing industrial practices and the Board's cumulative experience in dealing with labor-management relations. For the Board has the 'special function of applying the general provisions of the Act to the complexities of industrial life,' and its special competence in this field is the justification for the deference accorded its determination." 420 U.S. at 266 (citations omitted).

§ 8(a)(1) of the Act." *Standard Oil Co. of Ca., Western Operations, Inc. v. NLRB*, 399 F.2d 639, 642 (9th Cir. 1967). Whereas in *Truitt*, the Board relied upon the employer's failure to perform its duty to bargain under Section 8(a)(5) to support a finding of interference within the meaning of Section 8(a)(1), here, the Board relied on *Republic Aviation* to conclude that Section 8(a)(1) is sufficient authority to impose a duty upon employers to post an official government notice informing employees of their core Section 7 rights. In both instances, the Board's conclusion that Section 8(a)(1) interference is established where there has been a breach of an employer's 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") Section 105(a)(1) states that "[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this title." 29 U.S.C. § 2615(a)(1). This provision "largely mimics th[e] language of § 8(a)(1) of the NLRA." *Bachelder v. Am. W. Airlines*, 259 F. 3d 1112, 1123 (9th Cir. 2001). Like the NLRB rule, the Department of Labor's regulations specifically state that failure to post FMLA notice "may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights."[10] In causes of action under FMLA Section 105(a)(1), the courts rely upon this regulation

[10] 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*, 535 U.S. at 89; *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 intimidate employees. *See, e.g., NLRB v. Transpersonnel, Inc.*, 349 F.3d 175, 180

to interpret "interfere," stating that failure to post notice may violate that section. *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).

For these reasons, the Board reasonably concluded that, consistent with Section 8(a)(1) and *Chevron*, the Board may require employers to post a notice of employee rights.

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

A number of the Rule's opponents advanced the claim, urged by the Chamber here, that the Rule impairs employer free speech rights under the First Amendment. Compl., ¶¶ 59-72. The Board reasonably rejected that claim. 76 Fed. Reg. at 54,012. First, the notice does not involve employer speech at all, but rather governmental speech, which is "not subject to scrutiny under the Free Speech Clause." *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1129 (2009). 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 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.[11] These features confirm that the Board's notice

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(4th Cir. 2003). The FMLA also provides that an employer's willful violation of its notice posting requirement may result in civil monetary penalties. 29 U.S.C. § 2619(b).

[11] 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).

implicates only government speech under controlling precedents. *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560, 565-67 (2005).

Second, this case is virtually indistinguishable from *Lake Butler Apparel Co. v. Secretary of Labor*, 519 F.2d 84, 89 (5th Cir. 1975), 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." *Id.*[12]

But even assuming arguendo that the notice-posting requirement implicates employer speech interests, the Supreme Court has recognized that governments have "substantial leeway in determining appropriate information disclosure requirements for business corporations."[13] This discretion is particularly wide when the government requires information disclosures relevant to the employment relationship. Thus, as the D.C. Circuit 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

[12] *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).

[13] *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").

leaves it subject to a variety of burdens to post notices of rights and risks." *UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360, 365 (D.C. Cir. 2003) (citing *Lake Butler*, 519 F.2d at 89). For these reasons, the Board's notice-posting requirement is not in conflict with the First Amendment.

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

Section 8(c) of the Act, 29 U.S.C. § 158(c), 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." *Id.* (emphasis added). The purpose of this provision is to encourage the free flow of information from both unions and employers to employees. *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 requiring employers to 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." *Lake Butler*, 519 F.2d at 89. 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" because "employers remain free under this rule—as they have in the past—to express noncoercive views regarding the exercise of these rights as well as others." 76 Fed. Reg. at 54,012 n.44. 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.

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

The mandated notice is both even-handed and factual. The Chamber's attack on the notice, Compl., ¶¶ 33-47, fails fairly to acknowledge that the Board's essential task in this rulemaking was to construct a user-friendly notice, succinctly conveying 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, cannot convey all the information that might be, for example, in a treatise, or on a website. The Board explained that its goal of concision and readability did not permit inclusion 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.[14]

In furtherance of its "approach to present a balanced and neutral statement of rights," the Board responded to public comments by revising the notice's introduction to emphasize the right both to engage in protected activity and the right to refrain from such activity. *Id.* at 54,020; *see also id.* at 54,048. Thus, the very first paragraph of the notice explains 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*

[14] 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.*

> *misconduct.* This Notice gives you general information about your rights, and about the obligations of employers *and unions under the NLRA.*

76 Fed. Reg. at 54,048 (footnote omitted and emphasis added). 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. 29 U.S.C. § 157.

