# Nos. 12-5068 & 12-5138

# UNITED STATES COURT OF APPEALS
## FOR THE DISTRICT OF COLUMBIA CIRCUIT

**NATIONAL ASSOCIATION OF MANUFACTURERS, *et al.*,**

**Appellants/Cross-Appellees**

**v.**

**NATIONAL LABOR RELATIONS BOARD, *et al.*,**

**Appellees/Cross-Appellants**

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**ON CROSS-APPEALS FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**
**C.A. No. 11-cv-01629-ABJ**

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**PRINCIPAL AND RESPONSE BRIEF OF APPELLEES/CROSS-APPELLANTS**

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(a)(1)

Pursuant to Circuit Rule 28(a)(1), the National Labor Relations Board, *et al.* ("the Board or NLRB") hereby submits this Certificate as to Parties, Rulings, and Related Cases. Except for 31 Members of the U.S. House of Representatives who filed an appellate amicus brief on behalf of Plaintiff Employers ("House Amici"), and Professor Charles J. Morris, American Federation of Labor and Congress of Industrial Organizations, Change to Win, National Employment Law Project, Restaurant Opportunities Center and Food Chain Workers Alliance, who jointly filed an appellate amicus brief on behalf of the Board, all parties, intervenors, and amici appearing before the district court and in this court are listed in the Opening Brief for Plaintiff Employers.

**B. Ruling Under Review**

References to the rulings at issue appear in the Opening Brief for Plaintiff Employers.

**C. Related Cases**

Except for the following, references to related cases appear in the Opening Brief for Plaintiff Employers. The Board has now appealed the decision of the District Court for the District of South Carolina to the Fourth Circuit, *NLRB v.*

*Chamber of Commerce*, No. 12-1757, and its opening brief is currently due August 31, 2012.

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**Regulations**[1]



[1] The provisions contained in 29 C.F.R. Part 104 are enjoined pending appeal pursuant to this Court's order in this case on April 17, 2012.

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## GLOSSARY

APA – Administrative Procedure Act

Br.- Plaintiff Employers' Opening Brief

Br.-Ad.-Plaintiff Employers' Opening Brief Addendum

D.A.- Deferred Appendix

DOL—Department of Labor

FLSA-Fair Labor Standards Act

FMLA-Family Medical Leave Act

## GLOSSARY (cont'd)

House Amici- amici curiae brief filed by 31 Members of the U.S. House of Representatives

Mem. Op. – March 2, 2012 Decision by district court below, granting in part and denying in part Plaintiff Employers' and the Board's motions for summary judgment

NLRB - National Labor Relations Board or "the Board"

NLRA - National Labor Relations Act or "the Act"

RLA-Railway Labor Act

## JURISDICTION

The National Association of Manufacturers, *et al*. (collectively "Plaintiff Employers") pleaded district court jurisdiction under 5 U.S.C. §§ 702, 703, and 706 and 28 U.S.C. § 1331. On March 2, 2012, the district court granted in part and denied in part Plaintiff Employers' and the National Labor Relations Board's motions for summary judgment. Plaintiff Employers' timely appeal, and the NLRB's timely cross-appeal, were docketed and consolidated. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

## ISSUES PRESENTED

1. Whether the district court properly found the rule requiring employers to post a notice of employee rights under the National Labor Relations Act to be a lawful and reasonable exercise of the Board's statutory authority.
2. Whether the district court erred in enjoining the rule's unfair labor practice and equitable tolling provisions for failures to post the required notice.
3. Assuming that either (or both) of the challenged provisions is found unlawful, whether the district court correctly found the remainder of the rule severable.

4. Whether the district court properly found that neither the First Amendment nor Section 8(c) of the Act shield employers from the obligation to post an official government notice of legal rights.

## STATEMENT OF THE CASE AND FACTS

Plaintiff Employers are challenging a rule entitled Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104) ("the Rule") (D.A. 014).[1] Issued by the National Labor Relations Board ("NLRB" or "the Board"), the Rule establishes a duty for employers within the Board's jurisdiction to post a designated notice informing employees of their rights under the National Labor Relations Act," ("NLRA" or "the Act").

This Rule corrects a long-standing anomaly. Until now, the Board has been almost alone among agencies and departments administering major federal labor and employment laws in not requiring covered employers to routinely post workplace notices 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

[1] Record references in this final brief are to the joint deferred appendix ("D.A."); "Br." refers to Plaintiff Employers' opening brief. "House Amici" refers to the amicus brief filed by 31 Members of the U.S. House of Representatives.

minimal necessity to ensure that employees are informed of their workplace rights.

On March 2, 2012, the district court issued an opinion and order upholding employers' duty to post the notice under the Rule but partially invalidating two of the Rule's three enforcement mechanisms (D.A. 134). The district court agreed with the Board that the Act's Section 6 provides statutory authority for the Rule and that deference was merited under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*") (D.A. 098-109). Moreover, the court rejected Plaintiff Employers' argument that the First Amendment or Section 8(c) exempts employers who disagree with the notice from the posting requirement (D.A. 125-30). However, the district court found that neither the Rule's unfair labor practice remedy (D.A. 114-21) nor the Rule's equitable tolling provision (D.A. 121-30) were permissible. Nonetheless, the district court permitted the Board to employ both remedies on a case-by-case basis (D.A. 119, 125 n.21). Furthermore, despite enjoining these provisions, the district court determined that the Rule's notice-posting requirement was severable (D.A. 130-33). Finally, the court found that Plaintiff Employers had failed to challenge the Rule's third enforcement mechanism, which provides that the Board may make an evidentiary

inference of anti-union animus based on an employer's willful refusal to post the notice, but that, in any case, the provision was valid (D.A. 133 n.26).[2]

Both parties have appealed. On April 17, 2012, this Court granted Plaintiff Employers' motion for an injunction pending appeal and ordered expedited briefing. Argument has been set for September 11, 2012.

## STANDARD OF REVIEW

This Court reviews the district court's summary judgment decisions de novo. *See Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1292 (D.C. Cir. 2002).

## SUMMARY OF ARGUMENT

1. Section 6 of the Act allows the Board to issue rules "necessary to carry out" the Act's other provisions. The district court correctly held that the Board reasonably interpreted its "broad rulemaking authority" under Section 6 to authorize its creation of a duty for employers to post a notice of employee rights under the NLRA. Particularly in light of evidence in the administrative record showing declining levels of public awareness of the Act's protections and procedures, this Rule is necessary to carry out not only Section 7, which sets forth the core rights of employees under the NLRA,

[2] Subsequently, the District of South Carolina found in a parallel case that the Board lacked statutory authority to issue the Rule. *Chamber of Commerce v. NLRB*, No. 2:11–cv–02516–DCN, 2012 WL 1245677, at *15 (D.S.C. Apr. 13, 2012).

and Section 1, which sets forth the Act's policies, but also Sections 8-10, which empower the Board to protect those rights through cases brought before it by outside parties. Indeed, the Board's interpretation is so reasonable that, as the district court noted, Plaintiff Employers "did not even proffer an argument why the Court should find it to be unreasonable" (D.A. 109).

Plaintiff Employers' and House Amici's attempts to limit Section 6 to rules that merely carry out the Board's adjudicatory powers are unavailing. These arguments find no support in the plain text of Section 6, as the district court found, and they run contrary to the Supreme Court's instruction in *American Hospital Association v. NLRB*, that the Board's rulemaking power is not limited by other provisions of the Act unless those other provisions so state. Moreover, Plaintiff Employers' argument that the existence of specific notice-posting requirements in other statutes implicitly prohibits the Board from promulgating the Rule is contrary to authoritative precedent disapproving drawing just such an inference from legislative silence.

2. The district court erred in enjoining Section 104.210 of the Rule, which determined that failure to post the required notice could be found to be an unfair labor practice under Section 8(a)(1). Courts interpreting Section 8(a)(1) have long rejected the district court's distinction

between "doing something" and "failure" to do something as dispositive. Additionally, the district court was wrong to suggest that Section 8(a)(1) requires particularized proof of specific intent or effect of unlawful conduct.

The district court also erred in enjoining the Rule's Section 104.214(a), authorizing equitable tolling of the statute of limitations. This provision merely codifies the "prevailing judicial view" that failure to post notice is a strong factor supporting tolling. It was not intended to alter the burden of proof or necessity for case-by-case balancing, and the district court erred in concluding otherwise. The court further erred in finding no *Chevron* gap for the Board to fill with respect to equitable tolling and in finding that the Board could not rely on judicial decisions involving statutes expressly mandating notice posting.

3. Even if this Court affirms the district court's conclusions regarding the challenged enforcement mechanisms, it should also affirm the lower court's determination that the Rule is severable. During the rulemaking, the Board consistently expressed its view that the Rule would be "workable" even if only one enforcement mechanism stood. And because, as the lower court found, Plaintiff Employers never properly challenged the Rule's third enforcement mechanism, which the district court further found to be lawful, the Rule's workability in the event of severance

is clear. Severance would also be appropriate here because none of the three enforcement provisions depends on the others.

4. The district court correctly rejected Plaintiff Employers' First Amendment challenge to the Rule. The obligation for businesses to post a notice of legal rights that is created, produced, and distributed by the government does not implicate any compelled speech concerns. Moreover, the district court properly rejected Plaintiff Employers' entirely derivative argument that the Rule was contrary to Section 8(c), which immunizes noncoercive speech from unfair labor practice liability.

## ARGUMENT

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

The district court correctly held that the Board had statutory authority to require employers to post a notice of employee rights. As demonstrated below, the Rule is a legitimate exercise of the Board's substantive rulemaking authority under Section 6.

Section 6 grants the Board "broad rulemaking authority," *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 613 (1991) ("*AHA*"), to issue "such rules and regulations as may be necessary to carry out the provisions of this [Act]." 29 U.S.C. § 156; *cf. AFL-CIO v. Chao*, 409 F.3d 377, 384 (D.C. Cir. 2005)

(contrasting the Secretary of Labor's "more limited" authority to issue rules necessary to achieve discrete goals with the broader power granted other agencies "more generally to act as is 'necessary to carry out the purposes' or 'provisions' of a statute"). And precedent requires courts to apply a deferential standard of review whether a rule promulgated under Section 6 is "necessary." Thus, as the Supreme Court has instructed, "[w]here 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,' we have held that 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) (omission in original; citation, footnote omitted) (quoting *Thorpe v. Hous. Auth. of Durham*, 393 U.S. 268, 280-81 (1969)).

This Court has repeatedly applied *Mourning* and its progeny to uphold agency rules issued pursuant rulemaking grants similar to Section 6. For example, in *Checkosky v. SEC*, 23 F.3d 452 (D.C. Cir. 1994) (per curiam), this Court upheld the SEC's authority to promulgate a rule governing discipline of accountants "appearing or practicing" before the Commission. *Id.* at 468 (Randolph, J.). That rule was not expressly authorized by statute.

Instead, the Commission relied upon its authority, under the Securities Exchange Act of 1934, to issue rules "as may be necessary or appropriate to implement the provisions [of the 1934 Act]." *Id.* (alteration in original). Although the Court's opinion remanded the case to the Commission for "a more adequate explanation of [the rule] and its application to this case," *id.* at 454 (per curiam opinion), each panel judge issued an opinion relying on *Mourning* or decisions applying its test to conclude the SEC had statutory authority to promulgate a disciplinary rule. *See id.* at 455-56 (Silberman, J.); *id.* at 468-72 (Randolph, J.); *id.* at 493-94 (Reynolds, J., concurring in part and dissenting in part).

Similarly, in *Community for Creative Non-Violence v. Kerrigan*, 865 F.2d 382 (D.C. Cir. 1989), this Court relied on *Mourning* to reject a challenge to the Capitol Police Board's statutory authority to issue regulations "requiring permits for demonstrations on the Capitol Grounds and setting out rules governing the issuance of those permits." *Id.* at 384. As in *Checkosky* and here, the contested regulations were not expressly authorized by statute. Rather, the Police Board relied on 40 U.S.C. § 212(b) (1982) (recodified at 2 U.S.C. 1969(a) (2006)), which authorizes it to make "all necessary regulations" for controlling Capitol Grounds traffic. *Id.* at 385. Even though the Police Board's authority under the statute was limited

to regulating traffic, this Court concluded that the Police Board had demonstrated, consistent with *Mourning* and *Thorpe*, that the permit regulations were "reasonably related to traffic-related interests." *Id.*; *see id.* at 386-87.[3]

Although the *Mourning* test is deferential, it is not a rubberstamp "to prescribe whatever the agency sees fit. There are limits, derived from the substantive provisions of the statute." *Checkosky*, 23 F.3d at 469 (Randolph, J.). Thus, an agency cannot rely on its general rulemaking authority to contradict what Congress has said elsewhere in the enabling act. *See, e.g.*, *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 139-40 (D.C. Cir. 2006) (finding that agency lacked authority to issue a rule that was at odds with Congress's choice to leave such regulation to states and Indian tribes).

