No. 12-1757

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *et al.*,

Defendants/Appellants,

v.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE SOUTH CAROLINA CHAMBER OF COMMERCE,

Plaintiffs/Appellees.

On Cross Appeals from an Order of the United States District Court for the District of South Carolina at Charleston, C.A. No. 2:11-cv-02516-DCN

BRIEF OF *AMICI CURIAE* THE HONORABLE JOHN KLINE, CHAIRMAN, COMMITTEE ON EDUCATION AND THE WORKFORCE, UNITED STATES HOUSE OF REPRESENTATIVES, AND REPRESENTATIVES JOE WILSON, RODNEY ALEXANDER, STEVE PEARCE, GREGG HARPER, PHIL ROE, GLENN THOMPSON, TIM WALBERG, LOU BARLETTA, LARRY BUCSHON, SCOTT DESJARLAIS, TREY GOWDY, JOE HECK, BILL HUIZENGA, MIKE KELLY, JAMES LANKFORD, KRISTI NOEM, ALAN NUNNELEE, REID RIBBLE, TODD ROKITA, AND DANIEL WEBSTER FOR AFFIRMANCE IN SUPPORT OF PLAINTIFFS/APPELLEES

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DATED: December 5, 2012

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STATEMENT OF OF *AMICI CURIAE*'S IDENTITY AND INTEREST AND AUTHORITY TO FILE

(A) Identity of the *Amici Curiae*. The *Amici Curiae* are 21 members of the United States House of Representatives ("*Amici* House Members"), including The Honorable John Kline, Chairman of the House Committee on Education and the Workforce (the "Committee") and Representatives Joe Wilson, Rodney Alexander, Steve Pearce, Gregg Harper, Phil Roe, Glenn Thompson, Tim Walberg, Lou Barletta, Larry Bucshon, Scott DesJarlais, Trey Gowdy, Joe Heck, Bill Huizenga, Mike Kelly, James Lankford, Kristi Noem, Alan Nunnelee, Reid Ribble, Todd Rokita, and Daniel Webster.

(B) Interest. This appeal arises from an agency rule issued by the National Labor Relations Board that requires employers to post workplace notices regarding the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* ("NLRA," "Wagner Act" or "Act"), when such a notice obligation is not provided in the Act. The *Amici* House Members have an interest in this matter because details regarding the NLRA's legislative history – not described or elaborated upon by other parties – directly bear on the issues being considered in the instant appeal. Moreover, Chairman Kline and Representatives Joe Wilson, Phil Roe, Glenn Thompson, Tim Walberg, Scott DesJarlais, Todd Rokita, Larry Bucshon, Trey Gowdy, Lou Barletta, Kristi Noem, Joe Heck and Mike Kelly are members of the Committee to which the NLRA was originally referred in the House that played a

leading role when Congress adopted the NLRA.[1] The *Amici* House Members also have an interest in seeing that legislative choices made by Congress are not usurped by agencies that exceed their authority or create obligations that are contrary to federal law.

(C) Authority to File. All parties in the instant appeal have consented to the filing of an amicus brief by the *Amici* House Members, which makes this brief permissible under Fed. R. App. P. 29(a).

STATEMENT REGARDING BRIEF PREPARATION AND FUNDING PURSUANT TO FED. R. APP. P. 29(C)(5)

The *Amici* House Members in this matter are represented – as they were in the district court – by Charles I . Cohen, Philip A. Miscimarra, and certain other attorneys affiliated with Morgan Lewis & Bockius LLP, and Joshua W. Dixon, K&L Gates LLP. The U.S. Chamber was represented by separate outside counsel in the district court; however, the U.S. Chamber retained Morgan Lewis attorneys Howard M. Radzely, Jonathan C. Fritts and David M. Kerr as its additional co-counsel in the instant appeal. The retention of Messrs. Radzely, Fritts and Kerr by the U.S. Chamber has not in any way influenced or affected the authorship, preparation, submission or funding of this amicus brief. More generally, no other

[1] At the time of the NLRA's enactment, the Committee was known as the Committee on Labor. *See* H.R. Rep. No. 74-969, pt. 1, 74th Cong., 1st Sess.

party or counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting of this brief; and no persons other than the Amici Curiae or their counsel contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

This Court should affirm the district court's decision striking down the National Labor Relations Board's ("NLRB" or "Board") rule imposing an NLRA notice obligation on employers throughout the United States. *See Chamber of Commerce of the United States v. NLRB*, 856 F. Supp. 2d 778 (D.S.C. 2012) (Dist. Ct. Dkt. #49) (hereinafter "Mem. Op."). As the district court held, the Board exceeded its authority in promulgating the final rule. The district court's opinion was correct, as evidenced by two primary reasons made clear by the NLRA.

First, the NLRA and its legislative history demonstrate that the Notice Rule impermissibly constitutes the NLRB's exercise of authority over employers generally, even if they are not the subject of an unfair labor practice ("ULP") charge or representation petition. Congress – when enacting the NLRA – divested the NLRB of all discretionary authority to exercise jurisdiction over employers unless they are named in an unfair labor practice charge or representation petition.