The notice format then contains three different lists: first, 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;"[15] another, giving examples of employer misconduct; and a third, corresponding list of examples of union misconduct. 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. *Id.* at 54,048-49. Thus, it is clear that the Board has made extensive efforts to produce a "balanced and neutral statement of rights." *Id.* at 54,020.

6. The Board Reasonably Chose to Exclude an Explanation of Section 14(b) From the Notice.

The Board's decision not to mention or explain the impact of certain state laws enacted in accordance with Section 14(b) of the Act, 29 U.S.C. § 164(b), in a uniform, nationwide notice was rational and well-supported. Section 14(b) recognizes the authority of states and territories to craft a limited exception to Section 8(a)(3) of the NLRA. Under the first proviso to Section 8(a)(3), employers and unions may enter into union-security agreements requiring all employees

[15] This notice language "reflects the language of the NLRA itself, which specifically grants affirmative rights." *Id.* at 54,020.

in a particular bargaining unit to obtain and retain "membership" in the union on or after the thirtieth day following entry on duty.[16] Although "[f]ederal policy favors permitting such agreements," *Oil, Chem. & Atomic Workers, Int'l Union v. Mobil Oil Corp.*, 426 U.S. 407, 420 (1976), Congress added Section 14(b) to the Act in 1947 to "recognize[] and affirm[]" the preexisting authority of states and territories to enact "so-called 'right-to-work' measure[s]" that prohibit or restrict agreements conditioning employment on employees' meeting the financial obligations of union membership.[17]

Given the Board's objectives of clarity, concision, and overall readability for the notice, it was not unreasonable for the Board to reject various employer suggestions that a notice of core employee rights under the NLRA should also include a discussion of the rights a limited number of employees have under state laws in consequence of Section 14(b). Right-to-work laws within the ambit of Section 14(b) only operate when three conditions are met: (1) a state or territory has passed such a law, (2) the employees at issue are represented by a union, *and* (3) that union seeks

[16] 29 U.S.C. § 158(a)(3). In enacting this provision, Congress sought to eliminate abuses associated with the "closed shop, which requires preexisting union membership as a condition of obtaining employment," S. Rep. No. 80-105, at 6 (1947), "and yet give employers and unions who feel that [union-security] agreements promoted stability by eliminating 'free riders' the right to continue such arrangements," *id.* at 7. The proviso permits the achievement of these ends because when union "membership" is a condition of employment, it requires nothing more than the payment of dues and initiation fees after the employee has been hired. *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 742 (1963).

[17] *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1198 (10th Cir. 2002) (en banc). The Chamber is therefore incorrect when it asserts that the enactment of Section 14(b) in 1947 as part of the Taft-Hartley amendments to the NLRA "constituted a fundamental change in the direction of federal labor law." Compl. ¶ 35. Rather, that provision merely made explicit what had previously been implicit and ensured the preservation of the status quo under which states could enact laws prohibiting union-security agreements. *See Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 99-102 & n.9 (1963) (noting the abundant legislative history indicating that Congress's intent "was to continue the policy of the Wagner Act and avoid federal interference with state laws in this field").

a union-security clause in a collective bargaining agreement with an employer.[18] The Board's finding that including information on this issue was "unnecessary," logically followed from the Board's more basic editorial judgment not to "mention or explain [union-security] arrangements" at all in the notice. 76 Fed. Reg. at 54,022. Having made the decision to omit any reference to union-security arrangements on the ground that they potentially apply only to the small percentage of the workforce that is already represented by unions, the Board sensibly found "no reason to list . . . exception[s] to union-security requirements" such as right-to-work laws, which apply to an even smaller subset of union-represented employees. *Id.* Exclusion of right-to-work laws was also in full accord with the Board's decision not to list discrete rights that arise from external sources of law.[19]

By its very nature, an 8"x17" poster does not have the space needed to exhaustively list all rights and remedies connected to the NLRA. Because state right-to-work laws have a very limited scope of application compared to other NLRA rights, the Board was neither arbitrary nor capricious in omitting reference to them from its uniform, nationwide notice. For these reasons, the Board is entitled to summary judgment on Count II of the Chamber's complaint.