These precedents confirm that, as shown below, the Rule is properly upheld under *Mourning*'s "reasonably related" standard, *see infra* Part I.A. Moreover, the Rule is also properly upheld, as the district court found, under *Chevron*'s two-step test. *Chevron* step one requires a court to inquire into whether Congress "has directly spoken to the precise question at issue." *Id.*

[3] *See Checkosky*, 23 F.3d at 469 n.2 (Randolph, J.), for additional examples where this Court applied *Mourning* to analyze agency rules.

at 842. But "if the statute is silent or ambiguous with respect to the specific issue," *id.* at 843, the court determines at step two "whether [the agency's] interpretation is 'permissible' or 'reasonable,' giving 'controlling weight' to the agency's interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *Mount Royal Joint Venture v. Kempthorne*, 477 F.3d 745, 754 (D.C. Cir. 2007) (citations omitted).

Where, as here, an agency has exercised its general rulemaking authority to issue regulations "necessary to carry out the provisions of this [Act]," 29 U.S.C. § 156, the *Chevron* step one question is whether the challenged rule is "necessary." And "[g]iven the ambiguity inherent in the word 'necessary,' the question remains whether, under *Chevron* Step 2, the [agency's] interpretation of what is 'necessary' . . . is a reasonable application of [its] authority, and therefore is permissible and entitled to deference." *AFL-CIO*, 409 F.3d at 387; *see also Krause v. Titleserve, Inc.*, 402 F.3d 119, 126 (2d Cir. 2005) ("Particularly as used in the law, the word 'necessary' is ambiguous."). Thus, the district court correctly concluded at step one that Congress had not "sp[oken] directly to the Board's authority to promulgate this particular sort of rule," and, at step two, that the "Board reasonably interpreted section [6] of the Act to authorize the rulemaking here." (D.A. 099).

As shown below, this Rule, like the ones upheld in *Mourning*, *Thorpe*, *Checkosky*, and *Community for Creative Non-Violence*, is "'reasonably related to the purposes of the enabling legislation.'" *Mourning*, 411 U.S. at 369 (quoting *Thorpe*, 393 U.S. at 280-281). Moreover, the Board's notice-posting regulation does not run afoul of the substantive provisions of the statute. Therefore, the district court's judgment upholding the Board's statutory authority to require employers to display an official notice of employee rights merits affirmance under either *Mourning* or *Chevron*.

### A. The Rule "is necessary to carry out" several of the Act's provisions.

The NLRA reflects Congress's determination that certain employer and labor union practices and the inherent "inequality of bargaining power between employees . . . and employers" substantially burden commerce. 29 U.S.C. § 151. To address these problems, Congress decided 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—the Act's "centerpiece," *Office & Prof'l Employees Int'l Union v. NLRB*, 981 F.2d 76, 81 (2d Cir. 1992)—grants most private-sector employees the right "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.[4] Section 8, in turn, prohibits employers and unions from engaging in "unfair labor practices" that infringe on covered employees' Section 7 rights, *id.* § 158. To administer the statute, Section 3 establishes a National Labor Relations Board and a General Counsel of the Board. Section 10 authorizes the Board to adjudicate unfair labor practice cases litigated by the General Counsel, 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 Board relied on ample administrative record evidence, as well as the regulatory precedent set by the Department of Labor ("DOL") over sixty years ago when it required employers to post a notice under the Fair Labor Standards Act,[5] to support its reasonable conclusion that the full and free exercise of NLRA rights depends on employees knowing that those rights

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[4] The Board has long recognized that "[t]he rights guaranteed to employees by the Act include full freedom to receive aid, advice, and information from others, concerning those rights and their enjoyment." *Harlan Fuel Co.*, 8 NLRB 25, 32 (1938).

[5] *See* 14 Fed. Reg. 7516, 7516 (Dec. 16, 1949) (finding that "effective enforcement of the act 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").

exist and that the Board protects those rights. This conclusion accords with the long-standing tradition of other federal agencies and departments to require employers to post various notices of employee rights in the workplace. *See* 76 Fed. Reg. at 54,006-07 (D.A. 014-15) (listing examples). But until this Rule, the Board stood almost alone in not having a similar requirement. 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. Additionally, the notice tells employees how to contact the Board for additional information and how to report a violation of the Act before the statute of limitations expires.

The district court agreed with the Board that the information supplied by this notice was "necessary to carry out" the core rights set forth by Section 7 (D.A. 100, 104, 105). This by itself is sufficient to satisfy *Mourning*'s test. But in addition, the Rule also strongly promotes the Board's ability to "carry out" Sections 8, 9, and 10. Put simply, the Board's processes are not self-initiating. Under Section 10, the Board may not adjudicate an unfair labor practice case involving a violation of Section 8 unless the General Counsel issues a complaint, and the General Counsel may not issue a complaint on a particular allegation unless a charge has been filed

within the Act's brief, six-month statute of limitations. *See* 29 U.S.C. §§ 153(d), 160(b); *see also* 2 The Developing Labor Law 2683 (John E. Higgins, Jr. ed., 5th ed. 2006). Likewise, under Section 9, which implements employees' Section 7 right to representatives of their own choosing, union election "procedures are set in motion with the filing of a representation petition." 2 The Developing Labor Law 2662. In both instances, a private party must file the initiating document. *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 Act therefore presupposes employee awareness of and participation in the Board's processes. Accordingly, employee knowledge of NLRA rights and how to enforce them within statutory timeframes is crucial to effectuate Congress's national labor policy through the processes established by Sections 8, 9, and 10.

Consistent with the view of scholars who first urged the Board to adopt a notice-posting requirement,[6] the Board found—and Plaintiff Employers do not contest (Br. 1 n.2)—that there is now a significant lack of public awareness of the NLRA's protections and procedures. This informational deficit precludes the full exercise of Section 7 rights and the Board's ability to remedy violations of those rights under Sections 8, 9, and

[6] *See* 76 Fed. Reg. at 54,006 (D.A. 014) (citing three law review articles).

10. Therefore, given the critical link between employees' timely awareness of their NLRA rights and the fulfillment of the Act's objectives, the Board was correct to conclude that the Rule's notice-posting obligation is "necessary to carry out" all of the aforementioned provisions of the Act. (D.A. 108.) At the very least, the notice-posting requirement is "reasonably related" to the purposes of the Act, as *Mourning* requires.

The reasonableness of the Board's interpretation is so strong "that plaintiffs d[id] not even proffer an argument for why the [district c]ourt should find it to be unreasonable." (D.A. 108-09).[7] Indeed, even the district court in *Chamber of Commerce* conceded that the "Board articulated a satisfactory explanation for its action." *See* 2012 WL 1245677, at *15 n.20 (quotation omitted).

[7] The district court's waiver finding should be upheld, *see Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *FC Investment Group v. IFX Markets, Ltd.*, 529 F.3d 1087, 1095-96 (D.C. Cir. 2008), and this issue is not moot just because the court below alternatively found the Board's Rule reasonable. *GSS Group Ltd. v. Nat'l Port Auth.*, No. 11-7093, 2012 WL 1889384, at *5 (D.C. Cir. May 25, 2012).

Moreover, Plaintiff Employers' minimalist references to this issue in their opening brief constitute appellate level waiver (*see* Br. 24 (one sentence relating reasonableness standard); *id.* at 36 n.12 (a one-sentence footnote asserting that this issue was not waived below).)

### B. The notice-posting obligation is consistent with the Act.

Plaintiff Employers and House Amici attempt to show that Section 6 does not mean what it says and that other provisions of the Act say much more than they do. In their view, the Act must be read as limiting the Board's rulemaking authority to rules that carry out specific Board functions. (Br. 4-9, 26-31.) That view does not withstand scrutiny.

#### 1. Section 6 permits the Board to issue rules that create duties for employers and labor unions.

In *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969), the Supreme Court observed that the Board's rulemaking power must be exercised "'in the manner prescribed by the Administrative Procedure Act.'" *Id.* at 763 (quoting 29 U.S.C. § 156). The Court then commented:

> The Administrative Procedure Act contains specific provisions governing agency rule making, which it defines as "an agency statement of *general or particular applicability and future effect*."

*Id.* at 763-64 (emphasis added) (citation omitted). In issuing the Rule, the Board has promulgated "an agency statement of general . . . applicability and future effect," *id.*, by the means expressly permitted by the NLRA, the Administrative Procedure Act ("APA"), and Supreme Court precedent.

**a. Section 6 permits the Board to create affirmative duties.**

Legislative rulemaking authority, like that granted to the Board in Section 6, is widely understood to permit agencies to impose obligations on those subject to the statute. *See, e.g.*, *Batterton v. Marshall*, 648 F.2d 694, 701-02 (D.C. Cir. 1980) (legislative rules "grant rights, impose obligations, or produce other significant effects on private interests"); *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974) ("A properly adopted substantive rule establishes a standard of conduct which has the force of law."). Using such rules, agencies "prescribe standards for acceptable conduct." *Marshall*, 648 F.2d at 703.

In *Marshall*, this Court commented on the expansive scope of general rulemaking power: "the rights, conduct, obligations, and interests affected by legislative, binding rules cover a broad range." *Id.* at 702 n.30. And such standards and obligations established by agency rulemaking include both affirmative commands, such as the Rule's mandate to post a notice, as well as negative ones. *See Beltone Elecs. Corp. v. FTC*, 402 F. Supp. 590, 598 (N.D. Ill. 1975) (discussing FTC's creation of affirmative duties applicable to all manufacturers and sellers of products through its Trade Regulation Rule); Oren Bar-Gill & Rebecca Stone, *Mobile Misperceptions*, 23 Harv. J.

L. & Tech. 49, 110 (2009) (explaining that the FCC regulates cellular providers through both affirmative and negative disclosure provisions).

Plaintiff Employers have provided no examples of any other broad grants of rulemaking authority that have been interpreted otherwise. Their failure to do so is not surprising because when Congress grants legislative rulemaking authority, it expressly permits an agency to make policy decisions that further, and do not contradict, the enabling statute. *See Alcoa S.S. Co. v. Fed. Mar. Comm'n*, 348 F.2d 756, 761 (D.C. Cir. 1965) (upholding rule because newly-enacted general rulemaking grant gave the agency the authority "to adopt rules necessary to substantive regulation"); *Nat'l Ass'n of Pharm. Mfrs. v. FDA*, 637 F.2d 877, 880 (2d Cir. 1981) (Friendly, J.) (noting that the "generous construction of agency rulemaking authority has become firmly entrenched"). A conclusion that the Board—alone— cannot create affirmative obligations for employers and unions subject to its jurisdiction would be inherently incompatible with the purpose behind such a grant. Accordingly, Section 6 must be read at least as broadly as other grants of legislative rulemaking authority, which allow agencies to create both affirmative and negative obligations. *See, e.g.*, *Thorpe*, 393 U.S. at 278, 280-81 (upholding rule requiring federally assisted housing projects to "comply with a very simple notification procedure before evicting [their]

tenants"); *Lincoln Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 856 F.2d 1558, 1561-63 (D.C. Cir. 1988) (upholding rule requiring financial institutions "to obtain approval" before exceeding certain investing thresholds).

**b. The Board is not limited to issuing rules that relate solely to its duties under Sections 8, 9, and 10.**

Plaintiff Employers further maintain that Section 6 must be limited to authorizing rules "'necessary to carry out one of the Board's existing duties under the Act.'" (Br. 30 (quoting *Chamber of Commerce*, 2012 WL 1245677, at *10)). Thus, they assert that Section 6 should be restricted to carrying out the Board functions specified in Sections 8, 9, and 10 of the Act (Br. 10-11, 30-31, 35). This argument has no basis in Section 6's text. Congress authorized the Board to issue "such rules as may be necessary to carry out the provisions of this [Act]" *not* "such rules as may be necessary *for the Board* to carry out *its duties under Sections 8, 9, and 10*." (*See* D.A. 100 (noting that Section 6 "does not limit the Board to enacting rules for carrying out particular duties")); *cf.* 42 U.S.C. § 2000-e12(a) (authorizing the EEOC only to "issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter"). The district court was therefore correct to find "no grounds to conclude that a rule aimed at

carrying out section [7] of the Act is any less valid than a rule aimed at carrying out section [9]." (D.A. 104).

Additionally, Plaintiff Employers' argument fails on its own terms. As explained above, the Board reasonably concluded that this Rule is necessary to carry out Sections 1 and 7 of the Act as well as the Board's "existing duties" under Sections 8, 9, and 10, because the effectiveness of all these provisions depends on employees knowing their rights and how to enforce them. *See* 76 Fed. Reg. at 54,010-11 (D.A. 018-19). Accordingly, the Rule satisfies even Plaintiff Employers' insupportably narrow construction of Section 6.