(1935), *reprinted in* 2 Legislative History of the National Labor Relations Act of 1935, at 2910 (1935).

Moreover, this limitation – prohibiting any exercise of jurisdiction over employers unless they were named in a charge or petition – *was deemed central to the Act's constitutionality*. For these reasons, the district court properly recognized that Congress intentionally limited the Board's jurisdiction to employers who are actual parties in pending cases, where there can be adjudicated facts based on evidentiary hearings. *Id.* at 792-93. As the district court held, "by promulgating a rule that proactively imposes an obligation on employers *prior to the filing of a ULP charge or representation petition* . . . the Board has contravened the statutory scheme established by Congress." 856 F. Supp. 2d at 793 (emphasis added; citations omitted).

Second, Congress considered and removed express notice provisions from the original Wagner Act legislation at precisely the same time that Congress added express notice provisions to the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* ("RLA"). The Act and especially its legislative history also reveal that (i) a myriad of other notice issues were prominent during legislative hearings and debates over the Wagner Act legislation; (ii) multiple additional statutes – unlike the NLRA – contain express notice requirements; (iii) during a period spanning more than 75 years the NLRB did *not* deem a broad notice obligation "necessary" to the Act's administration; and (iv) Congress amended the NLRA in 1947, 1959 and 1974 without adding a notice obligation. These considerations demonstrate,

as the district found, that "Congress did not intend to impose a universal notice-posting requirement on employers, nor did it authorize the Board to do so." *Id.* at 793.

Because Congress has clearly "spoken to the precise question" and decided that the NLRB could not create or enforce a notice obligation applicable to employers generally, *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984), contrary to Congress' intentional inclusion of notice provisions in the RLA and a wide array of other employment statutes, this Court should affirm the district court's decision finding the notice-posting rule unlawful in its entirety.

ARGUMENT

This appeal involves the authority of the NLRB to create and enforce a notice obligation imposed on employers throughout the United States, even if the employers are not the subject of a filed ULP charge or representation petition, and even though Congress did not include such a notice obligation in the NLRA.

The district court determined that the NLRB had exceeded its authority in promulgating the final rule. For two reasons, the district court decision should be affirmed.

First, when enacting the NLRA (and as the district court recognized), Congress intentionally divested the NLRB of precisely the type of authority

reflected in the Notice Rule – *i.e.*, an exercise of NLRB jurisdiction over employers generally, without regard to whether they are the subject of an ULP charge or representation petition. Although the original Wagner Act legislation gave the NLRB broad discretion to exercise jurisdiction over employers at the Board's initiative, *Congress intentionally divested the Board of such authority when the NLRA was enacted, and limited the Board's jurisdiction* to actual parties, in pending cases, where there can be adjudicated facts based on evidentiary hearings. This limitation was more than a legislative preference, *it was central to the Act's constitutionality*. Thus, the district court invalidated the Notice Rule, and explained: "Where Congress has prescribed the form in which the Board may exercise its authority – in this case, *in reaction to a charge or petition* – this court 'cannot elevate the goals of an agency's action, however reasonable, over that prescribed form.'" 856 F. Supp. 2d at 791-92 (*quoting Amalgamated Transit Union v. Skinner*, 894 F.2d 1362, 1364 (D.C. Cir. 1990)).

Second, the Act and its legislative history demonstrate that Congress consciously excluded a variety of notice obligations from the NLRA, contrary to Congress' inclusion of notice obligations in other statutes. Indeed, *original versions of the Wagner Act legislation contained an employer unfair labor practice specifically making unlawful any employer's failure to provide notice to employees as required by the legislation*. Senator Wagner and others in Congress

eliminated these notice provisions from the Wagner Act legislation, which occurred at virtually the same time that Congress *added* notice provisions to the RLA.[2] As the district court held, "statements [in the Act's legislative history] reveal Congress's intent to place the Board in a primarily adjudicative role in relation to employers," "Congress did not impose [a notice obligation] in the NLRA, despite doing so in the RLA," and "Congress has inserted at least eight additional notice requirements in federal labor laws since 1934, while the NLRA remained silent." *Id*. at 793-94.

In short, when applying the two-step analysis articulated in *Chevron,* 467 U.S. at 842-43, this Court should uphold the district court's finding, under *Chevron* step one, that (i) the Board lacked authority to exercise jurisdiction over employers except "in a reactive role" (*i.e.*, ,when the employer was named in an unfair labor practice charge or a representation petition), *id*. at 790, and (ii) Congress precluded any creation or enforcement of an NLRB notice-posting obligation because it omitted such an obligation from the NLRA while including

[2] Though the district court found that legislative history from 1934 and 1935 showing that Congress originally considered including a notice-posting provision in the NLRA was "not particularly relevant" (Mem. Op. 26, n. 15), the notice provisions removed from Wagner Act legislation specifically dealt with an employer's failure to satisfy notice obligations. In that respect, the present Notice Rule accomplishes *precisely* what Congress considered – and rejected – when removing Section 5(5) from the Act. The Notice Rule treats a failure to provide a notice as non-compliance with the Act.

explicit notice obligations in the RLA and many other federal labor laws. *Id*. at 790-97. Under *Chevron* step two – which the district court held was not necessary to reach[3] – this Court should conclude that the Notice Rule does not properly fill a "gap" in the NLRA and, regarding any generalized notice-posting requirement, the Notice Rule is not based "on a permissible construction of the statute." *Chevron*, 467 U.S. at 843-44. For these reasons, as explained fully below, the district court decision should be affirmed.

