

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

**DEFENDANTS' CROSS-OPPOSITION
TO PLAINTIFFS' CROSS-MOTIONS FOR SUMMARY JUDGMENT**

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INTRODUCTION

Plaintiffs and their Amici challenge a rule issued by the National Labor Relations Board that requires all employers covered by the National Labor Relations Act to post a government notice informing employees of their NLRA rights. *See* 76 Fed. Reg. 54,006 (2011) (the “Rule”).¹ Informational notices are common for good reason: they are widely considered a minimal necessity to ensure that employees are aware of their workplace rights. The Board found that an informational notice is similarly necessary under the NLRA, and that it has the authority to promulgate this Rule. Plaintiffs sued to challenge the Board’s authority, and all parties moved for summary judgment.

Plaintiffs and their Amici aver that the Board’s rulemaking powers are uniquely constricted, but the Supreme Court has held otherwise. They argue that Congress intended to prohibit the Board from requiring an informational notice, but they point to no statutory language expressing this supposed intent. To the contrary, all the evidence shows that Congress did not consider this particular question. Under well-established law, such silence generally permits, not prohibits, a regulatory solution to an existing problem. Accordingly, this Court should grant the Board’s motion for summary judgment.

ARGUMENT

The Board had two equally sufficient bases for promulgating this Rule—first, its express rulemaking authority under Section 6 of the NLRA and second, its authority under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (“*Chevron*”), to

¹ References to Amici in this brief are *only* to the brief filed by the 36 Members of the House of Representatives on November 16, 2011. The Board’s Opposition does not respond to the amicus brief of the Motor and Equipment Manufacturers Association (MEMA), which the Court permitted to be filed late yesterday. As stated in this Court’s November 21, 2011, minute order,

construe Section 8(a)(1) of the NLRA in order to adapt its broadly written provisions to current industrial circumstances. Plaintiffs and Amici challenge both the bases for the Rule, but as we show below, their challenges are insufficient as a matter of law.

The central premise underlying the argument of the Rule’s opponents is that the Board is without authority to promulgate a rule that places legal obligations upon parties against whom an unfair labor practice charge or an election petition has not been filed. From this premise, the opponents build an argument that the Rule’s requirement that all employers post an official government notice setting forth core NLRA rights is beyond the Board’s “jurisdiction” and constitutes a punitive “order.” In view of *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 763-66 (1969) and *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290-295 (1974), the Rule’s opponents cannot dispute that the Board does possess the authority to make rules both through adjudication and rulemaking. But they urge the Court to find that the only rules that the Board can promulgate are ones that place obligations on parties only after an unfair labor practice charge or an election petition has been filed. As we discuss below, these contentions cannot be reconciled with the text of the NLRA, with the history of its interpretation, and with settled principles of administrative law.

I. Plaintiffs and Amici Have No Response to the Plain Text of Section 6.

As stated in *Wyman-Gordon*:

Section 6 of the National Labor Relations Act empowers the Board "to make . . . , in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act." 29 U. S. C. § 156. 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*," 5 U. S. C. § 551 (4).

MEMA’s submission simply provides “additional analysis and perspective on issues already addressed by the parties.”

394 U.S. at 763-64 (emphasis added). In issuing its notice posting rule, the Board has done no more than to promulgate “an agency statement of general applicability” and “future effect,” by the means expressly permitted by the NLRA, the APA, and Supreme Court precedent.

Plaintiffs’ only textual argument regarding the scope of the Board’s rulemaking authority under Section 6 is that the words “necessary to carry out the provisions of the Act” mean that Board rules cannot “create new substantive obligations.” (NRTW at 21; Amici at 23-24). Amici similarly claim that Section 6 “do[es] not vest the Board with any affirmative authority.” These contentions are contradicted by the Supreme Court’s definitive interpretation of the text. The operative words of Section 6 have been used repeatedly in the United States Code to vest agencies with legislative rulemaking authority. And the Supreme Court has explained precisely what these words mean:

Where the empowering provision of a statute states simply that the agency may “make . . . such rules and regulations as may be necessary to carry out the provisions of this Act,” . . . the validity of a regulation promulgated thereunder will be sustained so long as it is reasonably related to the purposes of the enabling legislation.

Mourning v. Family Publ’ns Serv., Inc., 411 U.S. 356, 369 (1973) (citation, quotation, and footnote omitted; first ellipsis in original). The interpretation of this plain language as a broad grant of legislative rulemaking authority is therefore unavoidable.²

² See also *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713-14 (2011); *Thorpe v. Hous. Auth.*, 393 U.S. 268, 277 n.28 (1969); *Lincoln Sav. and Loan Ass’n v. Fed. Home Loan Bank Bd.*, 856 F.2d 1558 (D.C. Cir. 1988); *Nat’l Ass’n of Pharm. Mfrs. v. FDA*, 637 F.2d 877 (2d Cir. 1981) (Friendly, J.) (the “generous construction of agency rulemaking authority has become firmly entrenched”).

II. The Requirements of Sections 9 and 10 Do Not Expressly or Implicitly Limit the Board’s Section 6 Rulemaking Authority.

A. In an effort to circumvent the meaning of the plain language, Plaintiffs and Amici argue that, because Sections 9 and 10 require a petition or charge before the Board may hear cases arising under those provisions, Section 6 must be read in a manner that permits the Board to “regulate the conduct of only those employers before it in representation or unfair labor practice proceedings.” (NAM at 6-10; *see also* Amici at 17-25). Under this view, Board rules can only describe the obligations of parties *during* a Section 9 or 10 proceeding, but not before a proceeding exists. Put another way, Plaintiffs read Section 6 as authorizing rules that “carry out” only Sections 9 and 10, and would not permit rules designed to carry out the remaining provisions of the Act.

As an initial matter, this argument cannot be reconciled with *American Hospital Association v. NLRB* (“*AHA*”), 499 U.S. 606 (1991), which teaches that the Board’s Section 6 authority is limited by other provisions of the Act *only* if those provisions specifically say so. *Id.* at 613 (“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.”). Plaintiffs and Amici attempt to limit *AHA* to its facts but provide no convincing reason to disregard the Court’s explicit instruction regarding attempts to narrow the Board’s Section 6 authority. (*See* NAM at 15; NRTW at 20; Amici at 17-18 n. 43). It is true that the rule under review in *AHA*—and in cases such as *Wyman-Gordon* and *Bell Aerospace*, where substantive rules were announced by adjudication—did not purport to bind employers as a class but only applied to employers who were parties to ongoing Board proceedings. But Plaintiffs’ focus on this particular feature of those cases only adds atmospherics to their argument, not

substance. Nothing in *AHA*, *Wyman-Gordon*, or *Bell Aerospace* supports a legal conclusion that the Board is precluded from issuing rules that apply to employers generally. To the contrary, as set forth above, *Wyman-Gordon* expressly recognized that Section 6 of the NLRA gives the Board APA rulemaking authority and that that APA authority permits rules of both “general” and “particular” effect. 394 U.S. at 763-64.³

Plaintiffs’ contention also makes little sense because it would result in an artificial distinction between rulemaking and adjudication. When the Board announces new substantive “rules” of conduct through the adjudication of a particular case, as it has historically done, its decisions not only resolve that particular case but also set forth legal standards that apply to employers and unions generally. Treatises and casebooks—as well as the notice of statutory rights at issue here—all recognize the well-settled principles of the NLRA that have been developed over the years and that apply to employers and unions nationwide. These standards apply regardless of whether employers or unions have ever had unfair labor practice charges filed against them.

