No. 12-1757

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *et al.*,

Appellants,

v.

CHAMBER OF COMMERCE OF THE UNITED STATES, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA AT CHARLESTON

BRIEF OF AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, CHANGE TO WIN AND NATIONAL EMPLOYMENT LAW PROJECT AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS URGING REVERSAL

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Jeff Vockrodt Date: 10/05/2012

Counsel for: AFL-CIO, Change to Win and NELP

CERTIFICATE OF SERVICE

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I certify that on October 5, 2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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IDENTITY AND INTEREST OF AMICUS CURIAE AND SOURCE OF AUTHORITY TO FILE

The AFL-CIO is a federation of 56 unions representing more than 12 million working men and women. Change to Win is a federation of four labor unions representing 5.5 million working men and women. NELP is a non-profit legal organization with over 40 years' experience in educating the public and policymakers about working conditions of low-wage, unemployed and primarily non-unionized workers, and advocating for their rights.

Pursuant to Federal Rule of Appellate Procedure 29(a), *amici* certify that all parties to this case have consented to this brief's filing.

STATEMENT REGARDING AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

Pursuant to Federal Rule of Appellate Procedure 29(c), *amici* certify that no counsel for any party authored this brief in whole or in part; no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than the *amici*, their members or their counsel made a monetary contribution to its preparation or submission.

ARGUMENT

I. THE RULE IS REASONABLE

It may be a venerable maxim that "ignorance of the law is no excuse," but it is indisputable that such ignorance hinders the effectuation of the public policies underlying our laws. The District Court erred in holding that Congress "unambiguously" intended to bar the National Labor Relations Board ("NLRB" or "Board") from using its broad, statutory rulemaking authority to address well-documented ignorance of the National Labor Relations Act ("NLRA" or "Act") through a simple notice-posting requirement. This use of the Board's rulemaking authority to ensure the more effective operation of the Act's other provisions was an exercise of precisely the sort of discretion that Congress expressly gave the Board in NLRA Section 6.

Before addressing the specific legal issues raised by this appeal, we believe it is illuminating (1) to illustrate through specific and commonplace examples the reasonableness of the Board's conclusion that requiring covered employers to post a one-page notice of employee rights "may be necessary to carry out the provisions of [the NLRA]." 29 U.S.C. §156; (2) to demonstrate that the required notice will serve the legitimate interests of employees, employers and the general public at little public or private cost; and (3) to document the near universality of notice-

posting requirements in the enforcement of federal and state labor and employment laws with and without specific, express statutory authorization.

A. Under the Act, employees have a right to engage in "concerted activities for … mutual aid and protection" wholly apart from any effort to form a union. 29 U.S.C. §157. The Board has construed that broad right to encompass, for example, a specific right to discuss wages with fellow employees. *See, e.g., Parexel Int'l*, 356 N.L.R.B. 82, slip op. at 4 (2011). Yet many employers are unaware of the right to engage in concerted activity for mutual aid and protection and even more are ignorant of its construction to encompass discussion of wages. Thus, it is entirely possible that, without notice of such a right, an employer (or even an individual supervisor)[1] would bar such discussion in order to avoid discord or for other innocent reasons. The result may be a charge, investigation by the Board's General Counsel, a complaint, and possibly litigation before the agency and courts. The Board's notice, informing both employers and employees that employees have a right to "[d]iscuss [their] wages and benefits … with [their] coworkers," will surely prevent many unwitting legal violations, the consequent undermining of federal labor policy, and the waste of resources.

[1] Under the NLRA, employers are liable for the actions of their agents, including supervisors. *Aladdin Indus.*, 147 N.L.R.B. 1392, 1392 (1964).

With approximately six million NLRA-covered employers,[2] the Board's long-standing conclusion that voluntary compliance is "a prerequisite to the continued efficacy" of the Act is self-evident. *Nat'l Family Op.*, 246 N.L.R.B. 521, 530 (1979). The simple requirement of posting this notice will promote such voluntary compliance.[3]

When employers or unions do not voluntarily comply, the notice will permit many employees, who would not otherwise have known to do so, to initiate the statutory processes Congress provided to enforce their rights. For example, under the Act, employees have the right "to form, join, or assist labor organizations" and also the right "to refrain from any or all of such activities." 29 U.S.C. §157. The Board has construed the latter to bar unions from refusing to represent an employee who declines to become a union member. *See, e.g., Electrical Workers Local 2088*, 218 N.L.R.B. 396, 396 (1975). Yet most employees, even if they are aware of their right not to join the union, are unaware that a union, once selected by a majority of employees, is obligated to fairly represent both members and nonmembers. Without notice, an employee who suffers discrimination on this

[2] 75 Fed. Reg. 80,410, 80,415 (Dec. 22, 2010).