**2. The limits on the Board's adjudicatory powers under Sections 9 and 10 do not prohibit the Board from exercising its Section 6 authority to create affirmative duties.**

Plaintiff Employers claim that "[t]he Board is not permitted to establish affirmative action obligations on the part of employers or indeed to impose *any* duty on employers except as a remedy for violations of the Act's express statutory requirements." (Br. 26-27). But immediately, Plaintiff Employers contradict themselves when they acknowledge, without criticism, that the Board has long required employers to post a notice of employee rights in the period preceding a Section 9 election (*id.* at 27; *see also id.* at 6 n.5). What they do not mention is that this requirement does not have a

remedial purpose or effect and has survived legal challenge. *See Pannier Corp., Graphics Div. v. NLRB*, 120 F.3d 603 (6th Cir. 1997) (discussing 29 C.F.R. § 103.20).

Even more significantly, Plaintiff Employers' argument that the NLRA's adjudicatory provisions prohibit the Board from requiring any affirmative conduct via rulemaking conflicts with *AHA*. Not only did the Court declare in that case that the Board possessed "broad rulemaking authority," 499 U.S. at 613, which presumptively allows for the creation of affirmative duties, the Court also 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.

*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.[8]

[8] Particularly without merit is Plaintiff Employers' suggestion (Br. 26-28) that because Section 10 limits the Board's authority to require posting of employee notices to remedy particular unfair labor practices, Section 10 also

Indeed, had Congress intended to limit the Board's rulemaking power in the way Plaintiff Employers urge, it would have used the exact same words of limitation that appear in the Act's provision detailing the Board's subpoena power.[9] Section 11 explicitly limits the Board's subpoena power to "hearings and investigations . . . necessary and proper for the exercise of the powers vested in [the Board] by sections [9] and [10]." 29 U.S.C. § 161. This provision demonstrates *AHA*'s point that when Congress wants to limit the Board's power by reference to Sections 9 and 10, it does so explicitly. The district court agreed, finding it "significant that Congress did not similarly limit the scope of the Board's rulemaking power under section [6]." (D.A. 105).

Plaintiff Employers would read these same words of limitation, "necessary and proper for the exercise of the powers vested in [the Board] by Section 9 and 10," into Section 6. But they fail to explain why it was

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restricts the Board's authority under Section 6 to require posting of general notices informing employees of their statutory rights. The court below reasonably rejected this argument as a non sequitur, noting that none of the cases relied upon by Plaintiff Employers "purport to consider the scope of the Board's general rulemaking authority, so they are not apposite or instructive here." (D.A. 105-06).

[9] House Amici claim Section 6 contains "words of limitation," (House Amici 13 n.10), but cite only to Justice Stewart's concurring opinion construing Section 8(a)(5). *See Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 220 (1964) (Stewart, J., concurring). As shown, Section 6 demands and has been accorded a much broader construction.

necessary for Congress to expressly limit the Board's subpoena power to Section 9 and 10 proceedings if, as they argue, that limitation necessarily applies to all the Board's functions. As this Court has stated, courts "must be 'hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.'" *AKM LLC v. Sec'y of Labor*, 675 F.3d 752, 756 (D.C. Cir. 2012) (quoting *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2330 (2011)).

Moreover, Plaintiff Employers' reading fails to heed this Court's instruction that "'[w]here Congress includes particular language in one [sub]section of a [provision] but omits it in another [subsection], it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Village of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 661 (D.C. Cir. 2011) (alterations in original) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *accord Ford v. Mabus*, 629 F.3d 198, 206 (D.C. Cir. 2010) ("[I]t is through the dint of phrasing that Congress speaks, and where it uses different language in different provisions of the same statute, we must give effect to those differences.") (internal quotations omitted). Thus, the enlightening contrast

of Section 11 demonstrates the infirmity of Plaintiff Employers' restricted reading of Section 6.[10]

### 3. The Board's Rule does not exceed the Act's jurisdictional limits.

Plaintiff Employers and House Amici repeatedly complain that the Board exceeded its "jurisdiction" by issuing this Rule **(**Br. 2, 8, 10, 21, 25, 26, 29, 30, 33; House Amici Br. 3, 5, 6, 8, 9, 11, 12, 13, 14). Plaintiff Employers point out that the Board's "jurisdiction" to decide unfair labor practice cases under Section 10 is dependent on the filing of a charge by a private party. However, jurisdiction in that sense "is the power to hear and determine the controversy presented in a given set of circumstances." *In re NLRB*, 304 U.S. 486, 494 (1938).

What Plaintiff Employers fail to recognize is that Congress intended the NLRA's jurisdictional breadth to encompass the full extent of Congress's power to regulate commerce. *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963). The obligations set forth in the NLRA's text, as well as those that the Board has developed through adjudication or rulemaking, apply to all employers within the Board's statutory jurisdiction,

[10] Plaintiff Employers note that Section 11 serves a different purpose than Section 6 (Br. 31 n.9) but never explain why this distinction justifies abandoning the canon to give effect to all the words in a statute.

not just those who have participated in official proceedings. For example, in *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16-17 (1962), the Supreme Court held that a nonunion employer's rule forbidding employees to leave work without permission did not provide a lawful cause for discharge when applied to the unorganized employees' concerted activity in spontaneously walking out to protest lack of heat in the workplace. The holding in that case defines a standard of conduct for employers generally.[11]

Employer breaches of obligations created by Board decisions such as *Washington Aluminum* may go unremedied if unfair labor practice charges are not timely filed, but that question is distinct from whether the statute itself, and case law and regulations implementing it, place obligations on employers in the first place. *See NLRB v. Pease Oil Co.*, 279 F.2d 135, 137 (2d Cir. 1960) ("An Act of Congress imposes a duty of obedience unrelated to the threat of punishment for disobedience."). Thus, whenever a new NLRA rule—whether established by adjudication or rulemaking—is created, it imposes similar legal obligations on all employers subject to the Act.

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

Regardless of their origin, such rules, including the one under review, are enforced in the same way—through unfair labor practice proceedings initiated by a private party. Accordingly, Plaintiff Employers' narrow focus on the Board's administrative "jurisdiction" sheds no light on the validity of this Rule.

**4. The general claim that the Board is an adjudicatory agency, not a regulatory agency, lacks merit.**

House Amici call attention to legislative history emphasizing the Board's adjudicatory role. (House Amici 7-11). But this proves only what is undisputed—that is, under Sections 9 and 10, investigation and adjudication must begin with a charge or a petition. As shown, these provisions do not limit the Board's authority under Section 6. Accordingly, House Amici's survey of legislative history fails to overcome the salient legal point—specifically, that the statute as enacted gives the Board ample authority to adopt legislative rules of general applicability and future effect. *See Wyman-Gordon*, 394 U.S. at 763-64; *Mourning*, 411 U.S. at 369.

This Court rejected a similar argument thirty years ago in *Trans-Pacific Freight Conference of Japan/Korea v. Federal Maritime Commission*, 650 F.2d 1235 (D.C. Cir. 1980) ("*Trans-Pacific*"). In that case, a shipper asserted that the adjudicatory provisions of the Shipping Act precluded the Federal Maritime Commission from exercising its statutory

rulemaking powers to prescribe standards of conduct for shippers. This Court squarely rejected that argument:

> [A]n agency is not to be constricted by the formalities of the adjudicatory process in the absence of a clear congressional intent to the contrary. . . . Congress added in the 1961 amendments to the Shipping Act section 43, which empowered the Commission to "make such rules and regulations as may be necessary to carry out the provisions of this Act." Congress thus expressly made section 43 applicable to *all* sections of the Act. We find nothing in the language of section 15 requiring "notice and hearing" that subtracts from the Commission's rulemaking powers either expressly or by implication.

*Trans-Pacific*, 650 F.2d at 1245 (footnotes omitted) (emphasis added); *see also Lincoln Sav. & Loan*, 856 F.2d at 1562 (explaining that the "existence of specific grants do not eviscerate a general grant of rulemaking power") (internal quotation omitted). Here, too Plaintiff Employers have failed to show any "clear congressional intent" to restrict the agency rulemaking powers. As *Trans-Pacific* shows, restrictions that exist when an agency administers an enabling act's adjudicatory provisions do not automatically circumscribe the agency's rulemaking authority.[12]

[12] Contrary to Plaintiff Employers (Br. 5) the fact that the Board has traditionally chosen to develop legal rules through adjudication instead of rulemaking says nothing about the extent of the Board's Section 6 powers. *See Am. Hosp. Ass'n v. NLRB*, 899 F.2d 651, 655 (7th Cir. 1990) (Posner, J.) ("[T]he exercise of the Board's dormant substantive rulemaking power is long overdue. . . . Its rulemaking power is not less when it proceeds, under the explicit authority of section 6, in accordance with the procedures that the

### 5. Contrary to Plaintiff Employers and House Amici, Congress did not prohibit an NLRA notice-posting rule by negative implication.

Plaintiff Employers and House Amici seek to show by negative implication that the absence of an express notice posting requirement in the NLRA can only be understood as an affirmative refusal to delegate to the Board interpretive authority on this issue. First, they argue that Congress's failure to adopt a vastly different provision in an earlier version of the Wagner Act together with the contemporaneous enactment of certain provisions into the Railway Labor Act ("RLA") supports such an inference. Similarly, they argue that because other labor and employment statutes expressly require notice posting, the Board is prohibited from issuing such a rule under its legislative rulemaking powers. These arguments lack merit.

#### a. The Act's legislative history does not manifest any clear congressional intent to preclude notice posting.

To find clear congressional intent in the NLRA's silence regarding notice posting "make[s] sense only if all omissions in legislative drafting were deliberate." Richard A. Posner, *Statutory Interpretation – In the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 813 (1983). Experience has demonstrated that there are several other plausible

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Administrative Procedure Act prescribes for rulemaking."), *aff'd*, 499 U.S. 606 (1991).

explanations for such an omission: Congress may not have focused on the point in the context at issue, or where an agency is empowered to administer the statute, Congress may have deliberately left the choice up to the agency. *See Clinchfield Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 895 F.2d 773, 779 (D.C. Cir. 1990); *see also Cheney R.R. Co. v. ICC*, 902 F.2d 66, 104 (D.C. Cir. 1990) (noting that "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.") (quotation omitted). And it is also possible that "Congress was unable to forge a coalition on either side of the question." *Chevron*, 467 U.S. at 865. As Judge Posner warned, "Not every silence is pregnant." *State of Ill., Dep't of Public Aid v. Schweiker*, 707 F.2d 273, 277 (7th Cir. 1983).

Here, House Amici rely heavily on legislative history (at 17-26) that both the court below and the district court in *Chamber of Commerce* agreed was irrelevant (D.A. 104-05 n.8); *Chamber of Commerce*, 2012 WL 1245677, at *13 n.15. House Amici rely upon Section 304(b) of the earliest introduced version of what would later become the Wagner Act:

> Any term of a contract or agreement of any kind which conflicts with the provisions of this Act is hereby abrogated, and every employer who is a party to such contract or

> agreement shall immediately so notify his employees by appropriate action.

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

Contrary to House Amici's claim, Congress's withdrawal of both Section 304(b) and Section 5(5) was predicated on concerns about the abrogation provision, not the notice-posting provision. For example, the United Mine Workers President (*see* House Amici 19 n.18) objected to the scope of the abrogation provision, not the employee notice provision. *Hearing on S. 2926 Before the S. Comm. on Educ. & Labor*, 73d Cong. 157 (1934) ("*S. 2926 Hearing*"), *reprinted in* 1 Leg. Hist. 187 (statement of John L. Lewis seeking to exclude certain dispute resolution procedures from Section 304(b)); *id.* at 652-53, 656, *reprinted in* 1 Leg. Hist. 690-91, 694 (testimony of L.L. Balleisen objecting to Section 304(b)'s abrogation, not Section 5(5) making it unlawful to not provide notice of abrogation (*see* House Amici 19 n.18)). House Amici italicize the portions of the testimony

of James A. Emery, General Counsel of the National Association of Manufacturers, mentioning the notice-posting obligation (House Amici 20-21). But as House Amici's own account demonstrates, these references were ancillary to Mr. Emery's repeated objection that, if an employer had "initiated or participated" in setting up a plan for dealing with its employees, Section 304(b) abrogated such arrangements "no matter how old they may be, or agreeable to the parties . . . . [T]hey are not only abrogated by this bill, but the employer must immediately so notify his employees, and they are destroyed." S. 2926 Hearing 360, *reprinted in* 1 Leg. Hist. 394. In fact, it was when Mr. Emery raised the abrogation issue that Senator Wagner acknowledged "there is raised there a more serious question of constitutional law," and the Committee unanimously agreed to eliminate Section 304(b). *Id.* at 360-61, *reprinted in* 1 Leg. Hist. 394-95.