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[18] Under the Act, no employer is required to agree to such a clause. *See* 29 U.S.C. § 158(d).

[19] *See id.* at 54,022, 54,023. Although the Chamber now complains that the Board's omission of discussion of Section 14(b) in the notice deprives employees of information about "fundamental" rights (Compl. ¶¶ 35-43), it is significant that the Chamber submission to the Board during the rulemaking proceeding does not even mention the omission of right-to-work laws from the proposed notice as a potential shortcoming. Comment of U.S. Chamber of Commerce, A.R. NLRB-004096-004106. The Coalition for a Democratic Workplace ("CDW"), whose rulemaking comment the Chamber adopted, made a fleeting reference to right-to-work laws and suggested only that their omission from the Board's notice might "mislead" the public into questioning "the Board's neutral[ity]." Comment of CDW, A.R. NLRB-003696, 003708 at n. 23.

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

In its 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 that the Board is almost unique in lacking any general requirement that all employees covered by the NLRA be notified of their rights. 76 Fed. Reg. at 54,006. Given the common practice of workplace notice-posting under comparable workplace statutes, the Board reasonably inferred that a posting requirement will increase employees' awareness of their rights. *Id.* at 54006-07, 54014-15.

Exercising its responsibility to adapt the Act to "the changing patterns of industrial life," the Board reasonably concluded that this longstanding gap in the NLRA's protections should be addressed now. Fed. Reg. at 54013 (citing to *Weingarten,* 420 U.S. at 266). No one disputes that rates of unionization have decreased dramatically since their high point in the 1950s. As the Board noted, "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." 76 Fed. Reg. at 54,013. Consequently, mechanisms that may have made the lack of notice 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 account 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 Rule. 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 enter the workforce are mostly uninformed about labor law.[20] 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. *Id.* at 54,015-016. 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," comment H.86, A.R. NLRB-00-3834, and another said, "it is my experience that most workers are almost totally unaware of their rights under the NLRA." Comment H.16, A.R. NLRB-003622. Numerous comments from Rule opponents themselves revealed such basic misunderstanding of the Act's requirements as, "Belonging to a union is a privilege and a preference – not a right," comment H. 136, A.R. NLRB-003954, and "If my employees want to join a union they need to look for a job in a union company." Comment H.138, A.R. NLRB-003957. Moreover, many opponents of the Rule objected that it will result in increased unionization, thereby tacitly recognizing that the notice will provide information that employees currently lack. *Id.* at 54,016; *see, e.g.*, comment H.17, A.R. NLRB-003623. In response to comments criticizing the level of factual support for the Rule, the Board explained: "To the extent that employees' general level of knowledge is uncertain, the Board believes that the potential benefit of a notice posting requirement outweighs the modest cost to

[20] 76 Fed. Reg. at 54,014-015; Dana Bramel & Clemencia Ortiz, *Tomorrow's Workers and Today's Unions: A Survey of High School Students*, LABOR STUDIES JOURNAL, Winter 1987-88, A.R. NLRB-004149-004164; Tom Juravich, *Anti-Union or Unaware? Work and Labor as Understood by High School Students*, LABOR STUDIES JOURNAL. Fall 1991, A.R. NLRB-004166-004182; Robert J. Amann & Ronnie Silverblatt, *High School Students' Views on Unionism*, LABOR STUDIES JOURNAL, Winter 1987-88; A.R. NLRB-004184-004200.

employers." *Id.* at 54,015. After all, even "if only 10 percent of workers were unaware of [their NLRA] rights, that would still mean that more than 10 million workers lacked knowledge of one of their most basic workplace rights." *Id.* at 54,018 n. 96.

In drawing such inferences from the record, the Board acted well within its authority. Agencies are not required to commission independent studies to confirm their experienced judgment.[21] And they are permitted to support their conclusions from the anecdotal evidence in the record. *Mansolf v. Babbitt*, 125 F.3d 661, 670 (8th Cir. 1997). Significantly, as the Board noted in the Rule, the Rule's opponents themselves put in no "empirical data" or "contrary studies" indicating that many employees do understand their Section 7 rights. *Id.* ("Certainly, the Board has been presented with no evidence persuasively demonstrating that knowledge of NLRA rights is widespread among employees.") Although the Agency must establish the reasonableness of its position, its opponents have posited no serious reason to disbelieve the evidence received in the course of the notice and comment rulemaking.