[3] The Board's rule is thus consistent with enlightened approaches to public administration, which consider "disclosure" a "minimally burdensome, low-cost" alternative to more intrusive forms of regulation. Sunstein, *Empirically Informed Regulation*, 78 U. Chi. L. Rev. 1349, 1365-66 (2011).

basis (*e.g.*, if a union refuses to file a grievance) may not know that her rights have been violated or that she can file a charge with the Board; the wrong will then go unremedied, undermining the Act's policies. The notice informing employees that "it is illegal for a union … to … [r]efuse to process a grievance because … you are not a member of the union," will prevent or remedy many such violations.

Similarly, the Board has construed the right "to form, join, or assist labor organizations" to bar employers from prohibiting employees from distributing union literature during non-work time in non-work areas. *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 492 (1978). Yet most employees, even if aware of their right to support a union, are unaware that they have this right to solicit other employees in this way. Without notice, an employee who is threatened or actually disciplined for engaging in such protected activity may not know to file a charge. The Board's notice, informing employees that "it is illegal for [their] employer to … [p]rohibit [them] … from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms," will again prevent or remedy many violations of the Act.

B. These clear benefits will be obtained at virtually no cost. The Board has made the notice available on its website[4] and will provide hard copies upon

[4] NLRB, *Employee Rights Notice Posting*, http://www.nlrb.gov/poster (last visited Oct. 5, 2012).

request.[5] Thus, the Board estimates the cost of informing employers and employees of employees' NLRA rights at $62.04 per covered *employer* in the first year and dramatically less subsequently. 75 Fed. Reg. 80,410, 80,415, J.A. 12.[6]

Nor will enforcement costs be significant. Most employers will comply voluntarily. The Board anticipates that most noncompliance will be inadvertent and most noncomplying employers "will comply without the need for formal administrative action or litigation" once informed of the requirement. 75 Fed. Reg. 80,414, J.A. 11. Whenever an employee files a charge, the Board's General Counsel has unreviewable discretion not to prosecute, *see, e.g.*, *Vaca v. Sipes*, 386 U.S. 171, 182 (1967), which would likely be exercised where an employer complied after learning of the requirement. 76 Fed. Reg. 54,006, 54,033, J.A. 179. Finally, even in the unlikely situation where an employer resists, and the case proceeds from complaint to judgment, the Board will "customarily order the employer to cease and desist and to post the notice of employee rights as well as a

[5] Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006, 54,047 (Aug. 30, 2011); NLRB, *Frequently Asked Questions – Poster*, https://www.nlrb.gov/faq/poster (last visited Oct. 5, 2012).

[6] There are also numerous companies that provide complete sets of all required workplace notices; in practice, many employers would not even need to seek out the NLRA notice but would receive it as a matter of course from their notice provider. *See, e.g.*, Labor Law Compliance Center, http://laborlawcc.com (last visited Oct. 5, 2012).

remedial notice." 75 Fed. Reg. 80,414, J.A. 11. In other words, the customary remedy will be an order to post two notices.

C. The reasonableness of the Board's judgment that a notice-posting requirement will further the Act's purposes is supported by the parallel judgment of Congress, state legislatures and sister federal and state agencies. As the district court observed, Congress has mandated workplace posting of an explanation of rights under nine separate labor and employment laws. J.A. 254. State legislatures in virtually every state have done the same, a pattern illustrated by Fourth Circuit state examples: s*ee, e.g.*, Md. Code Ann., Lab. & Empl. §3-423(b) (minimum wage and overtime notice), §3-306(b) (equal pay notice), §5-104(c) (health and safety notice); N.C. Gen. Stat. Ann. §95-9 (labor law notice), §97-93(e) (workers' compensation notice); S.C. Code Ann. §41-1-10 (general employment notice); Va. Code Ann. §40.1-51.1(E) (health and safety notice), §60.2-106 (unemployment compensation notice); W.Va. Code §21-5-9(5) (wage payment notice), §23-2C-15(c) (workers compensation notice).