In addition, the type of notice implicated by Section 304(b) differs in kind from the notice in the Rule, and so, as both the court below and the district court in *Chamber of Commerce* recognized, the rejection of one in no way implies rejection of the other (D.A. 104-05 n.8); *Chamber of Commerce*, 2012 WL 1245677, at *13 n.15. Section 304(b) required an individualized notice prepared by the employer, not a uniform government-supplied notice. The rejected notice was exclusively devoted to

detailing the provisions of private agreements no longer in effect at particular facilities, and was not an official government statement of key provisions of a public law applicable to employees nationwide.[13]

Moreover, House Amici's attempt to equate the notice envisioned in Section 304(b) with this Rule's notice requirement is refuted by their own account of the RLA, which treats the two kinds of notice in separate and distinct provisions. Similarly, House Amici's own categorization of different types of notice statutes demonstrates that Congress recognized the difference between the Section 304(b) notice and a general notice of statutory rights (House Amici 16-17).

In sum, neither House Amici nor Plaintiff Employers have uncovered any legislative history documenting Congress's consideration of whether employers subject to the NLRA should post a government-provided notice setting forth the core provisions of the Act and informing employees of their rights and how to exercise them. Thus, their arguments disregard the accepted legal principle that weight should be given to Congress's rejection

[13] There is no merit to House Amici's contention that Section 304(b)'s abrogation notice "would have functioned like a generalized notice requirement" because of the large numbers of abrogated contracts (House Amici 24 n.25). Since the abrogation notice would only have informed individual employees that their particular contract was unlawful, it would not in any way "function like" a general notice to all employees of their federal rights under a public law.

of a bill or amendment *only* if it is clear that Congress considered and rejected the very position argued before the court. *See Blau v. Lehman*, 368U.S. 403, 411-12 (1962). Otherwise, "[t]o explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities." *Helvering v. Hallock*, 309 U.S. 106, 119-20 (1940); *see also, e.g., Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 187 (1994) (warning that failed legislative proposals are "a particularly dangerous ground" for statutory interpretation, as "several equally tenable inferences may be drawn from [congressional] inaction").[14]

**b. The existence of other generalized notice-posting statutes does not undermine the Rule.**

Nor is there any merit to House Amici's assertion that RLA legislative history must be given decisive weight because that act and the NLRA are similar statutes that Congress considered contemporaneously (*see* House Amici 17-18, 22; *see also* Br. 12-13, 33-34). In fact, their particular

[14] House Amici also exaggerate the significance of the fact that the NLRA has been amended a number of times since 1935, without adding a notice obligation (*see* House Amici 25). A number of cases discount whether mere reenactment suffices to show congressional intent. *See, e.g., Zuber v. Allen*, 396 U.S. 168, 185-86 n.21 (1969) ("The verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible. . . . Congressional inaction frequently betokens unawareness, preoccupation, or paralysis."). To give weight to inaction on this issue during the NLRA's amendments would be particularly inappropriate inasmuch as legislative consideration at those times was entirely addressed to other matters. *See Aaron v. SEC*, 446 U.S. 680, 695 n.11 (1980).

reliance on Section 152 Fifth, (45 U.S.C. § 152, Fifth) (*see* House Amici 17-18) is a clear illustration of the point that the differences between the RLA and the NLRA are sometimes as important as the similarities. That provision places restrictions on so-called union security agreements making union membership a condition of employment. Congress did not enact similar restrictions in the Wagner Act. *See Communications Workers v. Beck*, 487 U.S. 735, 747-48, 754 (1988) (explaining that, as enacted, the Wagner Act's Section 8(3) permitted majority unions to negotiate "closed shop" agreements requiring employers to hire only persons who were already union members, while the RLA, between its 1934 and 1951 amendments, had an "open shop" policy).

As the Board observed in this Rule's preamble, 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 (D.A. 021) (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 RLA); *Air Transport Ass'n of Am., Inc. v. Nat'l Mediation Bd.*, 663 F.3d 476, 493 (D.C. Cir. 2011) (Henderson, J., dissenting) (advising against using the NLRA to interpret the RLA, because "the fit is far from neat").

What is more, the dearth of legislative history regarding notice posting in the NLRA, RLA and Title VII, is itself significant. For example, it is clear from the RLA's legislative history that its generalized notice-posting provision, Section 2, Eighth (45 U.S.C. § 152, Eighth), was considered so uncontroversial that it was not worthy of even a brief mention in the legislative history.[15] The lack of debate regarding notice posting in the RLA, the NLRA, and Title VII lends support to the Board's finding here that its notice-posting provision is not the type of "major policy decision,"

[15] Joseph B. Eastman, the "principal draftsman and proponent of the 1934 amendments," *Detroit & Toledo Line Shore R.R. Co. v. United Transp. Union*, 396 U.S. 142, 153 n.19 (1969)), did not mention the new notice-posting requirement, nor apparently did anyone else. *See, e.g., Hearings on H.R. 7650 Before the House Comm. on Interstate & Foreign Commerce*, 73d Cong. 28 (1934) (statement of Joseph Eastman, Federal Transportation Coordinator) *reprinted in* 3 The Railway Labor Act of 1926: A Legislative History 28 (1988) (hereinafter "RLA Leg. Hist."); *Hearings on S. 3266 Before the Senate Comm. on Interstate Commerce*, 73d Cong. 9-26, 156-57 (1934) (statement of Eastman), *reprinted in* 2 RLA Leg. Hist. 9-26, 156-67; H.R. Rep. No. 73-1944, at 2, 14 (1934), *reprinted in* 1 RLA Leg. Hist. 919, 931; S. Rep. No. 73-1065 (1934), *reprinted in* 1 RLA Leg. Hist. 820 (all making no mention of notice provision).

that Congress would have withheld from Agency decisionmaking. 76 Fed. Reg. at 54,009 (D.A. 017) (quoting *Am. Ship Bldg Co. v. NLRB*, 380 U.S. 300, 318 (1965)).[16] And where, as here, the unexplained inclusion of a general notice-posting requirement in the RLA does not appear to have been the result of any major or controversial policy decision, it is difficult to attach significance to the unexplained absence of a similar provision in the Wagner Act. Plaintiff Employers would have this Court believe that a majority of the members of Congress were cognizant of the absence of a notice-posting provision from the NLRA, and that such omission was deliberate. But the much more likely answer is that Congress did not think about this issue with respect to the NLRA.

Nor have Plaintiff Employers discussed the contrary, long-standing administrative precedent of the Department of Labor ("DOL"), which promulgated a notice-posting rule despite Congress's silence on notice posting in the enabling act. The Board partially relied on this regulation to

[16] *See also Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001); *AKM*, 675 F.3d at 756. The cases in this line cited by Plaintiff Employers such as *American Bar Association* and *Brown & Williamson* (Br. 22, 25, 31, 32, 34) are plainly inapposite, as they concern extraordinarily aggressive expansions of administrative authority, many involving agency efforts to regulate whole new industries. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 465 (D.C. Cir. 2005). By contrast, the Rule applies only to employers who are already covered by the Act (*see* D.A. 102).

support its conclusion that it possessed the requisite authority to mandate the same kind of notice commonly required under other workplace statutes. 76 Fed. Reg. at 54,010, 54,013-14 (D.A. 018, 021-22). 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, DOL, 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 follow. *See* 29 C.F.R. § 516.4 (2010). The Board is unaware of any challenge to DOL's authority to promulgate or enforce the FLSA notice requirement, which has been in effect for over 60 years. *See* 14 Fed. Reg. at 7516 (Dec. 16, 1949) (subsequently codified at 29 C.F.R. § 516.4).

**6. The Rule's recent vintage does not affect its validity.**

Consistent with their attempt to diminish the Board's policy-making powers, both Plaintiff Employers and House Amici suggest that the Rule should be subject to heightened scrutiny because the Act was passed 76 years prior to the Rule's promulgation (Br. 31; House Amici 26 n.26). But as the Supreme Court recently reiterated, "neither antiquity nor contemporaneity with a statute is a condition of a regulation's validity.'' *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704,

712 (2011) (internal quotations omitted); *see also Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740 (1996) (deferring to regulation ‘‘issued more than 100 years after the enactment’’ of the statutory provision the regulation construed).

The Board's "responsibility to adapt the Act to changing patterns of industrial life," *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975), means that it could reasonably choose to rectify perceived harms caused by the now widespread lack of knowledge of NLRA rights. Thus, the Rule's preamble properly found it would be an "abdication of that responsibility for the Board to decline to adopt this rule simply because of its recent vintage." 76 Fed. Reg. at 54,013 (D.A. 021).

### 7. Neither *Railway Labor Executives Association* nor *Teamsters, Local 357* apply to this case.

Plaintiff Employers' reliance on *Railway Labor Executives Association v. National Mediation Board*, 29 F.3d 655 (D.C. Cir. 1994) (en banc), is misplaced. There, this Court struck down an election rule of the NMB, an agency that, unlike the Board, lacks general rulemaking authority. The agency also "effectively" suggested that "deference is required any time a statute does not expressly negate the existence of a claimed power." *Id.* at 671. This Court rejected the argument as "both flatly unfaithful to the principles of administrative law . . . and refuted by precedent." *Id.*

But here, the NLRB is not claiming that the Act's failure to prohibit notice posting is the source of its power to create such an obligation. Rather, the Rule arises as an exercise of its general rulemaking authority, which NMB lacked. Moreover, in *Railway Labor Executives*, there was persuasive evidence in the RLA's language, structure, and legislative history that Congress had considered and rejected the NMB's regulatory choice. *Id.* at 665-69. By contrast, there is no such evidence here. And insofar as the Rule's unfair labor practice remedy is concerned, this Court distinguished *Railway Labor Executives* in a subsequent case involving the NLRB, declaring that "there can be no doubt that Congress delegated authority to the Board to construe provisions of the NLRA, especially those implicating alleged unfair labor practices." *Oil, Chem. & Atomic Workers Int'l Union v. NLRB*, 46 F.3d 82, 90 (D.C. Cir. 1995).

For many of the same reasons, Plaintiff Employers' citation of *Local 357, International Brotherhood of Teamsters v. NLRB*, 365 U.S. 667, 675 (1961) is inapposite (*see* Br. 28). In *Local 357*, the Supreme Court struck down a Board decision requiring certain "protective provisions" to appear in every hiring hall arrangement as a condition of validity under Section 8(a)(3). 365 U.S. at 671-72. The Court explained that the Board's rule failed to give due regard to the first two words of Section 8(a)(3)—"by

discrimination." *Id.* at 674-75. 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. *Id.* at 676. Thus, the Board lacked statutory authority to require broader hiring hall regulation than what Congress specifically chose. Here, by contrast, Congress has not expressed its intent—either in statutory language or in legislative history—regarding the extent of an employer's general notice-posting obligations. Thus, unlike in *Local 357*, where congressional intent and plain meaning were clear, the statute provides no clear answer here, and Plaintiff Employers' argument that the Board is foreclosed from promulgating a notice-posting requirement must fail.

* * *

For the foregoing reasons, the Board's understanding of its Section 6 authority is consistent with the statutory text, Supreme Court decisions interpreting Section 6, and Supreme Court and circuit decisions construing similar language in other statutes. Acceptance of Plaintiff Employers' and House Amici's crabbed and non-textual arguments about Section 6 would therefore place this Court on a collision course with its own decisions and those of the Supreme Court.

## II. The Injunction Against 104.210 and 104.214(a) Is Erroneous.

Though the central provisions of the Rule were upheld, the district court erroneously enjoined two enforcement mechanisms of the Rule, one concerning unfair labor practice liability (Section 104.210) and one equitable tolling (Section 104.214(a)).[17]

### A. The Board properly declared the failure to post the notice to be an unfair labor practice.

Section 104.210 states that "[f]ailure to post the employee notice may be found to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by NLRA Section 7, 29 U.S.C. § 157, in violation of NLRA Section 8(a)(1), 29 U.S.C. 158(a)(1)." Because the duty to post the notice is expressly designed to "ensure effective exercise of Section 7 rights," 76 Fed. Reg. at 54,032 (D.A. 040), the violation of that duty does "interfere with, restrain, or coerce" employees in the exercise of Section 7 rights. 29 U.S.C. § 158(a)(1). And so the Board properly found that a failure to post violates 8(a)(1). The district court's narrow interpretation of 8(a)(1) is not consistent with well-established NLRA law.

[17] Both provisions are reproduced at Br. Ad. 21 and 22.

### 1. Section 8(a)(1) encompasses an employer's failure to perform affirmative duties that the Board finds are necessary to protect employee rights under Section 7.