A. Congress Intentionally Divested the NLRB of Any Power to Create Obligations Applicable to Employers Generally.

The NLRA, originally known as the Wagner Act, was adopted in 1935 after 18 months of work by the House and Senate.[4] Important NLRA amendments were adopted in 1947, 1959 and 1974.[5]

The Wagner Act legislation dates back to March 1, 1934, when Senator Robert F. Wagner introduced S. 2926 during the 73d Congress. S. 2926, 73d

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[3] The district court found that the Board was not entitled to deference based on an alleged "gap" under *Chevron* step two, *id*. at 795-97, because "a gap for the Board to fill" would exist "[o]nly. . . if some related language was ambiguous or lacking." *Id*. at 796. The court concluded "there is not a single trace of statutory text that indicates Congress intended for the Board to proactively regulate employers in this manner." *Id*.

[4] Wagner Act, 49 Stat. 449 (1935), 29 U.S.C. §§ 151 *et seq.*

[5] *See* Labor Management Relations Act ("LMRA" or "Taft-Hartley Act"), 61 Stat. 136 (1947), 29 U.S.C. §§ 141 *et seq.*; Labor Management Reporting and Disclosure Act ("LMRDA" or "Landrum-Griffin Act"), 73 Stat. 541 (1959), 29

Cong. (1934), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, *1935*, at 1 (1935).[6] Companion legislation – H.R. 8434 – was introduced in the House by Representative William Connery, Chairman of the House Committee on Labor. H.R. 8423, 73d Cong. (1934), 1 Leg. Hist. 1128 (introduced March 1, 1934).

As introduced, S. 2926 and H.R. 8434 would have given the Board broad affirmative powers to address matters at the Board's own initiative. Thus, each bill initially stated:

> Whenever *any member of the Board*, or the executive secretary, or any person designated for such purpose by the Board, *shall have reason to believe, from information acquired from any source whatsoever*, that any person has engaged in or is engaging in any such unfair labor practice, *he shall in his discretion issue and cause to be served upon such person a complaint*. . . . Any such complaint may be amended by any member of the Board or by any person designated for that purpose by the Board *at any time* prior to the issuance of an order based thereon; and *the original complaint shall not be regarded as limiting the scope of the inquiry*.

S. 2926, 73d Cong. § 205(b), 1 Leg. Hist. 6; H.R. 8434, 73d Cong. § 205(b), 1 Leg. Hist. 1133 (emphasis added).

By the time the NLRA was enacted, however, Congress *eliminated* the Board's power, at its own initiative, to exercise jurisdiction over employers. *See*

U.S.C. §§ 401 *et seq.;* and Health Care Amendments to the NLRA, 88 Stat. 395 (1974).

[6] Hereinafter, the two-volume compiled NLRA legislative history is referred to as "__ Leg. Hist. __."

NLRA § 10(b), 29 U.S.C. § 160(b) (requiring charge as prerequisite to ULP proceedings); NLRA § 9(c)(1), 29 U.S.C. § 159(c)(1) (requiring representation petition in election proceedings).

The elimination of discretionary NLRB jurisdiction over employers was no accident. While Congress considered the Wagner Act legislation, concerns existed about the constitutionality of the National Industrial Recovery Act, 48 Stat. 195 (1933), 15 U.S.C. §§ 703 *et seq*. ("NIRA"). And on May 27, 1935, the Supreme Court declared the NIRA unconstitutional in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

The NIRA had authorized the President to approve and impose industry-specific "codes of fair competition" on employers. *Id*. at 521-24. The Supreme Court held that the formulation of such obligations involved "essential legislative functions with which [Congress] is vested," and that giving such "code-making authority" to the President (or the Executive branch) violated Article I of the U.S. Constitution as "an unconstitutional delegation of legislative power." *Id*. at 529, 537-542. In the words of Justice Cardozo, "Here in effect *is a roving commission* to inquire into evils and upon discovery correct them." *Id*. at 551 (emphasis added) (Cardozo, J., concurring).

The Supreme Court in *Schechter* contrasted NIRA's unconstitutional delegation of authority with the Federal Trade Commission ("FTC"), which was a

"quasi-judicial body" (*id*. at 532). This was permissible because the FTC could only make determinations "in *particular instances*, upon *evidence*. . . ." *Id*. at 533 (emphasis added).

Based on concerns about the Wagner Act's constitutionality, Congress embraced a "quasi-judicial body" model for the NLRB, which eliminated *all* of the NLRB's discretionary authority over employers, except for those who were parties in actual ULP and representation cases. This was explained by Representative William Connery, the legislation's sponsor in the House:

> The Board set up under the Wagner-Connery bill is just such a tribunal as the court describes. It is a quasi-judicial body, *which acts upon formal complaint*, after *due notice and hearing*. Provision is made for appropriate findings of fact, *supported by adequate evidence* and for judicial review to give assurance that the action of the Board is taken within its statutory authority.