But what the district court failed to acknowledge is that many federal and state agencies that enforce labor and employment laws have mandated such postings pursuant to general rulemaking authorizations. For example, the Secretary of Labor has adopted a regulation requiring posting of notices describing employees' Fair Labor Standards Act rights, even though that statute contains no

express posting requirement, nor specific authorization of such a rule. *See* 29 C.F.R. §516.4.[7] This practice is also common among state labor and employment law agencies, as the states in the Fourth Circuit again illustrate: *see*, *e.g.*, Md. Code Regs. 14.09.01.03 (workers' compensation notice, promulgated under general authority of Md. Code Ann., Lab. & Empl. §9-309(a)); Md. Code Regs. 09.32.01.04 (unemployment insurance notice, promulgated under general authority of Md. Code Ann., Lab. & Empl. §8-305(a)); Va. Workers Comp. Comm'n Rule 7.2 (workers' compensation notice, promulgated under general authority of Va. Code Ann. §65.2-201); S.C. Code Ann. Regs. §71-502(A) (occupational health and safety notice, promulgated under general authority of S.C. Code Ann. §41-15-210); S.C. Code Ann. Regs. §67-301 (workers' compensation notice, promulgated under general authority of S.C. Code Ann. §42-3-30); W.Va. Code R. §42-8-4.4 (minimum wage and overtime notice, promulgated under general authority of W.Va. Code §21-5C-6(a)).

This survey of federal and state practices demonstrates that Congress, state legislatures and federal and state enforcement agencies have all concluded that the posting of workplace notices informing employees of their rights furthers labor and

[7] Upholding the District Court's holding would cast into question the Labor Department's six-decade-old rule as well as numerous state agency rules throughout the Circuit.

employment law compliance and enforcement.[8] The Board's rule is thus not unusual or extraordinary – whether in content or in adoption under general rulemaking authority – but squarely conforms to widely adopted best practices in workplace law administration. Its judgment is unquestionably reasonable and, as we proceed to demonstrate, that is all this Court need find to uphold the rule.

II. THE DISTRICT COURT ERRED IN STRIKING DOWN THE RULE UNDER *CHEVRON* STEP ONE

A. The District Court Misapplied *Chevron* and *Mourning v. Family Publications Service*

The governing framework for analyzing agency authority to make rules under the Administrative Procedure Act is the one set forth in *Chevron*:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. [However,] if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

[8] What the survey does not demonstrate, contrary to the District Court's reasoning, is congressional intent to preclude a notice-posting requirement under the NLRA. Congressional silence, even coupled with an affirmative requirement in other statutes, certainly does not suggest Congress had "directly spoken to the precise question at issue." *See Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842 (1984).

467 U.S. at 842-43.

Chevron step one is a high bar: to find an agency's regulation invalid under step one requires finding that Congress spoke "*directly*" to the "*precise*" question at issue and "*unambiguously*" expressed an intent contrary to the agency's rule. *Chevron*, 467 U.S. at 842-43 (emphasis added); *Rust v. Sullivan*, 500 U.S. 173, 185-86 (1991).[9] The district court in this case rested at *Chevron* step one, while recognizing that the rule would clearly pass muster under *Chevron* step two.[10] In so doing, the district court failed to respect *Chevron* step one's high bar, which is particularly high in this case, for three reasons:

First, despite the requirement that Congress *directly* and *unambiguously* express an intent counter to the agency's rule, neither the court below nor the plaintiffs have pointed to any express language in the NLRA that even arguably bars this rule, much less does so *directly* and *unambiguously*.

[9] *See also* Silberman, *Chevron – The Intersection of Law & Policy*, 58 Geo. Wash. L. Rev. 821, 826 (1990) ("If a case is resolved at the first step of Chevron, one must assume a situation where either a petitioner has brought a particularly weak case … or the agency is sailing directly against a focused legislative wind. Neither eventuality occurs very often.").

[10] The district court in this case, agreeing with the U.S. District Court for the District of Columbia in a parallel case challenging the same rule, found that the Board had "articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made" for the purpose of *Chevron* step two. J.A. 276 (citation omitted); *accord NAM v. NLRB*, 846 F.Supp.2d 34, 49-52 (D.D.C. 2012).

Second, the rule here was promulgated under a statute that contains a particularly broad delegation of substantive rulemaking authority to the agency:

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

NLRA Section 6, 29 U.S.C. §156 (emphasis added).

Virtually identical language has been interpreted by several courts, including the Supreme Court, before and after *Chevron*, to vest the agency with broad, substantive rulemaking authority, so long as the authority is used in service of the policies and provisions of the relevant statute. *See Mourning v. Family Publ'ns Serv.*, 411 U.S. 356, 369 (1973) (when an agency has authority to issue rules it finds "necessary" to carry out the provisions of a statute, such rules "will be sustained so long as [they are] reasonably related to the purposes of the enabling legislation") (citing *Thorpe v. Hous. Auth.*, 393 U.S. 268, 280-81 (1969) (internal quotation omitted).[11] *See also Harman Mining v. Dir., Office of Workers' Comp. Programs*, 826 F.2d 1388, 1390 (4th Cir. 1987) (reaffirming *Mourning* standard).