Section 8(a)(1) declares it to be an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in section [7] of this [Act]." 29 U.S.C. § 158(a)(1). Citing little NLRA law, as though this were a question of first impression, the court reasoned that the term "interfere" applies only to "doing something" that impedes or hampers Section 7 rights, and "does not prohibit a mere failure to facilitate the exercise of those rights." (D.A. 117). In relying primarily on various dictionaries' definitions of "interfere," the district court failed to give effect to the principle that the "plain meaning" of a term is determined from "its use in the context of the statute as a whole." *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1045-47 (D.C. Cir. 1997).

When Section 8(a)(1) is evaluated in the proper context, it is clear that Congress intended 8(a)(1) to cover action as well as inaction. The same argument accepted by the district court was initially accepted by Judge Learned Hand in a Second Circuit opinion holding that a violation of the *affirmative duty* to bargain under Section 8(a)(5) is not also a violation of Section 8(a)(1). The court reasoned that "refusal to negotiate with one's employees does not properly 'interfere with,' 'restrain' or 'coerce' their right

to 'bargain collectively.' *Those words cover affirmative conduct; refusal to bargain is negative . . . .*" *NLRB v. Remington Rand, Inc.*, 94 F.2d 862, 869 (2d Cir. 1938) (emphasis added).

But only two years later, in an opinion also by Judge Hand, the Second Circuit reversed itself on the ground that Congress clearly intended a broader meaning of "interfere":

> [B]oth the Committee of the House and the Committee of the Senate in reporting the bill declared that Secs. 8(2), 8(3), 8(4) and 8(5), were species of the generic unfair labor practice defined in Sec. 8(1). Certainly the language does not so plainly forbid that construction that we must disregard it; on the contrary we consider it authoritative. For that reason we overrule our holding – it was in no sense a dictum – in [*Remington Rand*].

*Art Metals Constr. Co. v. NLRB*, 110 F.2d 148, 150-51 (2d Cir. 1940) (citation omitted); *accord NLRB v. Newark Morning Ledger Co.*, 120 F.2d 262 (3d Cir. 1941).

Examination of the Wagner Act's legislative history confirms that Section 8(a)(1) is a very broad "general declaration[]." *Hearings Before the House Comm. on Labor on H.R. 6288*, 74th Cong. 13 (1935), *reprinted in* 2 Leg. Hist. 2487. It encompasses all the other unfair labor practices of 8(a) within its terms, and the more detailed Sections 8(a)(2) through (5) are merely exemplary of "the most fertile sources for evading or obstructing the

purpose of the law." *Id.*, *reprinted in* 2 Leg. Hist. 2487. As the Senate Report states,

> In conjunction with section 7, the first unfair labor practice enumerated in section 8 makes it illegal for an employer—to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
> . . . .
>
> The four succeeding unfair-labor practices are designed not to impose limitations or restrictions upon the general guaranties of the first, but rather to spell out with particularity some of the practices that have been most prevalent and most troublesome.

S. Rep. No. 74-573, at 9, *reprinted in* 2 Leg. Hist. 2309.

The House Report is still clearer in this regard: "The succeeding unfair labor practices are intended to amplify and state more specifically certain *types of interference* and restraint that experience has proved require such amplification and specification. These specific practices, as enumerated in subsections (2), (3), (4), and (5), are not intended to limit in any way the interpretation of the general provisions of subsection (1)." H.R. No. 74-1147, at 17 (1935), *reprinted in* 2 Leg. Hist. 3066 (emphasis added).

And so a violation of the *affirmative duty* to bargain under Section 8(a)(5) is a "type[] of interference" with Section 7 rights. Given Congress's explanation that Sections 8(a)(2)-(5) only spell out particular obligations already encompassed in Section 8(a)(1), it follows that even if 8(a)(5) *never existed*, the Board could still find that 8(a)(1) *itself* included an affirmative

duty to bargain. The duty to bargain is only spelled out in 8(a)(5) because it is a sub-type of 8(a)(1) violation that particularly caught Congress's attention.

For these reasons, the Board and the courts have justifiably long held that Section 8(a)(1) is violated *whenever* an employer fails to perform its affirmative duties under Section 8(a)(5). *See, e.g.*, *Standard Oil Co. of Cal., W. Operations, Inc. v. NLRB*, 399 F.2d 639, 642 (9th Cir. 1968) ("It is elementary that an employer's violation of § 8(a)(5) of the Act by wrongfully refusing to bargain collectively with the statutory representative of its employees does 'interfere with, restrain and [sic] coerce' its employees in their rights of self organization and collective bargaining, in violation of § 8(a)(1) of the Act."); *Truitt Mfg. Co.*, 110 NLRB 856, 857, 870 (1954), *enforcement denied*, 224 F.2d 869 (4th Cir. 1955), *rev'd*, 351 U.S. 149 (1956). Though inclusive, Section 8(a)(1) is broader than Section 8(a)(5).[18]

[18] The district court attempted to distinguish the Section 8(a)(1) violation at issue from a Section 8(a)(1) violation based on breach of the duty to bargain by claiming that, in 8(a)(5) cases, "the Board made its determination in the context of a specific adjudication. It weighed the specific facts of the case and determined that the employer's conduct constituted a refusal to bargain collectively." (D.A. 120.) In fact, many 8(a)(5) violations involve no special "weighing," and are as bright-line as Section 104.210—e.g., refusing to execute a written contract, *NLRB v. Strong*, 393 U.S. 357, 359 (1969), or changing wages during bargaining, *NLRB v. Katz*, 369 U.S. 736 (1962). *See generally* 1 The Developing Labor Law 832-55 (discussing these and other "per se violations" of Section 8(a)(5)).

Consistent with the foregoing precedent, the Board has also relied on Section 8(a)(1) to identify and enforce other affirmative employer duties, beyond 8(a)(5). For example, in *Technology Service Solutions*, 324 NLRB 298, 301 (1997), which presented an *independent* 8(a)(1) predicated on an employer's refusal to supply employee names and addresses to a union, the Board reversed an administrative law judge who had concluded "that the plain meaning of Section 8(a)(1) requires that an employer must have 'performed some sort of definite action' to interfere with, restrain, or coerce employees in the exercise of their rights in order to violate that section and that the [employer] had performed no such 'overt act.'" *Id.* (quoting the judge). The Board rejected this theory, finding "no basis for the judge's holding that an overt act must occur for an employer to violate Section 8(a)(1)." *Id.* In support of its conclusion, the Board pointed to precedents involving an employer's unlawful refusal to grant a union access to the employer's property. *See id.* The Board reasoned that in these cases, the employer's "refusal" may be found as much "in the employer's mere failure to respond to the union's request for such access . . . as in the employer's express denial of such access." *Id.*[19]

[19] The Board has also found violations of Section 8(a)(1) in circumstances where an employer has failed to take any action in response to harassing or abusive behavior of a supervisor or employee towards employees known to

In addition, analogous provisions of the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 ("FMLA") have been interpreted to include, specifically, a duty to post a notice. The DOL's most recent FMLA regulations, issued in 2008, state that failure to post required notices "may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights."[20] In causes of action under FMLA Section 105(a)(1) (29 U.S.C. § 2615(a)(1))—which "largely mimics . . . § 8(a)(1) of the NLRA," *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1123 (9th Cir. 2001)—courts rely upon this regulation to interpret "interfere," stating that the failure to post may violate that section. *See, e.g.*, *Haitz v. Don Jacobs Imports, Inc.*, No. 5:10-cv-307-REW, 2011 WL 4743384, at *3-*5 (E.D. Ky. Oct. 6, 2011) (magistrate opinion); *see also*

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be union supporters. *See, e.g.*, *St. Francis Med. Ctr.*, 347 NLRB 368, 369 (2006); *Champagne Color, Inc.*, 234 NLRB 82, 82 (1978).

[20] 29 C.F.R. § 825.300(e). The FMLA regulation uses the word "may" because, under the specific enforcement scheme for interference with FMLA rights, the lack of notice must prejudice the employee. 29 U.S.C. § 2617(a)(1)(A)(i); *see Ragsdale v. Wolverine World Wide*, 535 U.S. 81, 89 (2002). No such concerns apply to interference with Section 7 rights under Section 8(a)(1) because lost benefits are not necessarily implicated under the NLRA, and the concept of prejudice does not apply. *See, e.g.*, *Venetian Casino Resort, LLC v. NLRB*, 484 F.3d 601, 610 (D.C. Cir. 2007).

*Greenwell v. Charles Mach. Works Inc.*, No. CIV–10–0313–HE, 2011 WL 1458565, at *4-*5 (W.D. Okla. Apr. 15, 2011).[21]

For these reasons, Section 8(a)(1) cannot be limited to prohibiting affirmative misconduct. As broadly conceived by Congress in 1935, "interfere" also encompasses an employer's *failure* to perform affirmative duties that the Board finds are necessary to protect employees' Section 7 rights, including, in this case, the duty to post a notice of those rights. Accordingly, the Board's conclusion that Section 8(a)(1) is an available remedy for violations of the notice Rule is a reasoned exercise of its "responsibility to adapt the Act to changing patterns of industrial life," *Weingarten*, 420 U.S. at 266. As the Court stated in *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500-01 (1978), "if [the Board] is to accomplish the task which Congress set for it [in Section 8(a)(1), the Board] necessarily must have authority to formulate rules to fill the interstices of the broad

[21] The district court's rejection of the FMLA example was based on its misunderstanding that "the employer is only required to notify a specific employee when it knows that the employee qualifies for [FMLA] benefits." (D.A. 120). This is true only with respect to individualized notices required by 29 C.F.R. § 825.300(b)-(d), not the general notice required by subsection (a) of that same provision. The district court also noted that, to its knowledge, this regulatory interpretation of "interfere" has never been challenged (D.A. 121 n.18). But before DOL promulgated its rule, courts had concluded that an employer's failure to provide required notice might interfere with FMLA rights. *See, e.g.*, *Downey v. Strain*, 510 F.3d 534, 537-42 (5th Cir. 2007).

statutory provisions." The legislative history shows that Congress did *not* have "a narrow reading of the word 'interfere' in mind." (D.A. 118).[22]

### 2. The remainder of the district court's analysis of Section 104.210 fails to comport with the APA or the NLRA.

The district court receded somewhat from the apparently bright line it drew between action and omission, stating: "The Court is not making an absolute statement that inaction can never be interference." (D.A. 119). However, the district court then enjoined Section 104.210 on the additional ground "that the Board cannot make a blanket advance determination that a failure to post will always constitute an unfair labor practice." (*Id.)*

This reasoning cannot be reconciled with the APA, which defines a "rule" as "an agency statement of general or particular applicability and future effect," 5 U.S.C. § 551(4), or, in other words, a "blanket advance

[22] The court below illogically relied on 8(c), enacted in 1947, for the proposition that the Wagner Act Congress intended a narrow meaning of interfere (D.A. 118-19). Section 8(c) in fact presupposes that "interfere" has a broad meaning and operates to preclude the Board from finding "[t]he expressing of any views, argument, or opinion" evidence of an unfair labor practice "if such expression contains no threat of reprisal or force or promise of benefit;" speech otherwise interfering with employee rights is not enough. Congress did not amend Section 8(a)(1) in 1947, and the term "interfere" in Section 8(a)(1) thus has the same broad meaning that it did in 1935. *See Huffman v. OPM*, 263 F.3d 1341, 1354 (Fed. Cir. 2001) (subsequent amendment of other provisions does not change the intent of Congress with respect to an unchanged term). In short, Section 8(c) is an exemption from Section 8(a)(1), not a limitation of its intentionally broad scope.

determination." Nothing is cited for the suggestion that the Board cannot make a "blanket advance determination" or "rule" interpreting what interferes with employee rights. And the district court overlooked that even an express statutory requirement to decide the appropriate unit "in each case" did not limit the Board's authority to make bright-line rules. *See AHA*, 499 U.S. at 22. The same is true under 8(a)(1).

The district court further found (again, without citing NLRA law), that the Board must prove that "an employer's failure to post was intended to or did exert influence over an employee's organizational efforts." (D.A. 117). However, "[t]he Board has long held that interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive, and the federal courts have reflected this position." *Medeco Sec. Locks, Inc. v. NLRB*, 142 F.3d 733, 747 (4th Cir. 1998).[23] The work rule cases illustrate this principle neatly. *See, e.g.*, *Cintas Corp. v. NLRB*,

[23] Of course, the presence of an unlawful motive—or the presence of a legitimate one—can sometimes make a difference in 8(a)(1) cases. *See NLRB v. Exch. Parts Co.*, 375 U.S. 405, 409-10 (1964) (employee benefits); *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354, 1359-61 (D.C. Cir. 1997) (polling). Unlike polling or employee benefits, however, when an employer interferes with the exercise of Section 7 rights by not posting notice, motive is irrelevant because there can be no legitimate reason for the failure to post the required notice.