2 Leg. Hist. 3007-3008 (statement of Rep. Connery; emphasis added).[7]

Pervasive in the Act's legislative history are similar references to the Board's lack of "roving commission" authority – *i.e.*, its inability to take action beyond *actual* parties, in *pending* cases, based on *adjudicated* facts after an

[7] Even the phrase "unfair labor practices" was based on the "unfair trade practices" addressed by the FTC, which was intended to give the Wagner Act a "sound constitutional basis . . . in accordance with decisions of the Supreme Court." *See* S. Rep. 73-1184, at 4, 1 Leg. Hist. 1103 (1934). Proposed changes to the policy statements in S. 1958 were likewise intended to "bring it more clearly outside of the ruling in the *Schechter* case." *See* H.R. Rep. 74-1147, 2 Leg, Hist. 3056 (1935).

evidentiary hearing. This was highlighted in the Senate report on the substitute version of S. 2926 passed by the Senate Labor Committee, which stated: "The quasi-judicial power of the Board *is restricted to four unfair labor practices and to cases in which the choice of representatives is doubtful*. . . . The Board is to enforce the law as written by Congress; and . . . the Board acts *only when enforcement is necessary*." S. Rep. 73-1184, 1 Leg. Hist. 1100, 1102-1103 (1934) (emphasis added). *Accord:* S. Rep. 74-573, 2 Leg. Hist. 2308 (1935) ("Neither the National Labor Relations Board nor the courts are given any blanket authority to prohibit whatever labor practices that in their judgment are deemed to be unfair"); 2 Leg. Hist. 3184 (statement of Rep. Eagle) (Wagner Act does not fall "within the category of the *Schechter* case" because "we set up a board to ascertain states of facts to apply to such legally declared unfair labor practices; and if they find such unfair labor practices . . . they then apply the machinery we set up in this bill").[8]

To the same effect, President Roosevelt, upon signing the Wagner Act, stressed that the NLRB's jurisdiction over employers was limited to actual cases involving alleged ULPs or representation elections:

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[8] *See also* H.R. Rep. 74-969, 2 Leg. Hist. at 2919 (1935) (letter from Secretary of Labor Frances Perkins); *id*. at 2932, 2933 (minority view of Rep. Marcantonio) (emphasis added); 2 Leg. Hist. 3207 (same). *Accord*: H.R. Rep. 74-972, 2 Leg. Hist. 2965-66, 2978-79 (1935); H.R. Rep. 74-1147, 2 Leg. Hist. 3059, 3076, 3077 (1935).

> This act . . . establishes a National Labor Relations Board *to hear and determine cases in which it is charged that this legal right is abridged or denied*, and to hold *fair elections* to ascertain who are the chosen representatives of employees.
>
> * * *
>
> This act . . . does not cover all industry and labor, but is applicable *only when violation of the legal right of independent self-organization* would burden or obstruct interstate commerce.

2 Leg. Hist. 3269 (signing statement of President Roosevelt) (emphasis added).

In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Supreme Court upheld the NLRA's constitutionality and likewise emphasized the NLRB's limited jurisdiction:

> The grant of authority to the Board *does not purport to extend to the relationship between all industrial employees and employers*. Its terms do *not* impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach *only what may be deemed to burden or obstruct that commerce* and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. . . . Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, *is left by the statute to be determined as individual cases arise*.

Id. at 31-32 (emphasis added; citations omitted). *See also Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 799-800 (1945).

The Notice Rule acknowledges that (i) representation proceedings must be "set in motion with the filing of a representation petition"; and (ii) Board action in cases involving alleged violations are not permissible "until an unfair labor

practice charge is filed."[9] Yet, the Rule disregards these limitations based on conclusory statements that the Act's Section 6 rulemaking authority is "general" and "broad."[10]

The Board's rulemaking authority – even if "general" and "broad" in some respects – is not unlimited. Section 6 contains "words of limitation"[11] and the "plain language of Section 6 requires that rules promulgated by the Board be 'necessary to carry out' other provisions of the Act." *U.S. Chamber*, 856 F. Supp. 2d at 789.

Claims that the Notice Rule is "necessary" are, in reality, expressions of dissatisfaction with jurisdictional constraints that Congress built into the Act. In effect, the Board argues: (i) the NLRA prevents the Board from exercising jurisdiction over any employer unless someone files a charge or petition; (ii)

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[9] 76 Fed. Reg. at 54,010, *citing* NLRA § 10(a), 29 U.S.C. § 160(a) (other citations omitted). *See also* 856 F. Supp. 2d at 782, where the district court noted that the NLRB itself "readily acknowledges" that it "traditionally functions as a reactive agency," that the Board "does not initiate cases" and "the agency has no authority to initiate proceedings on its own" (citations omitted).

[10] *See*, *e.g.*, 76 Fed. Reg. at 54,008 ("a general grant of rulemaking authority fully suffices to confer legislative (or binding) rulemaking authority upon an agency"); *id*. at 54,009 ("a broad grant of rulemaking authority will suffice for the agency to engage in legislative rulemaking").