[11] The Chamber argued to the court below that *Mourning* should be understood as only relevant to *Chevron* step two. Chamber Response Brief at 3-4. But to say that *Mourning* applies at *Chevron* step two is to say that courts will defer to agency rules and regulations like the one at issue here if they are "reasonably related to the purposes of the enabling legislation" *unless* Congress has unambiguously expressed an intention directly contrary to the agency's rule.

Despite the absence of any statutory language directly limiting the Board's authority to require notices, and despite the case law broadly interpreting rulemaking authority statutes nearly identical to the Board's, the district court rejected the rule here as not supported by "plain language," arguing that "necessary" should be read in its strictest sense so as not to "confuse a 'necessary' rule with one that is simply useful" or one that simply "aids" or "furthers" the goals of the Act. J.A. 262. This clearly conflicts with *Mourning* and its progeny. It also ignores numerous cases which have held that the word "necessary" in this context is inherently ambiguous and should be understood as a delegation to the agency to make policy judgments concerning what is "necessary" to carry out the provisions of a statute, to which courts should defer. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 845 (1986) ("An agency's expertise is superior to that of a court when a dispute centers on whether a particular regulation is 'reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes' of the Act the agency is charged with enforcing."); *see also AFL-CIO v. Chao*, 409 F.3d 377, 387 (D.C. Cir. 2005).

Put simply, a broad, express grant of rule-making authority, as construed in *Mourning*, surely heightens the burden on a plaintiff to show an unambiguous limitation on that authority that directly precludes its exercise. *See NAM*, 846 F.Supp.2d at 48 n.10.

Finally, the breadth of the Board's Section 6 authority does not rest solely on general administrative law principles and cases interpreting similar statutes. Section 6's case law and legislative history both compel the conclusion that it is a very broad delegation of substantive rulemaking authority.

The Supreme Court has specifically noted that Congress failed to include any specific constraints on NLRB Section 6 rulemaking authority in the NLRA and concluded that Section 6 authority extends to the fullest degree that its broad language implies:

> 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.

AHA v. NLRB, 499 U.S. 606, 613 (1991).

Moreover, as Professor Charles Morris' *amicus* brief discusses, the legislative history of the NLRA's 1947 Taft-Hartley amendments makes clear both (1) that the Taft-Hartley Congress understood that Section 6, which originated in the original NLRA of 1935, did indeed constitute a delegation to the NLRB of broad, substantive rulemaking authority and (2) that Congress considered and rejected efforts to limit the scope of that authority, although it did amend this provision in other ways not relevant here and then re-enacted it. Morris *Amicus*

Br. at 22-26. As the Supreme Court has emphasized, courts should be particularly "reluctant … to read into [a] statute … limitation[s] that Congress eliminated," *Bradley v. School Bd.*, 416 U.S. 696, 716 n.23 (1974), for "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987) (internal quotations omitted). [12]

B. The Rule Furthers the Express Purposes of the Act

Given the scope of NLRB rulemaking authority, the case for finding that this rule is well within that authority is overwhelming. This rule does no more than facilitate that employees covered by the NLRA know about that Act's rights and procedures. This is a statute that both explicitly declares the public interest in employees' possessing and exercising these rights and provides for specific, public, administrative procedures for those rights' vindication. Given this, there can be no doubt that the NLRB rule in question is a valid effort to "carry out the provisions of this Act."

[12] Even the more limited formulation proposed but rejected in 1947 (which would have limited the Board's authority to promulgating "such *regulations* as may be necessary to carry out [its] respective *functions*") would, for the reasons explained below, have allowed for the Board's modest exercise of rulemaking authority at issue here.

This is all the more so as Congress made unmistakably clear that this statute advances broad public policy goals that require that employees know of and can exercise their rights. The very first section of the Act states:

> It is hereby declared to be *the policy of the United States* to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred *by encouraging* the practice and procedure of collective bargaining and *by protecting* the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. §151 (emphasis added).

The statute goes on to enumerate the rights in question, stating them as rights that all covered employees "shall have":

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

NLRA Section 7, 29 U.S.C. §157.