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482 F.3d 463, 467-68 (D.C. Cir. 2007); *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 372 (D.C. Cir. 2007). For example, this Court stated in *Guardsmark* that "a work rule violates NLRA section 8(a)(1) . . . [if] the rule would reasonably tend to chill employees in the exercise of their statutory rights." 475 F.3d at 372. Employer intent is beside the point because "mere maintenance of a rule likely to chill section 7 activity" interferes with employee rights." *Id.* at 374 (quotations and citations omitted). In *Cintas*, the employer argued that the Board was required to prove some actual impact on the employees. 482 F.3d at 467-68. This Court rejected that argument: "No such evidence is required to support the Board's conclusion that the rule is overly broad and thus unlawful." *Id.*; *see also AMF Bowling Co. v. NLRB*, 977 F.2d 141, 145 (4th Cir. 1992) (motive, mistake, and employee harm are irrelevant when employer's policy—on its face—confers a benefit only on non-members).

Like an overbroad work rule, a violation of an employer's regulatory duty to post this notice reasonably tends to impede the exercise of statutory rights by keeping employees unaware of those rights. The notice is specifically designed to enable the free exercise of employee rights under Section 7, and so a violation of the regulation requiring that this notice be posted also violates 8(a)(1)—regardless of the employer's state of mind, and

without requiring any particularized proof of an impact on the specific employees. For these reasons, the district court's injunction against 104.210 must be reversed.

**B. The district court also erred in striking down 104.214(a).**

Section 104.214(a) authorizes tolling the statute of limitations when the notice is not posted. The district court interpreted this provision as "strip[ping] away the case-specific nature of the equitable tolling doctrine by imposing it as the rule rather than the exception," and "turn[ing] the burden of proof on its head." (D.A. 124-25). The district court held that this was in conflict with this Court's decisions on equitable tolling. But it further stated that this decision "does not prevent the Board from considering an employer's failure to post the employee rights notice in evaluating a plaintiff's equitable tolling defense in an individual case before it." (D.A. 125 n.21).

Simply put, the Board agrees with the district court that tolling should be established on a case-by-case basis, in light of the particular facts, and that the burden of proof should be on the plaintiff to establish diligence in the tolling inquiry. *See Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1419-21 (2012). The Board did not intend 104.214(a) to alter this.

The Rule's preamble expressly stated, regarding this provision, "that the prevailing judicial view should apply in the NLRA context as well." 76 Fed. Reg. at 54,034 (D.A. 042). The Board's primary model for the "prevailing judicial view" was *Mercado v. Ritz-Carlton San Juan Hotel, Spa & Casino*, 410 F.3d 41, 46–47 (1st Cir. 2005)—which the Board discussed four times in three pages—and which clearly places the burden of proof on the plaintiff in a fact-sensitive, case-by-case analysis. *See also* 76 Fed. Reg. at 54,033-34 (D.A. 041-42) (citing exemplary cases from many other circuits). The Board was quite clear in the preamble that all of the equities would be balanced on a case-by-case basis:

> The Board recognizes that with the passage of time evidence can be lost and witnesses die, move away, or their memories fade; it therefore will not lightly find that the 10(b) period should be tolled. . . . Tolling is an equitable matter, and one factor to be considered in deciding whether equitable tolling is appropriate is whether it would prejudice the respondent. *Mercado*, above, 410 F.3d at 48. Accordingly, if a lengthy tolling of the 10(b) period would prejudice an employer in a given case, the Board could properly consider that factor in determining whether tolling was appropriate in that case.

76 Fed. Reg. at 54,034 (D.A. 042-43).

In enjoining Section 104.214(a), the district court (D.A. 125) disregarded the Rule's expressed intent to be guided by "the prevailing judicial view" and seized on the following passage in the preamble: "If an employer proves that an employee had actual or constructive knowledge . . .

the Board will not toll." 76 Fed. Reg. at 54,035 (D.A. 043). In relying on this passage to find that Section 104.214(a) "turns the burden of proof on its head" (D.A. 125), the district court failed to note that the statement was made, not in a discussion of the burden of proof, but in support of the proposition "that failure to post the required notice will not automatically warrant a tolling remedy." 76 Fed. Reg. at 54,035 (D.A. 043). And in relying on this same passage to support its conclusion that Section 104.214(a) "strips away the case-specific nature of equitable tolling" (D.A. 124), the district court failed to consider that even in equity there are definite principles that can be gleaned from the cases. *See Holland v. Florida*, 130 S. Ct. 2549, 2563 (2010). In pointing to a circumstance that would obviate the need for further equitable balancing, the Board neither shifted the burden of proof nor eschewed the case-by-case balancing approach exemplified in the judicial precedent it relied upon.

Because the Board agrees with the district court that, in each case, the plaintiff must prove that extraordinary circumstances prevented timely filing, and notice posting is just one aspect of this inquiry, the Board finds itself in the unusual position of being enjoined on the basis of an interpretation of its Rule that is the polar opposite of the position that the Board itself urged before the district court. The court should have taken the

Board at its word. *See Bldg. & Constr. Trades Dep't v. Allbaugh*, 295 F.3d 28, 36 (D.C. Cir. 2002) ("We have no reason to doubt, and every reason to hold the Government to, [its] interpretation."). For these reasons, the injunction is an unnecessary and inappropriate burden on the Board, and should be lifted.

In any event, even if the district court's construction of Section 104.214(a) were justified, the court erred in enjoining 104.214(a) on the additional grounds (1) that "Congress did not leave a gap for the agency to fill with respect to the statute of limitations" (D.A. 121) and (2) that the court cases relied on by the Board in crafting the Rule were "inapposite" because in those case, unlike here, Congress had expressly mandated the notice-posting requirement at issue (D.A. 123-24). Not only are these erroneous rulings further ground for finding that Section 104.214(a) was improperly enjoined, but also, if not reversed, these rulings could be misconstrued to restrict what the district court elsewhere conceded is "the Board's unquestionable right to apply the doctrine of equitable tolling in an appropriate case." (D.A. 125).

First, the district court erred in holding that "Congress did not leave a gap for the agency to fill with respect to the statute of limitations" and in striking down 104.214(a) at *Chevron* step one (D.A. 121). The Act's statute

of limitations is undeniably subject to equitable tolling (*see* D.A. 122 n.19 (citing cases)); *see also Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 395 n.11 (1982). This Court has previously held that the NLRB is owed *Chevron* Step 2 deference in defining such equitable doctrines under the NLRA. *Dist. Lodge 64, Int'l Ass'n of Machinists, v. NLRB*, 949 F.2d 441, 445 (D.C. Cir. 1991). In *District Lodge 64*, the Board departed from the common law of laches to adopt a rule limiting charges reinstated by the General Counsel to six months in most cases. Though 10(b) did not apply directly, the rule was upheld as "adopting one of several possible policy choices consistent with the purposes of the Act." *Id.* at 446. Such discretion necessarily means that the Board may depart from the common law. *See e.g.*, *Harris v. Gonzales*, 488 F.3d 442, 444-45 (D.C. Cir. 2007) (EEOC appropriately departed from common law of tolling in its own procedures). When the Board applies equitable tolling, it must sensitively balance significant questions of labor policy, including industrial peace, repose, and the vindication of employee rights. And these interests may be balanced by the Board "either by rule-making under § 6 of the Act, [or] . . . by adjudication. The choice between rulemaking and adjudication is up to the Board." *Dist. Lodge 64*, 949 F.2d at 445 (citations omitted).

Thus, regardless of whether this Court would agree in the first instance with the analysis of *Mercado* and the many cases in accord, the Board's Rule adopting that analysis must be upheld as a permissible interpretation of 10(b)'s equitable exceptions under *Chevron* Step 2.

Second, the district court's enjoining of Section 104.214(a) is flawed for the further reason that the court held that the Board is not entitled to rely as it did on "the prevailing judicial view" of equitable tolling, 76 Fed. Reg. at 54,034 (D.A. 042), because the cases the Board cited involved an employee notice that was mandated by statute in express terms, and not by regulation (D.A. 123-24). But in *Asp v. Milardo Photography, Inc.*, 573 F. Supp. 2d 677 (D. Conn. 2008), and related cases, the courts applied tolling in the context of a purely regulatory notice under the FLSA. *Accord Henchy v. City of Absecon*, 148 F. Supp. 2d 435, 438-39 (D.N.J. 2001); *Kamens v. Summit Stainless, Inc.*, 586 F. Supp. 324, 328 (E.D. Pa. 1984). Cases of this kind were also relied on by the Board in crafting Section 104.214(a), *see* 76 Fed. Reg. at 54,034 (D.A. 042), and demonstrate that an employer's failure to post a *regulatory* workplace notice is treated just the same as a statutory notice. Rules have the force of law, *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977), and so a regulatory notice is entitled to precisely the

same equitable consideration as a statutorily-required one. The district court erred in suggesting otherwise.

* * *

For these reasons, the court's injunction against 104.210 and 104.214(a) was entered in error and should be reversed.

## III. The District Court Properly Found the Rule to Be Severable Based on Clear Board Intent and the Independent Functioning of the Rule's Enforcement Mechanisms.

Even assuming *arguendo* that this Court upholds the decision below as to one, or even both, of the two challenged enforcement mechanisms contained in the Rule's Subpart B, it should agree with the lower court's decision that any other portion of the Rule, including Subpart A's notice-posting requirement, is still valid. Generally, "[w]hether the offending portion of a regulation is severable depends upon the intent of the agency *and* upon whether the remainder of the regulation could function sensibly without the stricken provision." *MD/DC/DE Broadcasters Ass'n v. FCC ("MD/DC/DE I"),* 236 F.3d 13, 22 (D.C. Cir.) (citing *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988)), *reh'g and reh'g en banc denied*, 253 F.3d 732 (D.C. Cir. 2001) ("*MD/DC/DE II*"). In evaluating agency intent, "[s]everance and affirmance of a portion of an administrative regulation is improper if there is 'substantial doubt' that the agency would

have adopted the severed portion on its own." *Davis County Solid Waste Mgmt. v. U.S. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997) (per curiam).

Under these principles, the court below properly held that the Board intended the Rule to be severable (D.A. 130-33). Although the Board concluded that a purely voluntary notice-posting requirement—Subpart A standing alone—might not be as effective, the Board reasonably determined that the Rule could function sensibly if one or more of its three enforcement mechanisms were upheld. 76 Fed. Reg. at 54,031 (D.A. 039); 75 Fed. Reg. 80,410, 80,414 (Dec. 22, 2010) (Notice of Proposed Rulemaking or "NPRM") (D.A. 012, 013). Thus, in a portion of the NPRM ignored by Plaintiff Employers, the Board tentatively concluded that "voluntary compliance, in combination with either tolling the statute of limitations or finding a knowing failure to post employee notices to be evidence of unlawful motive, or both, may be a workable approach." 76 Fed. Reg. at 80,414 (D.A. 013). That logic applies as well to the Final Rule before this Court because the "unlawful animus" enforcement provision of Section 104.214(b), *see* 76 Fed. Reg. at 54,049 (D.A. 057), has not been properly challenged and, in any event, was determined by the court below to be valid

(D.A. 133 n.26).[24] Consequently, even should this Court invalidate both challenged enforcement mechanisms, the animus mechanism would remain, in the Board's stated view, "a workable approach."

Furthermore, under the established severability principles discussed above, each of the three enforcement mechanisms are functionally independent. In the Final Rule's preamble, the Board described the three mechanisms and the voluntary compliance option as "alternative approaches." 76 Fed. Reg. at 54,031 (D.A. 039). Each is justified by a different legal rationale and performs a different enforcement function. *See, e.g.*, D.A. 039 n.137, 042 n.149. As the court below found, "each of the specific remedies under Subpart B stands alone and is not intertwined with the others. The Board considered them separately and it reserved the power to invoke each of them separately." (D.A. 132 (citing 76 Fed. Reg. at 54,031-37 (D.A. 039-45)).) Where a rule is so structured, it logically follows that one enforcement mechanism could be severed without

[24] Section 104.214(b) provides that the Board "may consider a knowing and willful refusal to comply with the requirement to post the employee notice as evidence of unlawful motive in a case in which motive is an issue." 76 Fed/ Reg. at 54,049 (D.A. 057). As noted *supra*, at note 7, the question of waiver is not moot because of the court's alternative merits finding. In addition, Plaintiff Employers' cursory reference to this claim in their opening brief (Br. 40 (conclusory sentence questioning the animus mechanism's legality)) constitutes appellate-level waiver.

impairing the others. *Compare Davis County*, 108 F.3d at 1459 (where EPA standards operated "entirely independently of one another" the provision was found severable), *with Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 493 (D.C. Cir. 2007) (no severability finding where agency not only did not contend rule was severable, but the disputed provisions were expressly described as related, and some of the disputed provisions were required to define terms used in the others).[25]

Moreover, the case primarily relied upon by Plaintiff Employers, *MD/DC/DE II* (Br. 40-41, 44), in which this Court, in denying rehearing, found the FCC rule at issue not to be severable, is in no way comparable to the instant case. There, the Court explained that according to the final rule, the FCC rule had two distinct goals, and that one goal was served by the

[25] In this regard, Plaintiff Employers' assertion that "according to the Board's published Rule, the equitable tolling provision is not only linked to the notice posting requirement, but is also linked to the unfair labor practice component of enforcement of the rule" (Br. 43) is simply wrong. That portion of the preamble merely explains that: "Under the final rule, the Board could also find the failure to post the notice to be an unfair labor practice, and could, if appropriate, consider a willful failure to post to be evidence of unlawful motive in an unfair labor practice case." 76 Fed. Reg. at 54,034 n.149 (D.A. 042 n.149). Just because the three provisions could potentially be used in combination in a given unfair labor practice case does not render them "intertwined" within the meaning of *Davis*. And Plaintiff Employers' statement that the equitable tolling mechanism is "inextricably linked to the enforcement of the rule itself" (Br. 43) is no more than a statement of the obvious, since that provision *is* one of the three enforcement mechanisms.

rule's option A and the other by option B. Thus, by finding option B unconstitutional, the agency's expressed intent was clear that Option A could not alone serve *both* goals of the rule. *See* 253 F.3d at 734-35.