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 lack easy access to the Internet, but the Board found it reasonable to assume that employees who are ignorant of their rights are much less likely to seek out such information than those who are basically aware of such rights and want to learn more. 76 Fed. Reg. at 54,017. The Board also noted that the Section 7 right of employees (including non-union ones) to engage in "concerted activities" for the purpose of "mutual aid and protection" is "the most

[21] *Chamber of Commerce v. SEC*, 412 F.3d 133, 142 (D.C. Cir. 2005); *see also Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1124 (D.C. Cir. 1984) (failure to conduct independent study did not violate APA because notice and comment procedures "permit parties to bring relevant information quickly to the agency's attention").

misunderstood" of the Section 7 rights, and "not subject to an easy Internet search by employees who may have no idea of what terms to use, or even that such a right might be protected at all." *Id.*

Thus, the Board's detailed, cogent reasoning for promulgating this notice-posting rule demonstrates that it examined the relevant data and provided an explanation of its decision that includes "a 'rational connection between the facts found and the choice made.'" *Ohio Valley*, 556 F.3d at 192 (quoting *State Farm*, 463 U.S. at 43). The Board's reasons satisfy the deferential arbitrary and capricious standard of review, and consequently, the notice-posting rule must be upheld.

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

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

As stated previously, the Board found it had authority to require notice posting on two distinct bases: first, the Board's broad legislative rulemaking authority under *Mourning* and *AHA*; and second, the Board's authority to interpret the Act, including Section 8(a)(1), under *Chevron*. Because, as shown, the obligation to post a notice is authorized as an exercise of legislative authority under *Mourning*, it follows that the obligation can be enforced under Section 8(a)(1). 29 C.F.R. § 104.210. This is because, as explained above with respect to the *Truitt* case, violations of basic NLRA duties interfere with Section 7 rights. Here, because the requirement to post notice is expressly designed to "ensure effective exercise of Section 7 rights," 76 Fed. Reg. at 54,032, violation of the Board's legislative rule does "interfere with, restrain, or coerce" employees in the exercise of Section 7 rights. 29 U.S.C. § 158(a)(1).

In addition, as shown, the Board's interpretation of Section 8(a)(1) to impose an employer duty to post an official government notice of employee rights reflects a permissible construction of a statute that is silent with respect to notice posting. For that reason, the Section 8(a)(1) remedy can also be upheld as a reasonable exercise of the Board's gap-filling authority under *Republic Aviation* and *Chevron*. Because the Board created the duty as an exercise of its authority to interpret Section 8(a)(1), the Chamber's argument that the Board impermissibly created a "new" unfair labor practice fails under *Republic Aviation* and *Chevron.*[22]

[22] The Board noted in the Rule that if an unfair labor practice charge is filed for failure to post the required notice, that "reasonable efforts" will be made "to persuade the respondent employer to post the required employee notice expeditiously. If the employer does so, the Board expects that there will rarely be a need for further administrative proceedings." 76 Fed Reg. at 54,049 (to be codified at Section 104.212(a)). The Chamber in Paragraph 29 of its complaint questions this assurance, asserting that Section 3(d) of the NLRA, 29 U.S.C. § 153(d), "vests enforcement authority in the Board's General Counsel." This assertion overlooks that Section 3(d) does not affect the Board's authority to dismiss complaints inconsistent with Board policy. *See Inland Container Corp.*, 298 NLRB 715 (1990) (summary judgment granted where complaint being prosecuted should have been deferred to arbitration in accordance with Board policy). As the Ninth Circuit early explained in rejecting a similarly expansive view of Section 3(d), "After a complaint has been issued by the general counsel it remains, as before, the duty and function of the Board to pass upon its jurisdiction, to determine whether unfair practices have been committed, what remedy would best effectuate the policies of the Act, and whether to seek enforcement of its order in the courts. . . ." *Haleston Drug Stores v. NLRB*, 187 F.2d 418, 422 (9th Cir. 1951); *accord Frito Co., W. Div. v. N.L.R.B.*, 330 F. 2d 458, 463-464 (9th Cir. 1964) ("It is now settled that the General Counsel's decision to investigate a charge or issue a complaint is unreviewable by the Board. However, once the decision has been made to issue a complaint and to prosecute it, the General Counsel has embarked upon the judicial process which is reserved to the Board."). Consistent with the Office of the General Counsel's normal procedure to prosecute cases on the basis of the Board's policies, the General Counsel's Division of Operations Management has already issued a memorandum noting its intent to follow the Board's clear direction in this matter. *See* OM Memo 11-77 (Aug. 26, 2011), Attachment 1 at 9, available at http://www.nlrb.gov/publications/operations-management-memos (last visited Nov. 3, 2011).