The statute proceeds to establish the Board and provide it with the necessary powers to fulfill the "policy of the United States to eliminate … [such] obstructions … by encouraging … [such] practice[s] and procedure[s] … and by protecting …

[such] full freedom" of employees to exercise the rights provided. 29 U.S.C. §151. Those powers include adjudicating charges of interference with these rights, *see* NLRA Sections 8 and 10, 29 U.S.C. §§158, 160, processing election petitions to determine whether employees wish to exercise their right to representation, *see* NLRA Section 9, 29 U.S.C. §159, *and of course*, the power under Section 6 to formulate and adopt "such rules and regulations as may be necessary to carry out" these and other provisions of the Act.

The authors of the NLRA made unmistakably clear that they intended to create a system of rights and procedures that would be available to employees everywhere and become important elements of the overall economy's operations for the benefit of the nation as a whole. 29 U.S.C. §151. Indeed, the Act's lengthy and detailed preamble demonstrates this point, explaining that Congress was reacting to serious economic problems that had plagued the Nation for some time and had, by the time of the Act, contributed to the Great Depression. The preamble explains that Congress believed that it was establishing rights and providing for procedures whose widespread recognition and availability were crucial to remedying these systemic problems. And it viewed these problems, until so remedied, as potentially causing severe burdens on the overall economy, undermining the nation's prosperity, and causing widespread dislocation and harm

far beyond the situations of the particular employees and employers involved in any particular dispute. *Id.*

Given these stated goals, it is clear that the NLRA was not intended to operate only for the sophisticated. Nor would the NLRA Congress have been agnostic as to whether all covered workers had meaningful access to the procedures it was creating. While Congress left the choice of whether to participate in the process of collective bargaining to free employee choice, and similarly left to employees, employers and unions the decision whether to trigger Board examination of any particular dispute, the Act makes explicit that fulfillment of its crucial public policy goals depends on the widespread availability of the Act's mechanisms.

The Board thus acted entirely consistently with the understandings of the Act's framers in concluding that ignorance of the Act – and the resulting practical unavailability of its protections to many employees – presents a serious impediment to the Act's operating as intended.

C. The NLRA's Structure Does Not Undermine This Rule

Despite the language of Section 6, the established framework for understanding that language, the expressly stated policies of the Act, and the clear rationale for the rule in question, the district court asserted that the NLRA contains

within its structure a feature that – although not specifically expressed – bars by implication the notice-posting requirement:

> It is clear from the structure of the Act that Congress intended the board's authority over employers to be triggered by an outside party's filing of a representation petition [under Section 9] or ULP charge [under Section 8].

J.A. 265.

On the premise that these structural features of Sections 9 and 10 govern all aspects of Board authority – even authority derived from Section 6, which contains no such features – the notice-posting rule was held to be invalid because it "proactively dictates employer conduct prior to the filing of any petition or charge, and such a rule is inconsistent with the Board's reactive role under the Act." *Id.*

This argument is flawed for six reasons.

First, reliance on an unstated, supposedly implicit limitation on the Board, even though it had never been recognized by the Board or otherwise in case law, would be, in all but the most extraordinary cases, inconsistent with *Chevron*'s requirement of an "unambiguous" and "direct" statement of Congress's intent regarding the "precise" question at issue.

Second, the very essence of substantive rulemaking – which Section 6 clearly authorizes – is to prospectively establish broad rules of general application outside the confines of a particular case. That authority is at the heart of the

distinction between rulemaking and adjudication. The fact that a statute elsewhere grants an agency authority only to decide particular cases after a charge or petition is filed hardly compels the conclusion that the broad rulemaking authorization does not mean what it says.

Third, there is nothing in this particular rule that calls for or constitutes any actual exertion of Board power against any employer outside of what the Court below referred to as the "reactive" structures of the NLRA – *i.e.*, outside Sections 8, 9 and 10 proceedings, which must be initiated by a charge or petition. In other words, the Board has used Section 6 to establish a broad rule of general application (as is the normal function of administrative rulemaking); that exercise of rulemaking authority was undertaken in order better "to carry out" the other provisions of the Act (as Section 6 provides); and the resulting rule is enforced *solely* through operation of Sections 8, 9 and 10 in the manner that those sections provide. Given this approach, it is strange indeed to attack the rule as somehow at odds with the fundamental structure of the Act, which of course includes Section 6.

Fourth, the rule in question is entirely consistent with and supported by the structure of the Act. Indeed, the very "reactive" nature of the Board's authority under Sections 8, 9 and 10 of the Act, which the court below highlighted, underscores the reasonableness of the Board's rule. Given the Act's objectives, as set out in Sections 1 and 7, and the fact that the Board's adjudicatory authority

under Sections 8, 9 and 10 is dependent on employees, employers or unions seeking redress, the Board acted entirely reasonably in concluding that some modest employee knowledge of statutory rights and options was "necessary to carry out the provisions of the Act."