[11] *Cf. Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 200 (1964) (Stewart, J., concurring) ("It is important to note that the words of the statute are words of limitation. . . . The limiting purpose of the statute's language is made clear by the legislative history of the present Act.").

therefore, a "need" exists for the Board to take action against *all* employers, *without* the filing of a charge or petition, so the Board can satisfy the "charge or petition" requirement. The Board argues that this need is especially pertinent due to an alleged "significant lack of public awareness of the NLRA's protections and procedures." Dkt. 17, p. 13.

It is not reasonable to suggest that Congress intended to permit the Board to bypass jurisdictional prerequisites – deemed essential to the Act's constitutionality – so the Board could comply with them. The statement of such an absurd proposition demonstrates its lack of merit. *Sheridan v. United States*, 487 U.S. 392, 402 n. 7 (1988); *U.S. v. American Trucking Assns., Inc.*, 310 U.S. 534, 543 (1940).

Consistent with the above considerations, the district court properly concluded that the Notice Rule "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*." 856 F. Supp. 2d at 791 (emphasis added). Indeed, Congress affirmatively decided that the NLRB would have no jurisdiction to exercise jurisdiction over employers generally, based on a view that vesting such authority in the Board would be unconstitutional. For these reasons, the district court decision invalidating the Notice Rule should be affirmed.

B. The NLRA and Its Legislative History Show that Congress Intentionally Decided *Not* to Include Notice Provisions in the NLRA, Contrary to Congress' Inclusion of Notice Provisions in the RLA and Other Statutes

The NLRA and its legislative history also reveal that notice obligations were originally contained in the Wagner Act legislation, as introduced, and they were *removed* prior to the NLRA's enactment; Congress at virtually the same time *added* notice provisions to the RLA; and Congress adopted numerous other statutes which, *unlike* the NLRA, contain express notice requirements.

The starting point for evaluating the scope of any statute is its plain language. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982); *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997). The NLRA is replete with references to "notice" in many contexts,[12] but no provision creates an

[12] *See, e.g.*, NLRA § 3(a), 29 U.S.C. § 153(a) (regarding removal of Board members "upon notice and hearing"); § 8(d)(1), 29 U.S.C. § 158(d)(1) (referencing "written notice to the other party" before contract terminations or modifications); § 8(d)(2), 29 U.S.C.§ 158(d)(2) (referencing "notice of the existence of a dispute" to the Federal Mediation and Conciliation Services and state mediation agencies); § 8(d)(A), (B), (C), 29 U.S.C. §§ 158(d)(A), (B), (C) (referencing modified "notice" applicable to health care institutions); § 8(g), 29 U.S.C. § 158(g) (specifying content requirements applicable to health care institution "notice"); § 9(c)(1), 29 U.S.C. § 159(c)(1) (requiring "due notice" before representation hearings); § 10(b), 29 U.S.C. § 160(b) (requiring "notice of hearing" after service of unfair labor practice complaint); § 10(c), 29 U.S.C. § 160(c) (requiring "notice" before Board takes further testimony or argument in unfair labor practice proceedings); § 10(d), 29 U.S.C. § 160(d) (requiring "reasonable notice" before Board modifies or sets aside any finding or order); § 10(e), 29 U.S.C. § 160(e) (requiring court to "cause notice . . . to be served" upon filing of Board petition for enforcement of unfair labor practice orders); § 10(j), 29 U.S.C. § 160(j) (requiring court to "cause notice . . . to be served" upon filing of

employer notice obligation vis-à-vis employees.[13] This supports an inference that Congress intended *not* to impose an NLRA notice obligation on employers. *See* Mem. Op. 17 ("where Congress includes particular language in one section of the statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (*quoting Russello v. U.S.*, 464 U.S. 16, 23-24 (1983)). *See also INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987).

The same conclusion is supported by comparing the NLRA to other statutes. *Alcoa Steamship Co. v. Fed. Maritime Comm.*, 348 F.2d 756, 758 (D.C. Cir. 1965). In many additional federal laws, Congress (i) expressly required general notices informing employees of statutory rights,[14] or (ii) expressly required

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Board petition for interim injunctive relief); § 10(k), 29 U.S.C. § 160(k) (requiring Board resolution of unfair labor practice charges involving jurisdiction disputes absent satisfactory evidence of dispute adjustment within ten days "after notice that such charge has been filed"); § 10(l), 29 U.S.C. § 160(l) (requiring "notice" before secondary boycott temporary restraining orders and after filing of petitions for secondary boycott injunctive relief).

[13] In this brief, the phrase "notice obligation" refers to a requirement that employers provide notice *to employees* regarding various aspects of a statute. The NLRA refers to many other types of "notice," some applicable to employers, but none require employers to provide notice to employees regarding the law. *See* note 12, *supra*.

[14] RLA § 2, Eighth, 45 U.S.C. § 152, Eighth; Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e–10; the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 627; the Occupational Safety & Health Act ("OSHA"), 29 U.S.C. §§ 651, 657(c); the Employee Polygraph Protection Act ("EPPA"), 29 U.S.C. § 2003; the Americans with Disability Act ("ADA"), 42

specific notices triggered by certain events, agreements or benefits,[15] or (iii) elected *not* to impose any notice obligation (and no such obligation has ever been deemed to exist).[16] Reciting these categories demonstrates that legislative choices have dictated whether or not (and what type of) notice obligations exist under particular laws.