³ Amici call attention to extensive legislative history that emphasizes the Board’s adjudicatory role. (See Amici at 18-23). But, Amici’s legislative history 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, the enacted text of Section 6 does not similarly limit the Board’s authority. Accordingly, Amici’s legislative history argument fails to overcome the salient legal point—that, the statute as enacted plainly gives the Board authority to adopt legislative rules of general applicability and future effect. See *Wyman-Gordon*, 394 U.S. at 763-64; *Mourning v. Family Publ’ns Serv., Inc.*, 411 U.S. at 369.

Nor does the Board dispute that that aspects of the Wagner Act legislation were shaped by an effort to stay within the confines laid out by the Supreme Court in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), including the structure of the Board’s enforcement machinery, specific definitions of unfair labor practices, and portions of the Act’s Section 1 concerning the protection of interstate commerce. See Amici at 20-21, Irving Bernstein, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* 121-22 (Da Capo Press ed. 1975) (“Bernstein”). But none of these topics have any bearing on the Agency’s Section 6 rulemaking authority.

Consider the example of *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) (“*Weingarten*”), where the Board interpreted Section 8(a)(1) for the first time to bar an employer from forcing an employee to participate in an investigatory interview alone when that employee has requested to be accompanied by a representative. 420 U.S. at 260-67. This policy imposed new requirements on all other employers subject to the Act, and it did so in precisely the same way that Plaintiffs object so strenuously to in this Rule. But under Plaintiffs’ interpretation of the Board’s rulemaking authority under Section 6 of the NLRA, the *Weingarten* rule could have been decided only by adjudication, not by rulemaking.⁴ And yet, to extract this limitation from Sections 9 and 10, which themselves authorize the Board to set *substantive* standards of conduct through adjudication, and which make no mention of limiting the Board’s rulemaking authority Section 6,⁵ is both illogical and unfounded.⁶

⁴ If Plaintiffs believe that the Board’s *Weingarten* rule could have been reached through rulemaking, their argument that Sections 9 and 10 impose any limits on rulemaking falls entirely apart because *Weingarten*—like this Rule—was a new substantive policy applying to all covered employers and designed “to fit all cases at all times.” *Wyman-Gordon*, 394 U.S. at 777.

As in *Weingarten*, the Board could have created this Rule by adjudication. For example, faced with a case where it is alleged that a charging party missed the statute of limitations because she was not aware of her rights, the Board could hold that a notice of employee rights must be posted, that tolling would be appropriate where not posted, and that failure to post would henceforth violate Section 8(a)(1).

⁵ In fact, a grant of substantive rulemaking authority is intended to convey precisely the ability to impose “standards of conduct” on those subject to the statute. *See, e.g., Pacific Gas and Electric Co. v. Federal Power Commission*, 506 F.2d 33, 38 (D.C. Cir. 1974) (“A properly adopted substantive rule establishes a standard of conduct which has the force of law.”). Such a “standard of conduct” is an obligation that may either be expressed as a negative command or as an affirmative command. Plaintiffs argue that the Agency cannot regulate the employers under its jurisdiction affirmatively, unlike every other agency with legislative rulemaking authority. But such abnormally restricted understanding of Congress’ conveyance of legislative rulemaking authority requires express language saying so, as explained in *AHA*.

⁶ The same is true for NAM’s related argument (at 9) that, because Section 11’s subpoena power is limited to “hearings and investigations . . . necessary and proper for the exercise of the powers

Plaintiffs’ repeated claim that the Board exceeded its “jurisdiction” (*see, e.g.*, NAM at 1, 4, 7, 8, 10, 15 n.6, 17; NRTW at 4, 11) in promulgating a general notice-posting requirement must be evaluated in this context. Plaintiffs’ argument illustrates that “jurisdiction” is “a verbal coat of too many colors” so that use of that term can as easily obscure as illuminate what is really at stake. *United States v. Tucker Truck Lines*, 344 U.S. 33, 39 (1952) (Frankfurter, J., dissenting). Plaintiffs are correct in stating that the Board’s “jurisdiction” to decide unfair labor practice cases is dependent on the filing of a charge by a private party. Jurisdiction in that sense “is the power to hear and determine the controversy presented in a given set of circumstances.” *In re National Labor Relations Board*, 304 U.S. 486, 494 (1938). But it is also true that the jurisdictional breadth of the NLRA was intended by Congress to encompass the full extent of Congress’ power to regulate commerce. *NLRB v. Reliance Fuel Oil*, 371 U.S. 224, 226 (1963). The legal principles that have been established under the NLRA, whether through adjudication or rulemaking, apply to all employers within the Board’s statutory jurisdiction. Employer breaches of these obligations may go unremedied if no unfair labor practice charges are filed by a private party, but that is a distinct question from whether the caselaw and regulations place obligations upon employers that they ignore at their peril. *See NLRB v. Pease Oil Company*, 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.”). Whenever a new NLRA rule—whether established by adjudication or rulemaking—is created, it imposes similar legal obligations on all employers

vested in [the Board] by Section 9 and 10,” 29 U.S.C. § 161, somehow, Section 6 is also so limited. To the contrary, Section 11 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.

subject to the Act. And regardless of their origin, such new rules are enforced in the same way—that is, through unfair labor practice proceedings initiated by a private party.

B. Plaintiffs’ further argue that “[i]f the Board’s remedial authority over adjudicated labor law violators is limited, it surely lacks power to compel *permanent* notice posting by employers who have never committed a violation.” (NRTW at 15). Plaintiff’s argument ignores the crucial distinctions—both in content and purpose—between the *informational* notice at issue in this case and *remedial* notices that specific parties who have committed an unfair labor practice are required to post.

In this connection, Plaintiffs repeated use of the term “order” to describe the Board’s notice-posting rule obscures the true issue. *See, e.g.*, NRTW at 1, 4 (“notice posting order to all employers”); 5 (“orders all employers”); 14 (“order any entity to do an affirmative act”). An “order,” in the sense meant by Section 10(c) of the Act, is a specific command to particular parties designed to remedy a particular unfair labor practice. A rule, by contrast, simply *describes* what conduct an employer generally can and cannot do, regardless of whether the rule has been created by adjudication or rulemaking. An “order,” if enforced by a court, can result in contempt for noncompliance. Rulemaking does not “order” anyone to do anything in this sense. The same is true regarding the Rule under review unless and until there is an adjudication and a true remedial order issued by the Board under Section 10(c) and enforced in a court of appeals pursuant to Section 10(e) or (f) of the Act.