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

Section 102.214(a) of the Rule states that the Board "may find it appropriate" to equitably toll the statute of limitations "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." 76 Fed. Reg. at 54033.[23] This provision merely restates well-established equitable tolling doctrine. The doctrine protects employees who are "excusably unaware that the conduct is unlawful because mandatory notice was not given." 76 Fed. Reg. 54,031 at n. 137.

Traditional equitable exceptions apply whenever the statute is silent or ambiguous. The Supreme Court has expressly stated that Section 10(b) is subject to such equitable doctrines. In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 392-98, n.11 (1982),[24] the Court held that the timeliness provision of Title VII's EEOC charge-filing requirement was subject to waiver,

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[23] The statute 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." 29 U.S.C. § 160(b).

[24] *See also Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 94-96 (1990) (noting strong presumption that equitable tolling applies, "such a principle is likely to be a realistic assessment of legislative intent"); *Young v. United States*, 535 U.S. 43, 49 (2002) ("It is hornbook law that limitations periods are customarily subject to equitable tolling."); *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989); *Honda v. Clark*, 386 U.S. 484, 501 (1967); *Glus v. Brooklyn E. D. Terminal*, 359 U.S. 231, 232-33 (1959) (equitable tolling 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"); *cf. 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); *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. In so concluding, the Court analogized the EEOC requirement to the NLRA's Section 10(b):

> [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.

Thus, *Zipes* strongly supports the NLRB's policy choice to apply tolling here. Indeed, the Fourth Circuit has cited *Zipes*, suggesting that Section 10(b) "may be overcome by equitable considerations" including "general principles of equitable tolling." *Kolomick v. United Steelworkers of America, Dist. 8*, 762 F. 2d 354, 356 (4th Cir. 1985). Deference under *Chevron* also supports the Rule. As the D.C. Circuit stated, Section 10(b)'s "silence . . . clearly means that Congress has not 'directly spoken to the precise question at issue,' so that the Board is free to adopt any reasonable construction of the Act." *Lodge 64, IAM v. NLRB*, 949 F.2d 441, 444 (D.C. Cir. 1991) (citing *Chevron* in deferring to the Board's interpretation of § 10(b) fraudulent concealment doctrine). That Section 10(b) provides an express exception for persons prevented from timely filing due to military service does not foreclose the traditional equitable exceptions. *See Holland v. Florida*, 130 S.Ct. 2549, 2560-62 (2010).

This particular tolling rule is also consistent with Fourth Circuit precedent. In *Vance v. Whirlpool Corp.*, 716 F.2d 1010, 1012-13 (4th Cir. 1983), the court interpreted the analogous six-month statute of limitations in the Age Discrimination in Employment Act. The court found "*Zipes* to be highly persuasive authority for interpreting the [statute as] subject to equitable modification." *Id.* at 1012. The court then considered whether failure to post notice required by the ADEA justified tolling. The court held as follows:

> Congress imposed this requirement [to post a notice] to insure that covered employees would be informed of their rights, and in the present case Whirlpool's failure to post such a notice prevented Vance from learning of his ADEA rights at

> the time of his discharge. Under the circumstances the district court was correct in holding that the 180-day period *should be tolled by reason of Whirlpool's failure to post the statutory notice*.

Id. at 1012-13 (emphasis added); *see also English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987). Many other circuits agree.[25] The same is true for regulatory notices such as the FLSA notice discussed above. *See, e.g., Asp v. Milardo Photography, Inc.*, 573 F. Supp. 2d 677 (D. Conn. 2008) (applying equitable tolling to FLSA notice); *Henchy v. City of Absecon*, 148 F. Supp. 2d 435, 438-39 (D.N.J. 2001). The Board's tolling doctrine is in line with the long tradition of equity practice. Accordingly, in light of Supreme Court precedent on equitable tolling of Section 10(b) and the authority in the Fourth Circuit (and many other circuits) supporting equitable tolling for notice-posting violations, the Board's interpretation is a permissible statutory interpretation under *Chevron*.