U.S.C. §§ 12101, 12115; the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601, 2619(a); and the Uniformed Service Employment & Reemployment Rights Act ("USSERA"), 38 U.S.C. § 4334.

[15] RLA § 2, Fifth, 45 U.S.C. § 152, Fifth (requiring notice to employees regarding invalidated contracts); Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. §§ 2101, 2102(a)(1) (requiring notice in advance of plant closings or mass layoffs); Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001, 1021(a), 1022 (requiring issuance of summary plan descriptions and other disclosures regarding certain benefit plans); Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. §§ 626(f)(1)(H) (requiring disclosures regarding age discrimination waivers in group exit incentive or other employment termination programs) (enacted 1991); Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681b(b)(2), (3) (requiring notice and disclosure of credit reports used in certain employment decisions); the Consolidated Omnibus Budget Reconciliation Act ("COBRA"), 29 U.S.C. §§ 1161, 1166 (requiring notice to employees participating in group health plans regarding coverage continuation rights triggered by qualifying events); and the Internal Revenue Code ("IRC"), 26 U.S.C. § 6051(a) (requiring annual issuance of written statement to employees showing wages, tax deductions, and related information).

[16] NLRA; Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*; Norris LaGuardia Act, 29 U.S.C. §§ 101, 103; Labor Management Relations Act ("LMRA"), 29 U.S.C. §§ 186(a), (b), (d); Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. §§ 401, 432, 433; Immigration Reform and Control Act ("IRCA"), 8 U.S.C. §§ 1324a *et seq*.

Significantly, the RLA was enacted in 1926 *without* any notice provisions.[17] Yet, in 1934, RLA amendments were introduced which added two types of employer notice obligations to the RLA.[18] *First*, the amendments added a *general notice* requirement to the RLA. *See* RLA § 2, Eighth, 45 U.S.C. § 152, Eighth ("Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act"). *Second*, the RLA amendments added a provision requiring *notice regarding the statute's invalidation of various preexisting contracts*. RLA § 2, Fifth, 45 U.S.C. § 152, Fifth ("if any . . . contract [requiring individuals to join or not join a union] has been enforced . . . then such carrier shall notify the employees . . . that such contract . . . is no longer binding on them in any way").

The original Wagner Act legislation – S. 2926 and H.R. 8434 – also contained two notice provisions. Section 5(5) created an employer "unfair labor practice" specifically based on any employer's violation of the legislation's notice requirement:

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[17] 44 Stat. 577-587 (1926), 45 U.S.C. §§ 151 *et seq*.

[18] S. 3266, 73d Cong. (1934) (introduced April 2, 1934, calendar day; March 28, 1934, legislative day). When the legislative and calendar days differ, this brief refers to the calendar day.

> SEC. 5. It shall be an unfair labor practice for an employer, or anyone acting in his interest, directly or indirectly –
>
> * * *
>
> (5) *To fail to notify employees* in accordance with the provisions of *section 304(b).*

S. 2926 § 5(5), 1 Leg. Hist. 3 and H.R. 8434 § 5(5), 1 Leg. Hist. 1130 (emphasis added). In turn, Section 304(b) set forth a "contract invalidation" notice requirement which – similar to RLA § 2, Fifth – stated:

> 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 § 304(b), 1 Leg. Hist. 14 and H.R. 8434 § 304(b), 1 Leg. Hist. 1140 (emphasis added). Senator Wagner's bill – S. 2926 – was the subject of extensive hearing testimony, including testimony regarding the notice provisions and more general notice issues.[19]

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[19] *See* 1 Leg. Hist. 94 (testimony of Dr. Sumner Slichter); 1 Leg. Hist. 187 (testimony of John L. Lewis); 1 Leg. Hist. 694 (testimony of L.L. Balleisen). Numerous other witnesses discussed a wide range of notice issues. *See*, *e.g.*, 1 Leg. Hist. 104-105 (describing a document from Joseph Eastman, Coordinator of Railroads, providing that employees "be advised by appropriate notice posted on bulletin boards and distributed generally that . . . they are free to join or not to join any labor organization") (testimony of William Green); 1 Leg. Hist. 1055 (proposal to expand the scope of Section 304(b) to require notice regarding "any contract or agreement . . . , or any extension of such contract or agreement, in the negotiations preceding which or in the consummation of which unfair labor practices were employed") (testimony of Isadore Polier); 1 Leg. Hist. 138 (complaint that employer engaged in "deception" and "posted on its bulletin boards a garbled quotation of [NIRA] section 7(a)" which "omitted that portion . . . which states that the employees choice of representatives shall be free from the

On March 26, 1934, witness James A. Emery[20] placed into the hearing record the legislation's unfair labor practices, including Section 5(5) relating to notice.[21] Mr. Emery then expressed his opposition to Section 304(b), which resulted in the following exchange:

> Mr. EMERY. . . . There are many forms of employment relationship developed since the beginning of the factory operating today not only without complaint, but to the demonstrated satisfaction of employer and employee, but no matter how old they may be, or agreeable to the parties they are, if the employer initiated or participated in setting them up, they are