Fifth, it is particularly ironic to assert that a rule promulgated under Section 6 is invalid because it prospectively creates obligations of general application, and thereby ignores the "reactive" nature of Board authority under Sections 8, 9 and 10. J.A. 265. For Board authority under the so-called "reactive" provisions cited by the Court below, has always included the authority to declare broad rules of general application for use in future proceedings.[13] For example, the Board jurisprudence under Section 8(a)(1) is filled with declarations of broad and general rules regarding how employers must behave prospectively to avoid Section 8(a)(1) violations, should a charge against them be filed. *See, e.g.*, *Republic Aviation v.*

[13] To be clear, this Court need not address whether the Board could have issued the notice-posting rule through Section 8, 9 or 10 adjudicatory authority; such a finding is not necessary in order to uphold the rule under the Board's Section 6 rulemaking authority. This Court also need not address available enforcement mechanisms, which the district court did not reach, including enforcement based on Section 8(a)(1) of the Act. *See NLRB v. Pease Oil*, 279 F.2d 135, 137 (2d Cir. 1960) (issue of rule's enforcement is distinct from question of Board's authority to establish employer obligations).

NLRB, 324 U.S. 793 (1945); *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).[14] And the Supreme Court along with many scholars has criticized the Board for not using Section 6 to adopt the kinds of broad rules of general applicability it has adopted under sections 8, 9, 10, thereby avoiding retroactive application of new rules to parties without prior notice.[15] Yet sustaining the district court's position would seem to bar Board use of Section 6 to impose obligations, since there has been no charge or petition.

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[14] Nor is the rule adopted here different from other rules adopted by the Board in the Section 8 context on the basis that this rule establishes an affirmative obligation on employers, rather than limiting itself to correcting wrongful actions of an employer. As the Board has made clear, even in the context of Section 8(a)(1) adjudication:

> [There are] circumstances in which an *employer's failure to act* may interfere with, restrain, or coerce employees in the exercise of their Section 7 rights; nothing in the statute precludes such failure to act from being found violations of Section 8(a)(1).

Tech. Servs. Solutions, 324 N.L.R.B. 298, 301 (1997) (emphasis added).

[15] *See, e.g.*, *NLRB. v. Wyman-Gordon*, 394 U.S. 759, 764 (1969); Fisk & Malamud, *The NLRB in Administrative Law Exile*, 58 Duke L.J. 2013, 2016 (2009); Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 Yale L.J. 571, 610–22 (1970); Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 Admin. L. Rev. 163, 175–77 (1985); Peck, *A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making*, 117 U. Pa. L. Rev. 254, 260–75 (1968).

Finally, the Supreme Court has previously rejected the very argument that is made here – that the reactive nature of the Board's adjudicatory authority under Sections 8, 9 and 10 establishes a general limit on Board authority. In *NLRB v. Nash-Finch*, 404 U.S. 138 (1971), the Board filed suit to enjoin a state court action attempting to regulate peaceful labor picketing, a subject over which the Board has primary jurisdiction. The Board acted wholly on its own initiative – indeed, in the absence of any specific statutory authorization – arguing that the state court's action was preempted by the NLRA and would do injury to NLRA policies. *Id.* at 140-45. The Court held that the Board had implied authority to initiate such actions. *Id.* at 144. This holding is wholly incompatible with the contention – vital to the decision below – that the "reactive" structure found in Sections 8, 9 and 10 must be generalized to limit all Board authority regardless of its source. Indeed, that the Supreme Court rejected this kind of limit even where the Board was acting with no express statutory authorization – *i.e.*, even in the absence of the kind of express authority granted in Section 6 – makes all the more clear that there should be no such limit inferred where specific language clearly confers the power in question.[16]

[16] In the Court's words:

> The fact that the Board is given express authority … in some sections of the Act is not persuasive that the Act

For each of these reasons, the structure of the Act supports the Board's authority at issue.

D. Upholding the Rule Does Not Suggest Unlimited Section 6 Authority

While the plaintiffs contend that upholding this rule would grant unlimited power to the Board, nothing could be further from the truth. All that this rule does is require posting of a notice in order to ensure that employees have access to the procedures that the Act already provides to protect employees' already established rights. Nothing independent of existing provisions is proposed, no new procedures designed, and no novel purposes pursued. Indeed, the rule accomplishes its ends (educating employees as to their rights and options under the Act) through modest and conventional means – by requiring employers to post another workplace notice along with numerous others already required.