III. The Rule Fully Complied with the Regulatory Flexibility Act (RFA).

The RFA requires that a final rule contain either: (1) a description and analysis of the effect that the rule would have on small entities, or (2) a certification that the rule, as promulgated, will not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. §§ 603-605, 607. In this case, the Board certified that the Rule does not impose a significant economic impact on any small entity subject to the Board's jurisdiction. As required by Section 605(b) of the RFA, the Board published its certification and a supporting

[25] *Mercado v. Ritz-Carlton San Juan Hotel, Spa & Casino*, 410 F.3d 41, 46-47 (1st Cir. 2005); *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187, 193 (3d Cir. 1977); *Elliot v. Group Med. & Surgical Serv.*, 714 F.2d 556, 563-64 (5th Cir. 1983); *EEOC v. Ky. State Police Dep't*, 80 F.3d 1086, 1094-95 (6th Cir. 1996); *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); *McClinton v. Alabama By-Prods. Corp.*, 743 F.2d 1483, 1485-86 (11th Cir. 1984). The minority view appears to be confined to dicta in a Tenth Circuit decision. *See Wilkerson v. Siegfried Ins. Agency, Inc.*, 683 F.2d 344, 347 (10th Cir. 1982).

factual statement in the Federal Register, and sent both to the Chief Counsel for Advocacy of the Small Business Administration. 76 Fed. Reg. 54,042. In reviewing an agency's compliance with the RFA, courts are mindful that the Act does not require a specific outcome, nor does the statute require any specific substantive measures. *See Assoc. Fisheries of Maine. v. Daley*, 127 F.3d 104, 114 (1st Cir. 1997). The courts only examine whether the agency made a reasonable, good faith effort to carry out the RFA's mandate.[26]

The Board provided a detailed and clear factual basis for its certification. 76 Fed. Reg. at 54,042-045. It first identified the Rule's compliance costs. Because this Rule requires solely that employers post a free pre-printed notice, employers need only (1) learn where and how to post the notice, (2) acquire the notice, and (3) post the notice. *Id.* at 54,042, 54045. Thus, the Board estimated that compliance requires two employee work-hours for small entities: 30 minutes to learn the logistics of the Rule, 30 minutes to obtain the notice from the Board or its website, and 60 minutes to post it.[27] The Board then applied data from the Bureau of Labor Statistics to calculate that each hour of work costs employers $32.20. Thus, the Board estimated that the Rule will cost each employer $64.40 in the first year, with dramatically decreased costs

[26] *Id.*; *Ranchers Cattlemen Action Legal Fund v. USDA*, 415 F.3d 1078, 1101 (9th Cir. 2005) ("To satisfy the RFA, an agency must only demonstrate a "reasonable, good-faith effort" to fulfill its requirements."); *United States Cellular Corp. v. FCC*, 254 F.3d 78, 88 (D.C. Cir. 2001) (same); *Nat'l Women, Infants, and Children Grocers Ass'n. v. FDA*, 416 F.Supp.2d 92, 108 (D.D.C. 2006) (same).

[27] *Id.* To calculate the appropriate time required, the Board relied in part on a recent very similar DOL notice-posting rule. *See* Department of Labor Notification of Employee Rights Under Federal Labor Law, 75 Fed. Reg. 28,368, 28,394 (May 20, 2010) (to be codified at 29 C.F.R. pt. 471); *see* 76 Fed. Reg. at 54,007. DOL estimated that 3.5 hours would be required for compliance with its rule, but that total includes the time necessary to learn about and comply with contractual requirements that do not apply to the Board's Rule. 75 Fed. Reg. at 28,394. The Board reasonably relied on DOL's estimate as to the amount of time required to comply with notice-posting, considering that the DOL is responsible for overseeing similar workplace posting requirements, including OSHA, FLSA, FLMA, and Executive Order 13496.

thereafter. *Id.* at 54,042-43. Because $64.40 is less than two-tenths of one percent of the required inflow or outflow of any entity subject to the Board's jurisdiction, the Board reasonably concluded it would not impose a significant impact on any small entity. *Id.* at 54,042.