As Plaintiffs note, the Board often issues notice-posting “orders” as remedies in unfair labor practice cases. These remedial notice-posting orders were at issue in *Consolidated Edison Co. of New York, Inc. v. NLRB*, 305 U.S. 197, 235-36 (1938), *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940), *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-906 (1984), *Rose-Terminix*

Exterminator Co., 315 NLRB 1283, 1288-89 (1995), *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941), and the other cases discussed by NRTW at pp. 13-15 of their summary judgment memorandum. Surely, it makes sense to say that remedial orders of affirmative action must in fact remedy unfair labor practices, *Republic Steel*, 311 U.S. at 10-13, that remedial orders must remedy actual economic losses, *Sure-Tan*, 467 U.S. at 900-01, and that the remedial order must individually match the specific violation, *Phelps Dodge*. 313 U.S. at 195-96. But it makes no sense to say, as Plaintiffs do, that a general rule of employer conduct must also be “remedial.”

The content of the Section 10(c) notice that unfair labor practice violators must post is *remedial*: it is written in the employer’s voice, telling the reader that the Board has found the employer in violation of the NLRA, describing the violation in detail, and pledging not to engage in the conduct that the Board found unlawful in the future. By contrast, the content and purpose of the Section 6 notice at issue here is *informational*: it speaks in the government’s voice, telling employees that they have certain federal rights.⁷ Because the remedial notice necessarily concerns particulars of an unfair labor practice, and because it states that the Board has found the respondent committed an unfair labor practice, it is of course limited to adjudications of wrongdoing. Such a remedial notice posting has nothing whatsoever in common with this Rule, which simply informs employees of their rights. This Rule is a far cry indeed from “penal notice posting.” (NAM at 10). Plaintiffs’ argument only reinforces the point that Section 10 limits do not have any bearing on what powers the Board may exercise under Section 6.

⁷ The Board’s authority to issue a rule under Section 6 requiring certain employers to post a purely informational notice was confirmed by the Sixth Circuit in *Pannier Corp., Graphics Div. v. NLRB*, 120 F.3d 603, 606–07 (6th Cir. 1997) (rejecting an as-applied challenge to 29 C.F.R. § 103.20).

III. The Claim that the Board is an Adjudicatory Agency, not a Regulatory Agency, Lacks Merit.

Plaintiffs and Amici next contend that “the Board is not a regulatory agency like the FDA or FTC that have broad statutory powers to create substantive obligations.” (NRTW at 21; NAM at 8; *see* Amici at 17-19). But the FTC analogy in fact supports the opposite conclusion. There are differences between the FTC and NLRB, chiefly that the FTC unlike the Board can initiate its own investigations and adjudications. But in terms of their powers to make rules either through rulemaking or adjudication, the two agencies are quite similar. Like the NLRA, the Trade Commission Act (“TCA”) includes a very broad and general provision outlawing “unfair” practices, and a provision for interpreting and enforcing this law via adjudication. Also like the NLRA, Section 6(g) of the TCA gives the FTC authority “to make rules and regulations for the purpose of carrying out the provisions of [the TCA].” 15 U.S.C. § 46(g). And yet, for 50 years, the FTC did not use rulemaking, opting instead for policymaking by adjudication. Then the FTC changed course, and decided to use rulemaking to issue “substantive rules of business conduct” that applied to all entities covered by the TCA. *Nat’l Petroleum Refiners Ass’n v. FTC*, 482 F.2d 672, 673 (D.C. Cir. 1973). Like the NLRB’s rule, the FTC’s rules would be enforced through the existing adjudication process. Challengers attacked the FTC’s rulemaking authority, presenting many of the same arguments at issue here: the plain language of 6(g) is limited to procedure; the FTC “is best characterized as a prosecuting rather than a regulatory agency,” under the overall scheme of the TCA, *id.* at 684; the FTC’s failure to use rulemaking for the previous five decades, and its prior statements, were evidence that it in fact lacked such authority.

The court rejected all these arguments and upheld the FTC’s rulemaking authority. Regarding the plain language, the court discussed *Mourning* and other cases interpreting similar

provisions, and held that the plain text of 6(g) granted broad substantive rulemaking authority. *Id.* at 678-82. With respect to the FTC’s adjudicatory role, the court rejected the notion that adjudication is inconsistent with rulemaking, noting that, after all, many other agencies have both functions, and that rulemaking is typically the preferred choice for policymaking.

In fact, the court expressly analogized the FTC to the NLRB, stating “[t]he statutory method of adjudication and enforcement used by the NLRB is, of course, very similar to that of the FTC.” *Id.* at 684. The court discussed *Wyman-Gordon*, finding it strongly persuasive authority that despite its adjudicatory function, the FTC also possesses substantive rulemaking authority, just like the NLRB. *Id.* at 684-85. Despite the FTC’s long neglect of its rulemaking powers, the court found that such neglect does not change the statute, and that the plain language granted the FTC rulemaking authority. *Id.* at 693-94. Here too, the Board’s rulemaking powers under Section 6 have long lain dormant, but that has not changed the text or its meaning.

Amici, on the other hand, contend (at 20) that *because* the NLRB is modeled on the FTC, the NLRB *lacks* substantive rulemaking authority. But the relevant rulemaking provisions are the same, and so must have the same meaning. Under the plain text, Section 6 grants substantive rulemaking authority.⁸

* * *

⁸ A more recent case from the D.C. Circuit similarly reads a general grant of rulemaking authority generously. In *Lincoln*, *supra*, the plaintiff challenged the agency’s exercise of its general, rulemaking authority, and also pointed to other provisions which it asserted should limit the agency’s exercise of rulemaking authority. The court rejected the plaintiff’s “attempts to cabin the meaning of the provision. Section 1725(a) authorizes the Bank Board to issue ‘such bylaws, rules, and regulations as it may prescribe for carrying out the purposes of this subchapter.’” 856 F.2d at 1561. Nor did the court find that a specific grant of authority to promulgate certain types of regulations implies any intent to deny the agency general rulemaking authority. *Id.* at 1562. Here, Plaintiffs’ argument that statutory restrictions on the Agency’s enforcement powers operate to limit its rulemaking authority, is even further afield than that rejected by the D.C. Circuit in *Lincoln*.

In sum, the Board's understanding of its Section 6 authority is consistent with the text, Supreme Court decisions construing Section 6, and Supreme Court and circuit decisions construing similar language in other statutes. For these very reasons, acceptance of Plaintiffs' and Amici's crabbed and non-textual arguments about Section 6 would place this Court on a collision course with decisions of the Supreme Court and the D.C. Circuit.