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interference, restraint, or coercion of the employers") (testimony of William Green); 1 Leg. Hist. 278 (description of employer who "posted a notice to the effect that this company had this plan in effect and we must accept it and they would not bargain with any other group") (testimony of William J. Long); 1 Leg. Hist. 174 (description of company union election where "notices of the election were posted" and employees were told "the foreman desired to have a 100 percent record in his shop . . . in the company-held election") (testimony of UMW President John L. Lewis); 1 Leg. Hist. 520, 522 (references to misleading employer "posters throughout the mill" regarding employee rights, and to company union election ballot where employees, by voting, agreed to the election rules "as stated in the posted notice issued by the employees' committee . . . under the plan of employees' representation at [the] plant") (testimony of George H. Powers); 1 Leg. Hist. 572 (management witness describes having "posted" labor clause from NIRA industry code "on many of our posting boards") (testimony of George A. Seyler); 1 Leg. Hist. 705-706 (describing posting of election bulletins and nominees for union office on Company bulletin boards) (testimony of Edgar Woolford); 1 Leg. Hist. 724-25 ("set of shop rules was posted" to prevent any "misunderstanding" after company refused to sign union contract) (testimony of S.G. Brooks); 1 Leg. Hist. 805 (indicating that company union representatives "posted the rules for the election" one week in advance and gave a copy "to the Labor Board") (testimony of John Larkin).

[20] 1 Leg. Hist. 371-73 (opening statement of Chairman Walsh; introduction of James A. Emery).

[21] 1 Leg. Hist. 387-88 (testimony of James A. Emery).

> not only abrogated by this bill, *but the employer must immediately so notify his employees*, and they are destroyed.
>
> The CHAIRMAN. Any doubt about that?
>
> Senator BORAH. State that again, please.
>
> Mr. EMERY. I say that no matter how old a form of employee relationship now existing in any particular plant between the employer and employee or in any industry may be, no matter how old it may be, no matter how agreeable to the parties, if the employer initiated that plan, or participated in setting it up, *the plan is not only abrogated, but the employer must immediately so notify his employees, and the plan is destroyed. Not to do so is an unlawful act. That is provided by section 304 of the bill, section (b). . . .*

1 Leg. Hist. 394-95 (testimony of James A. Emery) (emphasis added).

Mr. Emery stated that Section 304(b) broadly "outlawed" preexisting employment arrangements (*id*.), which led to the following exchange:

> The CHAIRMAN. *It has been suggested by some witnesses*, witnesses who are friendly to the bill, who have appeared before the committee *that that section be eliminated from the bill*.
>
> Senator WAGNER. *Including the author*.
>
> The CHAIRMAN. *I am referring to section 304(b)*. I did not know you had agreed to the elimination, Senator, but I think others have.
>
> Senator DAVIS. *I think the committee is unanimous*.

1 Leg. Hist. 394-95 (emphasis added).

Following this March 26, 1934 exchange, a substitute version of S. 2926 was reported by the Senate Committee on Education and Labor. *See* S. 2926, 73d Cong. (1934), 1 Leg. Hist. 1070 (reported May 26, 1934). This substitute version *deleted* both Wagner Act notice provisions. *Id*. at 1072-73, 1084-85. Notice

provisions were similarly omitted from all subsequent versions of the Wagner Act legislation, including the version signed into law.[22]

As noted previously, the amendments adding employer notice obligations to the RLA were introduced *at virtually the same time* that Senator Wagner and others decided to remove the NLRA's notice provisions, as summarized on the next page:

[22] *See* S. 1958, 74th Cong. (1935), 1 Leg. Hist. 1295; H.R. 6187, 74th Cong. (1935), 2 Leg. Hist. 2445; H.R. 6288, 74th Cong. (1935), 2 Leg. Hist. 2459; H.R. 7978, 74th Cong. (1935), 2 Leg. Hist. 2857; S. 1958, 74th Cong. (1935), 2 Leg. Hist. 2944; S. 1958, 74th Cong. (1935), 2 Leg. Hist. 3032; S. 1958, 74th Cong. (1935), 2 Leg. Hist. 2416; S. 1958, 74th Cong (1935), 2 Leg. Hist. 3238; H.R. Rep. 74-1371 (1935), 2 Leg. Hist. 3252; S. 1958, 74th Cong. (1935), 2 Leg. Hist. 3270.