Given these factors, this case does not require defining the outer bounds of Section 6 authority. The Board has used Section 6 authority here in a manner

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> expresses a policy to bar the Board from enforcing the national interests on other matters. The instances where the Board is given explicit authority … are not exclusive examples, as we have already shown. They are only particularized instances of specific enforcement devices relating to specified orders, not a denial by implication that the Act and the Board would not be entitled to federal aid or protection in other instances[.]

Nash-Finch, 404 U.S. at 147.

wholly consistent with its language and truly incidental to the effective operations of the statute's other provisions. It narrowly seeks no objective but to improve the operation of those provisions to better serve the statute's express goals.

E. The District Court's Reliance on *Brown & Williamson* Was Misplaced

The district court relied heavily on *Brown & Williamson Tobacco v. FDA*, 153 F.3d 155 (4th Cir. 1998). J.A. 258-59, 268, 272, 275. In that case, the FDA had sought to regulate tobacco products, thereby suddenly extending its authority into an entirely new substantive arena of great political and economic importance. The Supreme Court held that the FDA's jurisdiction did not extend to tobacco. *FDA v. Brown & Williamson Tobacco*, 529 U.S. 120, 143 (2000).[17] The Court concluded that in "extraordinary cases … there may be reason to hesitate before concluding that Congress has intended [the] implicit delegation" assumed in *Chevron*. *Id.* at 159. The Court's holding rested on particular factors demonstrating that this was an extraordinary expansion of FDA authority contrary to Congress' intent, *id.*: (1) the FDA had assured Congress since 1914 that it did not have jurisdiction over tobacco, (2) the tobacco industry constitutes "a significant portion of the American economy," (3) if the FDA had jurisdiction over

[17] The District Court cited the Fourth Circuit's opinion in *Brown & Williamson*, although the Supreme Court issued a later opinion in the case.

tobacco, the logic of its statute would require it to ban tobacco products, and (4) Congress had created alternative regulatory structures that assumed the continued sale of tobacco. *Id.* at 159-60. No analogous "extraordinary" factors are present here. This is an ordinary case in which the *Chevron* steps should be applied according to their terms.

Indeed, cases like *Brown & Williamson* highlight the modest, limited, and entirely appropriate nature of the action here. This case involves no exercise of Board authority over an industry previously considered exempt, no new or novel understanding of the statute's policies or purposes, and no independent congressional actions incompatible with the authority claimed. The rule simply requires that already-covered employers post a notice describing already-established rights and procedures, wholly consistent with practices widely followed in similar contexts. *See supra* at 6-7.

F. Passage of Time Since the NLRA's Enactment Does Not Reduce the Deference Owed to the Agency's Judgment that Current Conditions Justify this Rule

The fact that this rule was issued only recently does not undermine its validity. The Supreme Court has "instructed that neither antiquity nor contemporaneity with a statute is a condition of a regulation's validity." *Mayo Found. v. United States*, 131 S.Ct. 704, 712 (2011) (citing *Smiley v. Citbank*, 517 U.S. 735, 740 (1996) (internal quotations omitted). In *Smiley*, the Court rejected

the argument that it should give less deference to a regulation because it had been adopted "more than 100 years" after the authorizing statute. 517 U.S. at 740.

Indeed, even if the Board had previously expressly concluded that a notice rule was not justified – which it did not do – such a change in the Board's position would not reduce the deference due under *Chevron*. *See, e.g.*, *FCC v. Fox Television Stations*, 556 U.S. 502, 515-16 (2009), *rev'd on other grounds*, 132 S.Ct. 2307 (2012) (an agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better").[18]

This principle holds particularly true where the Board – the agency with subject matter authority and expertise – made detailed findings after full notice-and-comment procedures. As the Supreme Court concluded in *AHA*:

> Given the extensive notice and comment rulemaking conducted by the Board, its careful analysis of the comments that it received, and its well-reasoned justification for the new rule, we would not be troubled even if there were inconsistencies between the current rule and prior NLRB pronouncements. The statutory authorization "from time to time to make, amend, and rescind" rules and regulations expressly contemplates the possibility that the Board will reshape its policies on the

[18] *See also Air Transp. Ass'n v. NMB*, 663 F.3d 476, 484 (D.C. Cir. 2011). *See generally* Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 518-19 (1989).

> basis of more information and experience in the administration of the Act.