IV. Notice-Posting of NLRA Rights Was Not Directly Addressed By Congress, Allowing the Agency to Issue the Rule as a Permissible Exercise of its Authority Under the Act.

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

In promulgating the Rule, the Board expressly found that the text of the NLRA is “completely silent,” 76 Fed. Reg. at 54,011, as to the “precise question at issue.” *Chevron*, 467 U.S. at 843. That is, the Act has no provision for making the “knowledge of the rights afforded by the statute and the means for their timely enforcement” available to employees covered by the Act. 76 Fed. Reg. at 54,011. Amici are now contesting the proposition that the NLRA has not spoken to the precise question of general, informational notice-posting of rights under the Act.

1. Amici's Claim that Wagner Act-Era Legislative History Manifests Congress' Intent to Preclude Mandatory Notice of NLRA Rights is Without Merit.

Amici rely heavily on legislative history that, because it is irrelevant, neither Plaintiffs nor the Board have raised to this point. Amici are attempting to demonstrate that, because Congress considered a provision, and did not adopt it, this legislative inaction must be read into the Act. Amici specifically rely upon Section 304(b) of the earliest introduced version of 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. (1934), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1 (1935) (Leg. Hist.); H.R. 8423, 1 Leg. Hist. 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).” 1 Leg. Hist. 3, 1130.

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

For example, the objection of United Mine Workers President (Amici at 9) was to the scope of the abrogation provision, not the employee notice provision. 1 Leg. Hist. 187 (seeking to exclude certain dispute resolution procedures from Section 304(b)). Similarly, the testimony of L.L. Balleisen (Amici at 9) objected to Section 304(b)’s retroactively invalidating existing contracts between employers and employees and did not complain of Section 5(5)’s making failure to post a 304(b) notice an unfair labor practice. 1 Leg. Hist. 690-91, 694. Amici italicize the portions of the testimony of James A. Emery, General Counsel of the National Association of Manufacturers, that mention the notice posting obligation (Amici at 10-11). But as Amici’s own account demonstrates, these notice posting references were ancillary to Mr. Emery’s repeated objection that, if an employer had “initiated or participated” in setting up a plan for dealing with its employees, Section 304(b) abrogated such arrangements “no matter how old they may be, or agreeable to the parties [T]hey are not only abrogated by this bill, but the employer must

immediately so notify his employees, and they are destroyed.” I Leg. Hist. 394.⁹ Significantly, to the extent that the withdrawal of Section 304(b) and Section 5(5) had constitutional overtones for Mr. Emery and Senator Wagner, those concerns were triggered by Mr. Emery’s complaint that “any old plans, any systems of employment relationship, which are in existence in which the employer participated or which he influenced are all outlawed by that provision right now.” I Leg. Hist. 394. It was at that point that Senator Wagner acknowledged “there is raised there a more serious question of constitutional law,” and it was brought out that the Committee had unanimously agreed to eliminate Section 304(b). *Id.* at 394-395. In sum, the focus of concern in the 1934 debates was on the abrogation provision, not the notice posting provision, and there is no evidence that Congress had a specific concern to withhold from the Board the authority to require the posting of notices of employee rights.

Furthermore, under accepted legal principles, weight should be given to Congress's rejection of a bill or amendment *only* if it is clear that Congress considered and rejected the very position argued before the court. *See Blau v. Lehman*, 368 U.S. 403, 411-12 (1962). Otherwise, “[t]o explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities.” *Helvering v. Hallock*, 309 U.S. 106, 119-120 (1940); *see also, e.g., Central 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”).

⁹ In fact, one of the major points of opposition to the 1934 bill was the proposed outlawing of company unions, because of the number of companies that would have been affected. For example, in the manufacturing and mining industries at that time, over 60 percent of firms had established such unions. Bernstein, *supra*, at 50, 70.

Here, at least this much is clear: Amici have failed to uncover any legislative history documenting that Congress ever considered whether employers subject to the NLRA should post a government-provided official notice setting forth the core provisions of the NLRA so that employees would be informed of their rights and how to exercise them.¹⁰ The type of notice called for in Section 304(b) was wholly different from the notice in the Rule at issue, and the rejection of one in no way implies rejection of the other. The notice required by Section 304(b) was an individualized notice prepared by the employer, not a uniform government-supplied notice. The notice required by Section 304(b) was exclusively devoted to detailing the provisions of private agreements that were no longer in effect at particular facilities, not an official government statement of the key provisions of a public law that applied to employees nationwide. Amici's attempt to equate the kind of notice called for in Section 304(b) with the kind of notice at issue here is refuted by their own account of the Railway Labor Act, which treats the two kinds of notice in separate and distinct provisions, as well as by their categorization of different types of notice statutes, which again demonstrate that Congress knows the difference between the type of notice called for in Section 304(b) and a general notice of statutory rights. (Amici at 5 n.12, 25-26.)¹¹

¹⁰ No weight should be given to the fact that some speakers at committee hearings (Amici at 9-10, n. 21) may have alluded to such generalized notices, when such an idea was never introduced as formal legislation before the committee. *See* William N. Eskridge, Jr., Phillip P. Frickey, and Elizabeth Garrett, *LEGISLATION AND STATUTORY INTERPRETATION* (2d ed.) 315 (2006).

¹¹ Nor is there any merit to Amici's assertion (at 12) that the notice provisions in the RLA determine Congressional intent regarding the NLRA's notice posting authority because the two statutes were on parallel tracks in 1934. There is no direct evidence to support this claim and the inferences that the Amici would have the Court draw are not well supported. For example, the abrogation and employee notice provisions at issue in the RLA amendments had nothing to do with the proposed NLRA provision setting aside arrangements for dealing with employees that the employer had initiated or participated in establishing. Rather, the RLA's abrogation and employee notice provisions were addressed to the quite different issue of whether employees

Thus, Amici attempt to square the circle by arguing that Congress's rejection of the more narrow Section 304(b) notice must mean that it was also rejecting the idea of a broader notice. (Amici at 14.) This illogical leap must be rejected for the same reason as NRTW's similar argument regarding remedial notices issued under Section 10(c), that these types of notices are utterly unrelated to the one at issue. The only reasonable inference that can be drawn from Amici's submission is that, after an exhaustive review of the legislative materials, it has failed to turn up any legislative history showing that Congress ever considered and rejected including in the NLRA *any general notification requirement like that in the RLA*.¹²

could be required to be members of a union as a condition of employment. Section 2, Fifth, 45 U.S.C. § 152. As the Board noted in the Rule, this is an area where the Board's right to require that employees be notified of their rights has been upheld. 76 Fed. Reg. at 54,006 n. 5, 54,032 (citing *California Saw & Knife Works*, 320 NLRB 224, 233 (1995), *enf'd sub nom. Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998)).