In the different circumstances here, however, this Court's finding one, or even both, of the challenged alternatives unavailable to the Board as a matter of law would in no way impugn the remaining alternatives or prevent the remainder of the Rule from functioning sensibly. So long as at least one of the mechanisms remains, employers would have an incentive to comply with the Rule, and as noted, the animus mechanism was never challenged below.[26] Accordingly, it is clear that severance of either or even both challenged mechanisms would not prevent the remaining portion of Subpart B from functioning sensibly to further the notice-posting Rule's goals. *See MD/DC/DE I*, 236 F.3d at 22-23.

As noted by the court below, and contrary to Plaintiff Employers' position (Br. 42), "in the face of this evidence of the Board's intent, the Rule's lack of a severability clause is insignificant." (D.A. 132 (citing *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968) ("[T]he ultimate

[26] Although Plaintiff Employers referred to the two challenged mechanisms as the Rule's "principal enforcement provisions," (Br.17), the Board views the animus provision as equally important. 76 Fed. Reg. at 54,034 (D.A. 039 n.137). In fact, a finding of animus in an 8(a)(3) case could make the difference in imposing liability for what may be a significant amount of back pay.

determination of severability will rarely turn on the presence or absence of such a [severability] clause.”))).

For all of these reasons, the challenged provisions of the Rule may be considered separately; Subpart A can stand if the Court ultimately concludes that one or both of the challenged provisions in Subpart B is invalid. And should this Court uphold the decision below that the Board may use the unfair labor practice and equitable tolling mechanisms on an individualized basis (D.A. 131), those potential consequences will create even greater incentive for compliance. Thus, because there is no “substantial doubt” within the meaning of *Davis* that the Board intended the Rule to be severable, and because the Rule could function sensibly even if both challenged enforcement mechanisms were struck entirely, the Rule must be considered severable.

## IV. Plaintiff Employers’ First Amendment and Section 8(c) Claims Are Meritless.

Finally, the district court properly concluded that the Rule, which follows the well-established practice of requiring employers to post a government notice that informs employees of their workplace rights, does not run afoul of the First Amendment’s guarantee of free speech (D.A. 125-30). In addition, the district court correctly held that the Rule is not contrary to Section 8(c) of the Act, which provides that the expression or

dissemination of noncoercive "views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice." 29 U.S.C. § 158(c). (D.A. 130 n.25).

### A. The First Amendment does not protect employers from the obligation to post a notice of employee rights.

Plaintiff Employers continue to advance the erroneous and startlingly broad argument that the First Amendment shields employers from the general obligation to post a notice (Br. 36-38). In their opinion, the Board is impermissibly attempting to compel employers to express certain views (*see* Br. 37). But, as the district court properly found,

> the Board's notice posting requirement does not compel employers to say anything. The poster that the regulation prescribes for the workplace is "government speech," which is "not subject to scrutiny under the Free Speech Clause." *See Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009)
>
> . . . .
>
> The poster at issue here fits squarely into the requirements for government speech because its content is entirely a message from the government. The poster makes the source of its content clear . . . . Furthermore, the text of the poster is written by a government agency and may not be altered by any private individual.

(D.A. 126.)

Plaintiff Employers' only response to this well-supported conclusion is to argue that the notice is unlawful because employers must post it on

their private property (Br. 36-37).[27] But Plaintiff Employers misunderstand the case on which they rely, *Wooley v. Maynard*, 430 U.S. 705 (1977), where the Supreme Court invalidated New Hampshire's requirement that citizens "publicly advertise" the state motto "Live Free or Die" on their license plates. 430 U.S. at 717 n.15. The critical feature of that challenged law was that it forced private parties to disseminate an "ideological point of view," *id.* at 715. An accurate explanation of legal rights is, by contrast, non-ideological. Therefore, Plaintiff Employers' free speech claims are not advanced by their reliance on *Wooley*.[28]

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[27] The government routinely requires private parties to transmit its message on their property so that appropriate audiences might receive pertinent information. Examples of this long-standing requirement can be found not only in other workplace notice requirements but also in fire marshal signs announcing occupancy limits as well as the Surgeon General's warnings regarding tobacco use and alcohol consumption. *See, e.g.*, 27 C.F.R. § 16.21.

[28] Plaintiff Employers' citations to *United States v. United Food, Inc.*, 533 U.S. 405, 410 (2001), and *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 16 (1986), only prove the Board's point. In *United Food*, the Court struck down a compelled subsidy that would have funded a *private entity's* speech. But only four years later, the Court upheld a nearly identical compelled subsidy that funded *government* speech. *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005). The same distinction between private and government speech can be seen in *Pacific Gas*. There, all Justices agreed that the government could require a public utility to disseminate the government's own messages. *See* 475 U.S. at 15 n.12 (plurality opinion); *id.* at 23 n.2 (Marshall, J., concurring); *id.* at 39 (Stevens, J., dissenting); *see id.* at 34 (Rehnquist, J., dissenting).

Tellingly, Plaintiff Employers fail to distinguish—or even mention—directly applicable precedents, including this Court's decision rejecting a free speech challenge to a workplace notice-posting obligation. In *UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360, 365 (D.C. Cir. 2003), this Court rejected the argument that the "right not to speak" exempted federal contractors from the requirement to post a notice informing employees of their right to refrain from supporting unions. *Id.* And in *Lake Butler Apparel Co. v. Secretary of Labor*, 519 F.2d 84, 89 (5th Cir. 1975), *cited in Chao*, 325 F.3d at 365, the Fifth Circuit rejected as "nonsensical" an employer's First Amendment challenge to the Occupational Safety and Health Act's requirement to post a workplace notice. These cases were expressly relied upon by the Board in the preamble to the Rule, as well as in the litigation of this case both below and before this Court, and they were discussed by the district court in its memorandum opinion. Yet not one word of Plaintiff Employers' brief is devoted to them.[29]

[29] As an alternative to the government speech theory, the Board concluded in the Rule's preamble that the requirement to post the notice was consistent with Supreme Court decisions upholding business disclosure mandates. 76 Fed. Reg. at 54,012 (D.A. 020); *see Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). Although the district court expressed skepticism that *Zauderer* applies outside the

In an effort to challenge the notice as impermissibly "ideological" Plaintiff Employers make a perfunctory argument that the notice is "not at all 'neutral' . . . [because it] omits important statements of employee rights that are not 'pro-union' in character." (Br. 38; *see also* Br. 15.) But, as the district court recognized, "the notice simply recites what the law is." (D.A. 128). Moreover, "[t]he fact that it contains only certain provisions of the law and not others does not matter." (*Id.* at 41 n.23 (citing *Zauderer*, 471 U.S. at 651 n.14, and *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 134 (2d Cir. 2009))).

Although Plaintiff Employers may have preferred a different poster—or no poster at all—their criticism of the Board's poster as biased in favor of unions has no merit. Given the Board's objectives of clarity, conciseness, and the effective conveyance of information to employees, it was not unreasonable for the Board to reject Plaintiff Employers' suggested additions to the Rule. (*See* Br. 15, 38). The Board has fully explained the editorial judgments it made as to the content of the notice. *See* 76 Fed. Reg. at 54,022-23 (D.A. 030-31). Those judgments were rational and not indicative of any bias, and so, Plaintiff Employers' cursory argument that the

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commercial speech context, the Court correctly held that the Board's poster would pass muster under that standard (D.A. 128-29).

Rule is not even-handed must fail, along with the rest of their First Amendment argument.

### B. This Court should decline to reach Plaintiff Employers' brand new preemption argument, which in any event, lacks merit.

Below, Plaintiff Employers argued that the Rule was invalid under Section 8(c) because, in their view, that provision incorporates a First Amendment right against compelled speech. The district court correctly rejected this argument as merely derivative of their unavailing First Amendment claim (D.A. 130 n.25).

In this appeal, Plaintiff Employers make a brand new Section 8(c) argument—that under the preemption principles of *Machinists v. Wisconsin Employment Commission*, 427 U.S. 132, 140 (1976), the Board's posting requirement improperly regulates in an area that Congress intended to be "controlled by the free play of economic forces." This untimely argument has been waived and, regardless, lacks merit.

Plaintiff Employers concede that this claim was first raised "in their opposition brief on cross-motions for summary judgment ([D.A. 086]" (D.C. Cir. Emerg. Reply at 5.) Since the briefing schedule below provided for simultaneous briefing (D.A. 003), the Board had no opportunity to respond

to this late-raised argument.[30] Nor was the issue addressed by the district court. And even in Plaintiff Employers' opening appellate brief, they spend only two sentences on this claim.

In any event, this argument is meritless. The Rule requires employers to post an official government notice that recites legal rights. It is not comparable to the situation addressed in *Brown*, where California improperly regulated "partisan employer speech about unions," 554 U.S. at 66, which Congress intended to leave unregulated, *id.* at 66-69. Thus, even assuming Plaintiff Employers' new Section 8(c) argument is not waived, it is unavailing.

[30] Although one of Plaintiff Employers' summary judgment briefs below cites *Chamber of Commerce v. Brown*, 554 U.S. 60, 66 (2008), a case which discusses *Machinists* preemption, that citation was only for the principle that Section 8(c) limits the Board's authority to promulgate the Rule's unfair labor practice provision. (*See* D.A. 082-84.) This is quite different from their current assertion that the Rule's posting requirement is wholesale preempted (Br. 28-29). *See United States v. Hewlett*, 395 F.3d 458, 460 (D.C. Cir. 2005) ("[W]hile the cases were there, the proposition for which they were cited was different from that urged here.").

## CONCLUSION

For each of the reasons set forth above, the challenged Rule should either be upheld in its entirety or at least found to be severable.

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August 2012

# ADDENDUM OF STATUTES AND REGULATIONS

Except for the provisions contained in this addendum, all other applicable statutes and regulatory provisions are contained in the addendum to the Opening Brief for Plaintiff Employers.

## TABLE OF CONTENTS

## ADMINISTRATIVE PROCEDURE ACT

5 U.S.C. § 551(4) Definitions.

"[R]ule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

## RAILWAY LABOR ACT

45 U.S.C. §152

Fifth. Agreements to join or not to join labor organizations forbidden

No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Eighth. Notices of manner of settlement of disputes; posting

Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section.

The provisions of said paragraphs are made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

## TITLE VII, CIVIL RIGHTS ACT

42 U.S.C. § 2000e-12(a). Regulations; conformity of regulations with administrative procedure provisions; reliance on interpretations and instructions of Commission

The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter. Regulations issued under this section shall be in conformity with the standards and limitations of subchapter II of chapter 5 of Title 5.

## FAIR LABOR STANDARDS ACT

29 U.S.C.§ 211(c). Collection of data; Records

Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder. The employer of an employee who performs substitute work described in section 207(p)(3) of this title may not be required under this subsection to keep a record of the hours of the substitute work.

## FAMILY AND MEDICAL LEAVE ACT

29 U.S.C. § 2615. Prohibited acts

(a) Interference with rights

(1) Exercise of rights

It 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 subchapter.

(2) Discrimination
It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

(b) Interference with proceedings or inquiries
It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual--

**(1)** has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter;
**(2)** has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or
**(3)** has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter. ***

29 U.S.C. § 2617(a). Enforcement

(a) Civil action by employees

(1) Liability
Any employer who violates section 2615 of this title shall be liable to any eligible employee affected—

(A) for damages equal to—

(i) the amount of--
(I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or
(II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks (or 26 weeks, in a case involving leave

under section 2612(a)(3) of this title) of wages or salary for the employee;

(ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and

(iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer who has violated section 2615 of this title proves to the satisfaction of the court that the act or omission which violated section 2615 of this title was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 2615 of this title, such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively;

## NATIONAL LABOR RELATIONS ACT REGULATIONS

## 29 CFR § 102.9

§ 102.9 Who may file; withdrawal and dismissal.