499 U.S. at 618.

Here, the Board made extensive findings regarding the current necessity of notice posting for the effective administration of the Act, concluding that today "many employees are unaware of their NLRA rights and therefore cannot effectively exercise those rights." 76 Fed. Reg. 54,011, 54,014-18, J.A. 157, 160-64; 75 Fed. Reg. 80,410-12, J.A. 7-9. In fact, even many *employer* comments demonstrated ignorance of employee NLRA rights. 76 Fed. Reg. 54,017 (*quoting* P&L Fire Protection comment: "If my employees want to join a union they need to look for a job in a union company."). Indeed, the district court recognized the sufficiency of the Board's findings under *Chevron* step two. *See supra* at 9.

That there is today widespread ignorance regarding the Act fully justifies the reexamination of Board practices. In 1935, when the Act was passed, and for several decades thereafter, labor relations and regulation were at the forefront of public debate. Union membership would rise to 35 percent of the workforce, and many employees and employers had direct experience with collective bargaining or direct contact with someone who had.[19] Private sector union membership now

[19] Mayer, *Union Membership Trends in the United States*, Congressional Research Service (Aug. 31, 2004), at Appendix A: Table A1 ("Union Membership in the United States, 1930-2003"), *available at*

stands at less than 7 percent.[20] While declining in union density is not *itself* a reason for requiring notice posting, it is clear that employees and employers are now exposed to fewer people with experience under the Act, and there is an attendant reduction in their knowledge about the NLRA. The Board may certainly consider these evolving circumstances – including the resulting widespread ignorance of the Act – justifying such a change of practice.

This is especially so, given that the NLRA offers substantial protection to "concerted activity for mutual aid and protection" outside union contexts,[21] and yet there is widespread ignorance of this. *See, e.g.*, DeChiara, *The Right to Know: An Argument for Informing Employees of Their Rights Under the NLRA*, 32 Harv. J. on Legis. 431, 436 (compiling studies); Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the NLRA*, 140 U. Pa. L. Rev. 921, 939-40 n.93 (1992) (discussing the "popular perception

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http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1176&context=key_workplace.

[20] U.S. Department of Labor, Bureau of Labor Statistics, *Economic News Release - Table 3: Union affiliation*, http://www.bls.gov/news.release/union2.t03.htm (last modified Jan. 27, 2012).

[21] *See, e.g.*, *Saigon Gourmet Rest.*, 353 N.L.R.B. 110 (2009) (non-union restaurant employees protected when they approached their employer asserting wage and hour claims); *Franklin Iron & Metal Corp.*, 315 N.L.R.B. 819 (1994), *enforced*, 83 F.3d 156 (6th Cir. 1996) (non-unionized minority employees protected when they discussed amongst themselves whether pay disparity was racially motivated, and then questioned the employer).

that the NLRB deals only with cases involving union activity"); Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at the General Theory of Section 7 Conduct*, 137 U. Pa. L. Rev. 1673, 1675 (1989) (many employers and employees "are totally oblivious of the existence of this important body of law.").

Even those generally aware of the NLRA often mistakenly believe that it protects employees only in union contexts. *See, e.g.*, Estlund, 140 U. Pa. L. Rev. at 939-40 n.93 (1992) ("Given the popular perception that the NLRB deals only with cases involving union activity – a perception shared by almost all of [the author's] labor law students and most of [the author's] law school colleagues – relatively few employees fired for protest outside the context of unionization even approach the Board."); Trottman, *Worker Rights Get Promotional Drive*, Wall St. J. (Mar. 22, 2012) (noting that while only 6.9 percent of private sector workers belong to unions, more than 90 percent of complaints to the Board involve union activity); Meisburg & Silverman, *Why Should a Non-Union Company Care About the NLRB?*, Society for Human Resource Management (Aug. 11, 2010) (former NLRB General Counsel and Member, noting that few non-union employers understand NLRA relevance).

Recognizing that this widely misunderstood area of legal protection has increased in importance as the unionized sector has declined, the mandated notice specifically explains NLRA rights unrelated to unions. *See, e.g.*, 75 Fed. Reg.

80,419 (employees have right to "discuss the terms and conditions of employment … with your co-workers" and to "take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer"). In this and other ways, the Board "drafted the mandatory language of the notice in a way that conveyed the information of which employees were likely to be unaware." *NAM*, 846 F.Supp.2d at 25.

CONCLUSION

For all of the foregoing reasons, the Court should reverse the district court's ruling and uphold the Board's notice-posting rule.

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Respectfully submitted,

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Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), *amici* certify that their brief, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii), contains 6,982 words in proportionally spaced, 14-point Times New Roman font, and the word processing system used was Microsoft Word 2010.

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