¹² Amici also argue the significance of the fact that the NLRA has been amended a number of times since 1935, without adding a notice obligation. (Amici at 16.) But a number of cases discount whether mere reenactment can suffice to show congressional intent. *See, e.g., Zuber v. Allen*, 396 U.S. 168, 185-86 n.21 (1969) ("The verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible. . . . Congressional inaction frequently betokens unawareness, preoccupation, or paralysis."); *Girouard v. United States*, 328 U.S. 61, 69 (1946) ("It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.") (quoting *Hallock*, 309 U.S. at 119). This Court should especially refuse to give any weight to inaction on this issue during the NLRA's amendments, because legislative consideration during those amendments was addressed wholly to matters apart from notice-postings of NLRA rights. *See Aaron v. Securities and Exchange Commission*, 446 U.S. 680, 695 n.11 (1980).

Multiple bills have been introduced in Congress seeking to amend the NLRA to limit and/or preclude notice-posting generally and specifically to repeal this Rule. These bills are sponsored or co-sponsored by a majority of the Congressmen who have signed on as amici curiae in the Amici brief filed in this case. *See, e.g.,* Protecting American Jobs Act of 2011, H.R. 2978, 112th Cong., Section 2(b) (2011) (clarifying and limiting Section 6 rulemaking authority to Board "internal functions" and "prohibit[ing] the Board] from promulgating rules that affect the substantive rights of any person, employer, employee, or labor organization."); Employee Workplace Freedom Act of 2011, H.R. 2833, 112th Cong., Section 2(a), (b) (2011)(repealing the Rule and prohibiting the Board from "promulgat[ing] or enforc[ing] any rule that requires employers to post notices relating" to the Act). These bills demonstrate what the law would look

B. Under *Chevron* Step 2, the Board Has Not Created a “New” Unfair Labor Practice but Consistent With Past Practice, Has Permissibly Interpreted the Failure to Post as a Violation of Section 8(a)(1) of the Act.

Plaintiffs argue that only action, not failure to act, can be an unfair labor practice under Section 8(a)(1). But they concede that this principle is not absolute. NAM at 19, n.10; NRTW at 24-25. As NRTW put it, Section 8(a)(1) is used to enforce “affirmative duties” that are created by “an independent provision of the law.” *Id.* at 25. In so arguing, Plaintiffs have overlooked that the Board’s Section 8(a)(1) finding here satisfies the standard they concede.

As explained in the Board’s motion for summary judgment (Section II), the Board found it had authority to require notice posting on two distinct bases: first, the Board’s broad legislative rulemaking authority under *Mourning* and *AHA*; and second, the Board’s authority to interpret the Act, including Section 8(a)(1), under *Chevron*. That *Chevron* interpretation, in turn, is defensible on two different grounds, each of which supplies a valid basis for finding that employers have an affirmative duty to post notices giving employees the minimal information necessary to exercise their statutory rights. One finds the Rule itself to be the source of that affirmative duty. The other finds that Section 8(a)(1) creates that duty.

Under the first *Chevron* interpretation of Section 8(a)(1), the starting point is that the Rule validly places an affirmative duty to post on employers because the Rule is “reasonably related to the purposes of the enabling legislation” and does not unduly burden the subjects of the regulation. *Mourning*, 411 U.S. at 369. From that starting point, it follows that a failure to perform that independent affirmative duty to post violates Section 8(a)(1) for the same reason that a violation of the duty to supply relevant bargaining information on demand violates 8(a)(1), namely, that violations of basic NLRA duties interfere with Section 7 rights. *See Standard Oil*

like if it did speak “directly to the precise question at issue” as required by *Chevron*, and provide

Co. of Ca., Western Operations, Inc. v. NLRB, 399 F.2d 639, 642 (9th Cir. 1967) (“[i]t is elementary that an employer's violation of § 8(a)(5) of the Act by wrongfully refusing to bargain collectively with the statutory representative of its employees does ‘interfere with, restrain and coerce’ its employees in their rights of self organization and collective bargaining, in violation of § 8(a)(1) of the Act.”); *Truitt Mfg. Co.*, 110 NLRB 856, 857, 870 (1954), *enfd.*, 351 U.S. 149 (1956) (*Truitt*). Here, because the requirement to post notice is expressly designed to “ensure effective exercise of Section 7 rights,” 76 Fed. Reg. at 54,032, violation of the Board’s legislative rule does “interfere with, restrain, or coerce” employees in the exercise of Section 7 rights. 29 U.S.C. § 158(a)(1).

Under the second *Chevron* interpretation of Section 8(a)(1), the Board’s interpretation of Section 8(a)(1) to impose an affirmative duty to post an official government notice of employee rights reflects a permissible construction of Section 8(a)(1) itself. In arguing that Section 8(a)(1) is only used to enforce “affirmative duties” that are created by “an independent provision of the law” (NRTW at 25), NRTW overlooks that Section 8(a)(1) can be the source of affirmative duties. That result follows from the Supreme Court’s recognition that the NLRA “left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms.” *Republic Aviation v. NLRB*, 324 U.S. 793, 798 (1945). *Accord Weingarten*, 420 U.S. at 260-267 (recognizing the Board’s authority to adapt the Act “to changing patterns of industrial life”). Whereas in *Truitt*, the Board relied upon the employer’s failure to perform its duty to bargain under Section 8(a)(5) to support a finding of interference within the meaning of Section 8(a)(1), here, the Board relied on *Republic Aviation* to conclude that Section 8(a)(1) is sufficient authority to impose a duty

an enlightening contrast to the current text of the Act.

upon employers to post an official government notice informing employees of their core Section 7 rights.

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

V. Plaintiffs' Claim that the Rule Impairs their Rights Under the First Amendment and Section 8(c) of the Act Fails as a Matter of Law

A. The government-supplied official notice of statutory rights that employers must post pursuant to the Board's rule is a prime example of government speech, which is "not subject to scrutiny under the Free Speech Clause" of the First Amendment. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1129 (2009). As the Board has explained, the funding, control, and attribution of the poster all point to the conclusion that government speech is present. (NLRB MSJ at 21-22). Moreover, even if the poster is not government speech, it easily satisfies the relaxed *Zauderer* test applied to compelled disclosures in commercial contexts. (*Id.* at 22-23 & n.104).

None of the Plaintiffs directly challenge the government speech argument, which the Board adopted in the final rule. *See* 76 Fed. Reg. at 54,012 & n.45. Instead, they espouse two very different First Amendment theories, both of which lack merit.

1. NRTW's principal contention is that the First Amendment requires strict scrutiny of *any* requirement that "compels entities to disseminate a message on their property against their

will.” NRTW at 33. This argument fails at the outset because neither *Lake Butler Apparel Co. v. Secretary of Labor*, 519 F.2d 84 (5th Cir. 1984), nor *Chao v. UAW-Labor Employment & Training Corp.*, 325 F.3d 360 (D.C. Cir. 2003), applied strict scrutiny—or anything close to it—to the contested workplace notices upheld in those cases. Nonetheless, in support of their startlingly broad proposition, which would call into question numerous mandatory disclosure laws at the state and federal level, NRTW cites several inapposite cases and “exaggerat[e] the reach of [the Supreme Court’s] First Amendment precedents.” *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 70 (2006) (“FAIR”).