A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person. Any such charge may be withdrawn, prior to the hearing, only with the consent of the regional director with whom such charge was filed; at the hearing and until the case has been transferred to the Board pursuant to § 102.45, upon motion, with the consent of the administrative law judge designated to conduct the hearing; and after the case has been transferred to the Board pursuant to § 102.45, upon motion, with the consent of the Board. Upon withdrawal of any charge, any complaint based thereon shall be dismissed by the regional director issuing the complaint, the administrative law judge designated to conduct the hearing, or the Board.

**29 C.F.R. § 103.20**

§ 103.20 Posting of election notices.

(a) Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

(b) The term "working day" shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays.

(c) A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 working days prior to the commencement of the election that it has not received copies of the election notice.

(d) Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of § 102.69(a).

**FAIR LABOR STANDARDS ACT REGULATION**

**29 C.F.R. § 516.4**

§ 516.4 Posting of notices.

Every employer employing any employees subject to the Act's minimum wage provisions shall post and keep posted a notice explaining the Act, as prescribed by the Wage and Hour Division, in conspicuous places in every establishment where such employees are employed so as to permit them to observe readily a copy. Any employer of employees to whom section 7 of the Act does not apply because of an exemption of broad application to an establishment may alter or modify the poster with a legible notation to show

that the overtime provisions do not apply. For example: Overtime Provisions Not Applicable to Taxicab Drivers (section 13(b)(17)).

**14 Fed Reg. 7516 (1949)**

Title 29 - Labor, Chapter V – Wage and Hour Division, Part 516 – Records to be Kept By Employers: Posting of Notices

In the administration of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, 29 U. S. C. 201, Public Law 393, 81st Cong., 1st Sess.), it has been found that effective enforcement of the act 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, and a greater degree of compliance with the act has been effected in situations where employees are aware of their rights under the law. For this reason Industry Wage Orders Issued pursuant to the act have included a requirement that employers post appropriate notices in conspicuous places where covered employees are working.

On the basis of the accumulated experience of the Division over a period of more than 11 years of administration of the act, I hereby find and determine that the posting of notices of the applicability of the act in establishments where covered employees are employed is a necessary adjunct to proper enforcement of the statutory provisions, and is an essential aid to the Division in preventing evasion or circumvention of the statutory provisions, and that a general requirement for posting of such notices in all covered establishments should be adopted. On the basis of these facts and the fact that the administrative experience of the Division has provided complete and conclusive information and data necessary to a determination of the matter here involved, I find that notice and public procedure provided for in section 4 of the Administrative Procedure Act is unnecessary. Now, therefore, pursuant to authority vested In me by the Fair Labor Standards Act, as amended, this part is amended by adding a new section, designated as §516.18, to read as follows:

> §516.18 *Posting of notices.* Every employer employing any employees engaged in commerce or in the production of goods for commerce shall post and keep posted such notices pertaining to the applicability of the Fair Labor Standards Act as shall be prescribed by the Division, in conspicuous places in every establishment where such employees are employed so as

to permit them to readily observe a copy on the way to or from their place of employment.

Present §§ 516.18 and 516.19 are renumbered as §§ 516.19 and 516.20, respectively. The above amendments are to become effective on January 25, 1950. (See. 11, 52 Stat. 1066, as amended; 20 U. S. C. and Sup., 211)

## FAMILY AND MEDICAL LEAVE ACT REGULATION

### 29 C.F.R. § 825.300

§ 825.300 Employer Notice Requirements.

(a) General notice.

(1) Every employer covered by the FMLA is required to post and keep posted on its premises, in conspicuous places where employees are employed, a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act with the Wage and Hour Division. The notice must be posted prominently where it can be readily seen by employees and applicants for employment. The poster and the text must be large enough to be easily read and contain fully legible text. Electronic posting is sufficient to meet this posting requirement as long as it otherwise meets the requirements of this section. An employer that willfully violates the posting requirement may be assessed a civil money penalty by the Wage and Hour Division not to exceed $110 for each separate offense.

(2) Covered employers must post this general notice even if no employees are eligible for FMLA leave.

(3) If an FMLA–covered employer has any eligible employees, it shall also provide this general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring. In either case, distribution may be accomplished electronically.

(4) To meet the requirements of paragraph (a)(3) of this section, employers may duplicate the text of the notice contained in Appendix C of this part or may use another format so long as the information provided includes, at a minimum, all of the information contained in that notice. Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer shall provide the general notice in a language in which the employees are literate. Prototypes are available from the nearest office of the Wage and Hour Division or on the Internet at http://www.wagehour.dol.gov. Employers furnishing FMLA notices to sensory-impaired individuals must also comply with all applicable requirements under Federal or State law.

(b) Eligibility notice.

(1) When an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA–qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances. See § 825.110 for definition of an eligible employee. Employee eligibility is determined (and notice must be provided) at the commencement of the first instance of leave for each FMLA–qualifying reason in the applicable 12–month period (see §§ 825.127(c) and 825.200(b)). All FMLA absences for the same qualifying reason are considered a single leave and employee eligibility as to that reason for leave does not change during the applicable 12–month period.

(2) The eligibility notice must state whether the employee is eligible for FMLA leave as defined in § 825.110(a). If the employee is not eligible for FMLA leave, the notice must state at least one reason why the employee is not eligible, including as applicable the number of months the employee has been employed by the employer, the number of hours of service worked for the employer during the 12–month period, and whether the employee is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. Notification of eligibility may be oral or in writing; employers may use Appendix D of this part 825 to provide such notification to employees. The employer is obligated to translate this

notice in any situation in which it is obligated to do so in § 825.300(a)(4).

(3) If, at the time an employee provides notice of a subsequent need for FMLA leave during the applicable 12–month period due to a different FMLA–qualifying reason, and the employee's eligibility status has not changed, no additional eligibility notice is required. If, however, the employee's eligibility status has changed (e.g., if the employee has worked less than 1,250 hours of service for the employer in the 12 months preceding the commencement of leave for the subsequent qualifying reason or the size of the workforce at the worksite has dropped below 50 employees), the employer must notify the employee of the change in eligibility status within five business days, absent extenuating circumstances.

(c) Rights and responsibilities notice.

(1) Employers shall provide written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The employer is obligated to translate this notice in any situation in which it is obligated to do so in § 825.300(a)(4). This notice shall be provided to the employee each time the eligibility notice is provided pursuant to paragraph (b) of this section. If leave has already begun, the notice should be mailed to the employee's address of record. Such specific notice must include, as appropriate:

(i) That the leave may be designated and counted against the employee's annual FMLA leave entitlement if qualifying (see §§ 825.300(c) and 825.301) and the applicable 12–month period for FMLA entitlement (see §§ 825.127(c), 825.200(b), (f), and (g));

(ii) Any requirements for the employee to furnish certification of a serious health condition, serious injury or illness, or qualifying exigency arising out of active duty or call to active duty status, and the consequences of failing to do so (see §§ 825.305, 825.309, 825.310, 825.313);

(iii) The employee's right to substitute paid leave, whether the employer will require the substitution of paid leave, the

conditions related to any substitution, and the employee's entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave (see § 825.207);

(iv) Any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments (see § 825.210), and the possible consequences of failure to make such payments on a timely basis (i.e., the circumstances under which coverage may lapse);

(v) The employee's status as a "key employee" and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (see § 825.218);

(vi) The employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave (see §§ 825.214 and 825.604); and

(vii) The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (see § 825.213).

(2) The notice of rights and responsibilities may include other information--e.g., whether the employer will require periodic reports of the employee's status and intent to return to work--but is not required to do so.

(3) The notice of rights and responsibilities may be accompanied by any required certification form.

(4) If the specific information provided by the notice of rights and responsibilities changes, the employer shall, within five business days of receipt of the employee's first notice of need for leave subsequent to any change, provide written notice referencing the prior notice and setting forth any of the information in the notice of rights and responsibilities that has changed. For example, if the initial leave period was paid leave and the subsequent leave period would be unpaid leave, the employer may need to give notice of the arrangements for making premium payments.

(5) Employers are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA.

(6) A prototype notice of rights and responsibilities is contained in Appendix D of this part; the prototype may be obtained from local offices of the Wage and Hour Division or from the Internet at www.wagehour.dol.gov. Employers may adapt the prototype notice as appropriate to meet these notice requirements. The notice of rights and responsibilities may be distributed electronically so long as it otherwise meets the requirements of this section.

(d) Designation notice.

(1) The employer is responsible in all circumstances for designating leave as FMLA–qualifying, and for giving notice of the designation to the employee as provided in this section. When the employer has enough information to determine whether the leave is being taken for a FMLA–qualifying reason (e.g., after receiving a certification), the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave within five business days absent extenuating circumstances. Only one notice of designation is required for each FMLA–qualifying reason per applicable 12–month period, regardless of whether the leave taken due to the qualifying reason will be a continuous block of leave or intermittent or reduced schedule leave. If the employer determines that the leave will not be designated as FMLA–qualifying (e.g., if the leave is not for a reason covered by FMLA or the FMLA leave entitlement has been exhausted), the employer must notify the employee of that determination. If the employer requires paid leave to be substituted for unpaid FMLA leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, the employer must inform the employee of this designation at the time of designating the FMLA leave.

(2) If the employer has sufficient information to designate the leave as FMLA leave immediately after receiving notice of the employee's need for leave, the employer may provide the employee with the designation notice at that time.

(3) If the employer will require the employee to present a fitness-for-duty certification to be restored to employment, the employer must provide notice of such requirement with the designation notice. If the employer will require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's position, the employer must so indicate in the designation notice, and must include a list of the essential functions of the employee's position. See § 825.312. If the employer handbook or other written documents (if any) describing the employer's leave policies clearly provide that a fitness-for-duty certification will be required in specific circumstances (e.g., by stating that fitness-for-duty certification will be required in all cases of back injuries for employees in a certain occupation), the employer is not required to provide written notice of the requirement with the designation notice, but must provide oral notice no later than with the designation notice.

(4) The designation notice must be in writing. A prototype designation notice is contained in Appendix E of this part; the prototype designation notice may be obtained from local offices of the Wage and Hour Division or from the Internet at http://www.wagehour.dol.gov. If the leave is not designated as FMLA leave because it does not meet the requirements of the Act, the notice to the employee that the leave is not designated as FMLA leave may be in the form of a simple written statement.

(5) If the information provided by the employer to the employee in the designation notice changes (e.g., the employee exhausts the FMLA leave entitlement), the employer shall provide, within five business days of receipt of the employee's first notice of need for leave subsequent to any change, written notice of the change.

(6) The employer must notify the employee of the amount of leave counted against the employee's FMLA leave entitlement. If the amount of leave needed is known at the time the employer designates the leave as FMLA–qualifying, the employer must notify the employee of the number of hours, days, or weeks that will be counted against the employee's FMLA leave entitlement in the designation notice. If it is not possible to provide the hours, days, or weeks that will be counted against the employee's FMLA leave entitlement (such as in the case of unforeseeable intermittent leave), then the employer

> must provide notice of the amount of leave counted against the employee's FMLA leave entitlement upon the request by the employee, but no more often than once in a 30–day period and only if leave was taken in that period. The notice of the amount of leave counted against the employee's FMLA entitlement may be oral or in writing. If such notice is oral, it shall be confirmed in writing, no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). Such written notice may be in any form, including a notation on the employee's pay stub.

(e) Consequences of failing to provide notice. Failure to follow the notice requirements set forth in this section may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered (see § 825.400(c)).

## FEDERAL ALCOHOL ADMINISTRATION ACT REGULATION

### 29 C.F.R. § 16.21

§ 16.21 Mandatory label information.

There shall be stated on the brand label or separate front label, or on a back or side label, separate and apart from all other information, the following statement:

> GOVERNMENT WARNING:
> (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects.
> (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems.

**CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e)**

1. This final brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B)(i) because this brief contains 16,480 words, not including the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32.

2. This final brief complies with the typeface requirements of Fed. R. App. P. 28.1(e)(2)(B)(i) and the type style requirements of Fed. R. App. P. 32(a)(6) because this final brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman, Font 14.

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## CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2012, the Board's Final Principal and Response Brief were filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system.

I certify that the foregoing document was served electronically on the following counsel for Plaintiff Employers, as well as on counsel for both sets of Amici, most of whom have consented to electronic service (with the exception of Professor Charles Morris, who received the brief by email and first-class mail, Christine Owens, who received the brief by first-class mail, and Nancy Schiffer and Lynn Rhinehart, who received the brief by email (with their consent):

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