In its complaint, the Chamber erroneously alleges that the Board underestimated the economic impact of the Rule by failing to include such speculative and discretionary employer expenses as costs of educating human resource professionals, management, and employees about the notice, answering questions regarding the notice, and monitoring the notice to ensure it remains posted (Compl. at ¶ 56). However, the RFA is only concerned with the costs of compliance with a regulation, not other expenses that an employer may independently choose to incur. The seminal case on the issue is *Mid-Tex Electric Co-op v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985), which states: "[I]t is clear that Congress envisioned that the relevant 'economic impact' was *the impact of compliance* with the proposed rule on regulated small entities." More recently, the United States Court of International Trade rejected the argument that it needed to consider costs other than compliance costs, and cited *Mid-Tex Electric Co-op* to support its assertion that Congress intended the RFA to make agencies consider "the impact of compliance with the proposed rule."[28]

The Board's conclusion that Congress equated the "economic impact" referred to by the RFA with compliance costs is supported by the RFA itself and the administrative guidance offered by the Small Business Administration ("SBA"). For example, the RFA sections that list the requirements for an initial regulatory flexibility analysis (IRFA) and for a final regulatory

[28] *M.G. Maher & Co., Inc. v. United States*, 26 CIT 1040, 1043, 1044 (Ct. Int'l Trade 2002), *appeal voluntarily dismissed*, 61 Fed. Appx. 675 (Fed. Cir. 2003) (Court held that Customs need not include the cost of claim denials resulting from a rule that imposed a deadline on filing tax refund claims) (citing *Mid–Tex Elec.*, 773 F.2d at 342 (emphasis added)); *accord State of Colorado v. Resolution Trust Corp.*, 926 F.2d 931, 948 (10th Cir. 1991).

analysis (FRFA) both define "the *impact* of the proposed rule on small entities," *solely as compliance costs*, namely " a description of the projected reporting, recordkeeping *and other compliance requirements"* of the rule.[29] Moreover, guidance from the SBA, the agency responsible for compliance with the RFA, cites only compliance-based costs – that is expenses incurred that are required by the rule – as examples of the expenses agencies must consider.[30]

In sum, the Rule simply obliges employers to obtain a free notice and post it. No employee education at any level is compelled. Moreover, while employers may choose to answer questions about the notice, the notice itself provides clearly that those with questions may contact the Board.[31] Finally, the Board only calls on employers to take "reasonable steps" to ensure that the notice remains posted, not "every conceivable step."[32] For all these reasons, the

[29] *Id*. at § 603(a) & (b)(4) (emphasis added) and § 604(b)(5) (incorporating §603(a)). The Board's notice-posting rule imposes no "reporting, recordkeeping and other compliance requirements," nor does it impose any of the costs contemplated in the SBA guidance other than the minimal cost described above.

[30] SBA Office of Advocacy, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* 34, *available at* http://archive.sba.gov/advo/laws/rfaguide.pdf (last visited November 3, 2011).

[31] *See* 76 Fed. Reg. at 54,045. The Chamber speculates, without support, about "adverse impact on employee relations and interference with normal business operations[.]" Compl. at ¶ 56. To the extent the Chamber implies that employees with increased knowledge of the NLRA may assert their Section 7 rights more frequently, such changes flow from the rights in the NLRA itself, not a notice-posting about the NLRA, and cannot be considered a compliance cost of the Rule. "Congress, not the Board, created the subject rights and did so after finding that vesting employees with these rights would reduce industrial strife." 76 Fed. Reg. at 54,045.

[32] *Id.*; *see also* Section 104.202(d) at 54,047. The Board explained that the Rule does not require employers to "constantly monitor the notice." 76 Fed. Reg. at 54,045. Any monitoring should occur in the course of normal surveillance to confirm that other workplace notices remain posted; consequently, any incremental cost due to the Rule should be *de minimis*.

Board's factual certification is manifestly reasonable and constitutes a good faith effort to comply with the requirements of the RFA.[33]

CONCLUSION

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

RESPECTFULLY SUBMITTED,

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[33] While the Board considered alternatives to minimize the impact of the Rule (75 Fed. Reg. at 80416; 76 Fed. Reg. at 54043), the Court should disregard the Chamber's assertion that the Agency was required to "minimize the Rule's significant impact on small entities" or to "discuss any significant alternatives to the proposed rule which would accomplish the stated objectives of the applicable statutes." Compl. at ¶ 57. Under the RFA, such actions are unnecessary "if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. § 605(b).