For example, in *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986), upon which NRTW chiefly relies, the Court invalidated a regulatory requirement that compelled “a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagree[d].” *Id.* at 4 (plurality opinion). In reaching this conclusion, a four-Justice plurality found the compelled access order “readily distinguishable from [commission] orders requiring [the utility company] to carry various legal notices” because the government “has substantial leeway in determining appropriate information disclosure requirements for business corporations.” *Id.* at 15 n.12. In accord with the distinction drawn by the plurality, Justice Marshall, who concurred in the judgment, noted that the state had a “particularly compelling” interest in requiring the utility company “to carry messages concerning utility ratemaking and the rights of utility consumers.” *Id.* at 23 n.2 (Marshall, J., concurring in the judgment). Even the dissenters expressed agreement with their colleagues on this issue. *Id.* at 39 (Stevens, J., dissenting) (“[T]he Commission can require the utility to make certain statements and to carry the Commission’s own messages to its customers”); *see id.* at 34 (Rehnquist, J., dissenting) (“[T]he constitutional interest of a corporation in not permitting the

presentation of other distinct views clearly identified as those of the speaker is *de minimis*.”). Thus, far from supporting Plaintiffs’ argument, *Pacific Gas* actually confirms that the Board’s rule does not offend First Amendment principles.

Similarly, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 577-78, provides little assistance to NRTW’s cause. *Hurley*, like *Pacific Gas*, involved a law that compelled a speaker to provide a forum for a *private third party* to express views that were not shared by the speaker. There, the Court held that a state law could not be applied to a private parade in such a manner as to force the parade to include a group espousing an unwelcome message. *Id.* at 572-73. By contrast, in *FAIR*, the Court upheld the “Solomon Amendment,” which conditioned law schools’ receipt of certain federal funds on their accommodation of “Government speech.” 547 U.S. at 61 n.4. Specifically, those law schools were required to provide “military recruiters access equal to that provided other recruiters.” *Id.* at 51.¹³ The different outcomes in *Hurley* and *FAIR* once again demonstrate that the Supreme Court views government speech as analytically distinct from third-party speech.

Finally, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court struck down “a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper.” *Id.* at 243. *Tornillo* “rest[ed] on the principle that the State cannot tell a newspaper what it must print.” *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980). The Court was also persuaded that the statute threatened to chill “controversial political statements.” *Id.* Neither of these concerns is present here.

¹³ The Court further observed that the “First Amendment would not prevent Congress from directly imposing the [statute’s] access requirement,” rather than as a condition on the receipt of funds. *Id.* at 60.

After setting forth the wrong First Amendment framework, NRTW asserts that the Board’s rule “cannot survive strict scrutiny” (NRTW at 34), because it does not serve a “*compelling* state interest,” (*id.* (emphasis added and quotation omitted)). NRTW then performs a verbal sleight-of-hand and claims that the informational notice upheld in *Lake Butler* passes muster under that same standard because, there, the Secretary of Labor had a “*cognizable* government interest” by virtue of the enabling act, which expressly contained a notice-posting provision. (*Id.* at 34 n.20 (emphasis added)). Thus, NRTW’s view, which finds no support in *Lake Butler* or any other case, is that a First Amendment violation potentially occurs whenever an administrative agency requires an informational notice to be posted pursuant to its express authority to engage in legislative rulemaking or adjudication, but no violation occurs so long as Congress demonstrates a “*cognizable* government interest,” (*id.*), by explicitly requiring the notice-posting. This distortion of *Lake Butler* and First Amendment principles is unsupported and illogical, and must be rejected.¹⁴

2. NAM takes a different tack. To its credit, NAM correctly acknowledges that “the First Amendment’s protection against compelled speech is not absolute.” (NAM at 23). Under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), and its progeny, mandated disclosures of factual and uncontroversial information that further a legitimate state interest are constitutional as long as they are not “unjustified or unduly burdensome.” *Id.* at 651.¹⁵

¹⁴ Even under NRTW’s misconception of applicable principles, the Board’s rule does not offend the First Amendment. NRTW ultimately concedes that the Board would have a “*cognizable* government interest” sufficient to overcome First Amendment concerns if the Board has “statutory authority under the NLRA to require the notice posting.” (*Id.*) As shown, the Board has ample authority to issue the rule under review.

¹⁵ NAM suggests that *Zauderer* only permits disclosure requirements that “are reasonably related to the state’s interest in preventing *deception* to consumers.” (NAM at 23 (emphasis added)). The first case NAM cites after making this statement rejects this cramped reading of *Zauderer*.

However, NAM's primary contention is *not* that the Board's poster is either nonfactual or controversial, or that the Board lacks a legitimate interest in spreading information about NLRA rights, or that the posting requirement lacks justification or is too onerous. Rather, NAM's only claim is that the informational notice is "biased" because it lacks "[e]ssential factual information regarding employee rights." (NAM at 23). But this argument does nothing to advance its case because the Supreme Court expressly stated in *Zauderer* that it is "unpersuaded by . . . argument[s] that a lawful disclosure requirement is subject to attack if it is 'under-inclusive.'" 471 U.S. 651 n.14; *see also NYSRA*, 556 F.3d at 134 (holding that "the First Amendment does not bar the [government] from compelling such 'under-inclusive' factual disclosures").¹⁶

B. Just as the Board's rule does not offend the First Amendment, neither does it violate Section 8(c) of the Act, which permits employers and unions to express noncoercive "views, argument, or opinion" without fear of violating the NLRA. 29 U.S.C. § 158(c). The posting of a required notice does not by any measure "reflect . . . on the views of the employer." *Lake Butler*, 519 F.2d at 89; *see also NLRB MSJ* at 23-24. Nor is there any reason to believe that Section 8(c) affirmatively protects an employer who refuses to post such a notice. Plaintiffs' Section 8(c) arguments are nothing more than a repackaging of their unavailing First Amendment arguments. Accordingly, they should be rejected.

See Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001) (noting that the compelled disclosure upheld by the court "was not intended to prevent 'consumer confusion or deception' per se"), *cited in* NAM at 23; *see also N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 133 (2d Cir. 2009) ("*NYSRA*") ("[I]n *Sorrell*, . . . we held that *Zauderer's* holding was broad enough to encompass nonmisleading statements.").

¹⁶ NAM next argues that the Board's rule does not survive strict scrutiny (NAM at 23, 24), but as explained, this standard does not apply.

1. Relying on First Amendment precedents that recognize the right not to speak as a necessary corollary to the Free Speech Clause, NRTW concludes that Section 8(c) must also protect a right not to speak. (See NRTW at 28 (citing *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), and *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988))). Regardless of the merits of this assertion, its conclusion that Section 8(c) therefore protects an employer who refuses to follow the Board's rule does not follow. As the D.C. Circuit decisively held, a notice-posting obligation like the one under review is valid "even assuming that the § 8(c) right includes the right not to speak." *UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360, 365 (D.C. Cir. 2003).

NRTW attempts to distinguish *Chao* by claiming that the court's holding applies to notice-posting obligations imposed by other federal agencies and departments, but not those required by the Board. (See NRTW at 32 ("Section 8(c) does not give employers a right to refrain from posting posters required by laws *other than* the NLRA.")).¹⁷ However, the only reason NRTW gives as to why Section 8(c) would bar a posting requirement is that Section 8(c) incorporates a First Amendment right against compelled speech. (*Id.* at 28). If the informational notice established by the Board's rule implicates First Amendment protections against compelled speech, as Plaintiffs assert, then surely the posting requirement upheld in *Chao* would have done so as well.

¹⁷ As noted, Section 8(c) protects both employers *and* unions. If Section 8(c) actually meant what NRTW says it does, it would call into question whether the Board could lawfully require unions to notify employees of their rights under *NLRB v. General Motors*, 373 U.S. 734, 743-45 (1963), and *Communications Workers v. Beck*, 487 U.S. 735 (1988). See, e.g., *Cal. Saw & Knife Works*, 320 N.L.R.B. 224, 231 (1995) (requiring unions to give notice of *Beck* rights to employees), *enforced sub nom. Int'l Ass'n of Machinists v. NLRB*, 133 F.3d 1012 (1998). Presumably, NRTW would not support such a result. See *Machinists*, 133 F.3d at 1018 (noting that "the National Right to Work Foundation has been active in encouraging workers to assert their *Beck* rights").

Finally, *Chao* does not support NRTW’s position that Section 8(c) invalidates the enforcement mechanisms for the rule under review. In support of this argument, NRTW relies on the court’s statement that “§ 8(c) works to *negate* an unfair labor practice claim against an employer posting a notice.” 325 F.3d at 365; (*see* NRTW at 32). This statement does nothing more than accurately predict that employers who post a noncoercive notice of any type will be shielded from unfair labor practice liability. It does not mean that employers who refuse to post such a notice—particularly one communicating *government* speech—are equally immune, much less that Section 8(c) supplies employers with an affirmative right to refuse to post a federally required notice. Thus, contrary to NRTW’s claim, Section 8(c) does not undermine the Board’s decision to impose potential unfair labor practice liability on employers who persist in their refusal to post the Board’s notice.

Similarly, the Board’s decision that it “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” is not inconsistent with Section 8(c). 76 Fed. Reg. at 54,049 (to be codified at 29 C.F.R. § 104.214(b)). As the Board explained, “the animus provision is little more than the common-sense extension of well-established evidentiary principles that apply to many other NLRA violations.” *Id.* at 54,037. Any evidentiary use of an employer’s “knowing and willful refusal to comply” with the rule’s notice-posting requirement does not “punish” the employer for its *speech* but rather holds it accountable for its *conduct*. *Cf. FAIR*, 547 U.S. at 65-66 (noting that the Court has “rejected the view that conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea”) (quotation omitted).¹⁸

¹⁸ Contrary to Amici’s statement on p. 24 n.54, the lawfulness of this mechanism has not been challenged by any of the Plaintiffs. (Section 102.214(b) of the Final Rule, 54,035-36, 54,049).

2. NAM’s analysis of Section 8(c) is cursory and, again, merely repeats their First Amendment argument. Without citation to authority, NAM claims that Section 8(c) protects employers from being “compell[ed] . . . to communicate through specified media a selective and incomplete message.” (NAM at 24). For reasons explained above, even if Section 8(c) incorporates a right not to speak, the D.C. Circuit has foreclosed this line of argument. *See Chao*, 325 F.3d at 365. And if NAM or any other employer truly believes that the Board’s notice is “selective and incomplete,” (NAM at 24), a remedy is readily available to them—namely, Section 8(c) itself. They “remain free under this rule—as they have in the past—to express noncoercive views regarding the exercise of the[] rights [listed in the Board’s poster] as well as others.” 76 Fed. Reg. at 54,012.

VI. Plaintiffs’ Attack on the Rule’s Equitable Tolling Provision Disregards Established Tolling Principles.

Section 102.214(a) of the Rule informs the public that, in some cases, the Board “may find it appropriate” to equitably toll the statute of limitations where an employee is excusably unaware that the law has been violated because mandatory notice was not posted.¹⁹ *See* 76 Fed. Reg. at 54,033, 54,049. Contrary to Plaintiffs’ claims, this section does not create a “blanket rule” tolling the statute “whenever a notice is not posted;” it does not “alter the statute of limitations;” let alone “effectively repeal” the statute of limitations. (NAM at 20; NRTW at 26) It merely interprets the statute of limitations—and it does so consistently with well-established equitable doctrines. Contrary claims merely obscure the true issues: first, whether it is permissible to find that the statute of limitations is subject to equitable tolling and second, if so,

¹⁹ Although Plaintiffs and Amici persist in describing the Board’s three enforcement mechanisms for the Rule as penalties (*see, e.g.,* Amici at 23, n. 51), they are not. Each mechanism simply seeks to remedy the unlawful conduct, and describe consequences that may occur if an employer refuses to post the Rule. 76 Fed. Reg. at 54,031.

whether it is permissible to consider failure to post a notice as a factor in the equitable tolling analysis.

As to the first question, it is not only permissible but *mandatory* to find that Section 10(b) is subject to equitable tolling. The Supreme Court expressly so stated in *Zipes*, noting that “the time requirement for filing an unfair labor practice charge under the National Labor Relations Act operates as a statute of limitations *subject to recognized equitable doctrines*” including equitable tolling. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 392-98 (1982); *see Young v. United States*, 535 U.S. 43, 49 (2002) (“It is hornbook law that limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute.” (quotations and citations omitted)); *Holland v. Florida*, 130 S.Ct. 2549, 2560 (2010); *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95 (1990). Congress is presumed to have permitted equitable tolling in every statute unless the statute expressly states otherwise. *Irwin*, 498 U.S. at 95 (“such a principle is likely to be a realistic assessment of legislative intent”).

In the face of this precedent, both NRTW and NAM appear to argue (consistent with their other arguments), that the silence of the statute of limitations means that it implicitly forbids tolling (NRTW at 26-27; NAM at 21-22). They identify two points in favor of this argument: first, they cite many cases interpreting the statute of limitations in Section 10(b) “strictly;”²⁰ second, they claim that the explicit military service exception in the statute is “the only exception.” (NRTW at 26; NAM at 21-22.) It is sufficient to note that they do not address *Zipes*,

²⁰ NRTW at 26, citing *Local Lodge No. 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411, 424-30 (1960); *Precision Concrete v. NLRB*, 362 F.3d 847, 851-852 (D.C. Cir. 2004); *Kelley v. NLRB*, 79 F.3d 1238, 1245-46 (1st Cir. 1996). NAM at 21, citing *Local 1424* and *Don Lee Distributor, Inc. v. NLRB*, 145 F.3d 834 (6th Cir. 1998).

which recognized that the limitations period in Section 10(b) is subject to equitable doctrines. Nor do they adequately come to grips with *Lodge 64, IAM v. NLRB*, 949 F.2d 441 (D.C. Cir. 1991), where the court stated “silence . . . clearly means that Congress has not ‘directly spoken to the precise question at issue,’ so that the Board is free to adopt any reasonable construction of the Act.” *Id.* at 444. On the question of whether Section 10(b) is subject to the traditional equitable exceptions, *Lodge 64* found that 10(b) was subject to just such an exception, fraudulent concealment. *Id.* at 450.

In any event, none of the cases that the NRTW and NAM cite (NRTW at 26; NAM at 21) support their argument. *Kelley* states that “Section 10(b) operates as an ordinary statute of limitations, subject to recognized equitable doctrines, and not as a jurisdictional restriction.” 79 F.3d at 1244 (acknowledging the Board’s discretion to interpret 10(b), and upholding the Board’s regulations requiring the charging party to serve the charge). And *Don Lee Distributor* expressly applies a purely equitable exception to Section 10(b), namely, that “[f]raudulent concealment of a material fact underlying an unfair-labor-practice charge tolls the six-month limitations period.” 145 F.3d at 845. Nor is *Bryan* to the contrary. In *Bryan*, the Court held that enforcement of a minority contract which was executed outside of the Section 10(b) period could not be a “continuing violation” as the cause of action must accrue at the time of execution. Nothing in *Bryan* addresses equitable tolling, which may occur irrespective of accrual;²¹ indeed, in footnote 19, the *Bryan* court responded to arguments that its ruling was inequitable by

²¹ Accrual doctrines relate to “the date on which the statute of limitations begins to run.” *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-52 (7th Cir. 1990) (Posner, J.) (cited with approval by *Holland v. Florida*, 130 S.Ct. 2549, 2561 (2010); *Klehr v. AO Smith Corp.*, 521 U.S. 179, 192 (1997)). Tolling doctrines, by contrast, “stop the statute of limitations from running even if the accrual date has passed.” *Id.*

suggesting that Section 10(b) would be subject to the equitable exceptions such as fraudulent concealment. 362 U.S. at 429.

Thus, even Plaintiffs' own cases contradict their argument that the military exception is the "only exception" to 10(b). Equitable exceptions to 10(b) have been applied for decades, including in the D.C. Circuit. *Lodge 64*, 949 F. 2d at 444.

Regarding the second question, whether it is permissible to consider failure to post a notice as a factor in the equitable tolling analysis, that question does not appear to be seriously contested. Plaintiffs say little about the circuit court authority in accord with the Board's application of tolling doctrine to notice posting.²² The Board's Rule is nothing more than a brief summary of this caselaw.

VII. Plaintiffs are Wrong that the Board Was Required to Present New Empirical Studies In Support of Its Factual Finding that A Need for the Rule Existed.

NAM complains that the Board's rule is lacking in substantial, credible evidence. (NAM at 18.) But in drawing the reasonable inference that NLRA knowledge is not widely known from the record, the Board acted well within its authority. Although many opposing comments claimed that employees are aware of their NLRA rights, they cited little, if any support for that proposition.²³ 76 Fed. Reg. at 54,015; *see, e.g.*, Comment G.1, A.R. NLRB-001188; Comment H.46, A.R. NLRB-003721; Comment H.59, A.R. NLRB-003757; Comment H.60, A.R. NLRB-003763. Moreover, few, if any, of these opposing comments asserting widespread NLRA knowledge also claimed that employees are aware of the right to engage in protected concerted

²² *See, e.g., Mercado v. Ritz-Carlton San Juan Hotel, Spa & Casino*, 410 F.3d 41, 46-47 (1st Cir. 2005); and other cases cited in NLRB's MSJ Memo at 41 n.180.

²³ Citations to the administrative record, which was filed in conjunction with the Board's motion for summary judgment and memorandum in support, are in the following format: "A.R. NLRB-000000."

activity in the nonunion setting. 76 Fed. Reg. at 54,016; ; *see, e.g.*, Comment G.1, A.R. NLRB-001188; Comment H.46, A.R. NLRB-003721; Comment H.59, A.R. NLRB-003757; Comment H.60, A.R. NLRB-003763. Agencies are not required to commission independent studies to confirm their experienced judgment.²⁴ And they are permitted to support their conclusions from the anecdotal evidence in the record. *Mansolf v. Babbitt*, 125 F.3d 661, 670 (8th Cir. 1997). Significantly, as the Board noted in the Rule, the Rule’s opponents themselves put in no “substantive empirical evidence” or “analyses of rigorous scholarly merit” indicating that many employees do understand their Section 7 rights. *See* NAM at 18.²⁵

²⁴ *Chamber of Commerce v. SEC*, 412 F.3d 133, 142 (D.C. Cir. 2005); *see also Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1124 (D.C. Cir. 1984) (failure to conduct independent study did not violate APA because notice and comment procedures “permit parties to bring relevant information quickly to the agency’s attention”).

²⁵ Amici’s third argument, that the creation of a notice obligation without statutory authority “undermines important rights afforded by *other* statutes in which Congress has included express statutory notice requirements,” (Amici at 25-28), is no more than a rehashing of the comments that the Board received regarding “cluttered bulletin boards.” 76 Fed. Reg. at 54,017, 54,027. As the Board noted there, comments were submitted indicating that employees know more about their rights under statutes requiring notice-posting because of those notices than they do about their NLRA rights. Comment G.1, A.R. NLRB-000776; Comment G.1, A.R. NLRB-000672. In fact, as Amici point out, so many employer notices are already required, what possible difference could one additional notice make, rendering that one alone in excess of statutory authority?

And finally, NAM has failed to cite one case demonstrating that *Leedom v. Kyne*, 358 U.S. 184 (1958), applies in the APA rulemaking context. The one case it cited (NAM at 6), *Railway Labor Executives*, was an RLA case for which normally, no judicial review is provided, requiring the use of *Leedom* as the necessary exception to this lack of jurisdiction. 29 F.3d at 663-64. Here, there is no such need for any application of the very narrow *Leedom* exception, since APA jurisdiction is not disputed. Nor have Plaintiffs, for the reasons stated in this Opposition and in Defendants’ Motion for Summary Judgment made out the other necessary showing, of a violation of a “clear and mandatory” provision of law. *Id.* at 661 (quoting *Leedom*, 358 U.S. at 188).

CONCLUSION

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

RESPECTFULLY SUBMITTED,

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