Wagner Act legislation[23]	**RLA amendments**[24]
March 1: House and Senate bills introduced with notice obligation provisions (S. 2926 and H.R. 8434)	–
March 14-16, 20-22: Senate Labor Committee hearings (notice provisions still in bills)	–
March 26: Senators Wagner, Walsh, and Davis mention "unanimous" support for **removing** notice provisions	–
March 27-30, April 3-7 and 9: More Senate Labor Committee hearings	**April 2:** Senate RLA bill introduced **adding** notice provisions (S. 3266)
–	**May 21:** RLA amendments (**adding** notice provisions) reported favorably to Senate (S. 3266)
May 26: Substitute bill reported favorably to Senate, **removing** employer notice (S. 2926)	–
–	**June 6:** RLA amendments (**adding** notice provisions) introduced in House (H.R. 9861) and debated in Senate (S. 3266) **June 21:** RLA amendments (**adding** notice requirements) **signed into law** by President (H.R. 9861)
Feb 21, 1935 - July 5, 1935: Further consideration to Wagner Act (requiring **no** employer notice), which the President ultimately **signed into law** (S. 1958)	–

This legislative history leaves no room for arguments that a "gap" existed regarding a potential notice obligation for employers.[25] Here, as in *Railway Labor Executives v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994), "'Congress has directly spoken to the precise question at issue' in this case . . . *so there is no*

[23] *See* 1 Leg. Hist. 27-1066 (hearings held by Senate Labor Committee in 1934 on dates specified in the table). *See also* notes 17-22, *supra*, and accompanying text.

[24] *See* S. 3266, 73d Cong. (1934) (introduced April 2, 1934); S. 3266, 73d Cong. (1934) (reported favorably to Senate, April 2, 1934); H.R. 9861, 73d Cong. (1934) (introduced June 6, 1934); 78 Cong. Rec. 10,576 (Senate debates, June 6, 1934); 48 Stat. 1185-1997 (1934) (signed June 21, 1934).

gap for the agency to fill." *Id*., *quoting Chevron*, 467 U.S. at 842 (emphasis added).[26]

The district court correctly held that "the legislative history of the Act supports a finding that Congress did not intend to impose a universal notice-posting requirement on employers, nor did it authorize the Board to do so." 856 F. Supp. 2d at 793. The district court emphasized the absence of any notice requirement in the NLRA, which contrasts with the inclusion of express notice provisions in the RLA and eight other labor laws enacted since 1934. *Id*. at 794("Congress clearly knows how to include a notice-posting requirement in a federal labor statute when it so desires").

Although the district court properly interpreted these aspects of the Act's legislative history, the court – in a footnote – suggested that the original Wagner Act legislation's notice provisions, which Congress ultimately removed, were "not particularly relevant to the notice-posting rule at issue in this case." *Id*. at 794 n.15. The notice provisions in the original Wagner Act legislation are *directly* relevant in the instant case, even though they were not identical to the Board's

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[25] 76 Fed. Reg. at 54,011.

[26] The district court correctly found that, because "there is no statutory language in the NLRA that requires employers to inform employees of their Section 7 rights," there was no ambiguous or related language that gave rise to a "gap for the Board to fill." 856 F. Supp. 2d at 796. The court concluded "there is not a single trace of

current Notice Rule. And for several reasons, the elimination of the proposed notice provisions, when the Wagner Act was adopted by Congress, reinforces the district court's conclusion that the current Notice Rule is not "a permissible construction of the statute." *Chevron*, 467 U.S. at 843-44.

First, as noted above, the Wagner Act legislation's original proposed notice requirement required employers to notify employees about contracts invalidated by the new law.[27] To the extent this was more narrow than the generalized notice requirement the Board is now imposing on all employers, this hurts – not helps – efforts to justify the Notice Rule. If an agency cannot impose a new requirement that Congress specifically rejected when adopting a statute like the NLRA, it is even more improper for the agency to create a broader requirement.

Second, the notice provisions removed from the Wagner Act legislation not only included Section 304(b) – dealing with notice regarding invalidated contracts – they also included Section 5(5), which created a separate "unfair labor practice" exclusively pertaining to an employer's failure to satisfy the Act's notice obligations. The Notice Rule accomplishes precisely what Congress considered and rejected when removing Section 5(5) from the Act: the Notice Rule treats a failure to provide a notice as non-compliance with the Act. When removing

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statutory text that indicates Congress intended for the Board to proactively regular employers in this manner." *Id.*

Section 5(5) from the original Wagner Act, Congress explicitly decided that compliance should *not* turn on whether employers satisfied a notice requirement imposed by the NLRA.

Third, not only were notice obligations added to the RLA at the same time they were removed from the Wagner Act legislation, the RLA amendments included *both* types of notice requirements: a generalized notice obligation (requiring notice-posting regarding RLA rights), and an employer obligation to notify employees regarding invalidated contracts (similar to the Wagner Act legislation's notice obligation). The existence of both types of notice provisions in the RLA amendments demonstrates that (i) even when formulating the original Wagner Act legislation, Congress rejected a generalized notice obligation (which was contained in the RLA amendments as introduced and enacted, but never proposed for the Wagner Act), and (ii) when *adopting* the Wagner Act, Congress rejected even the more narrow "invalidated contracts" notice obligation (which Congress proposed but ultimately removed in the Wagner Act, but which was contained in the RLA amendments as introduced and enacted).

Finally, there are many additional ways in which the Act's legislative history refutes any suggestion that the absence of an NLRA notice requirement constitutes a "gap" permitting the NLRB to create and impose a generalized notice

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[27] *See* text accompanying note 19, *supra*.

obligation on all employers who are potentially subject to the Act. As noted previously, an array of issues relating to notice were prominent during the original Wagner Act's consideration by Congress (see notes 19-21, *supra*); the RLA and multiple additional statutes, unlike the NLRA, contain express notice requirements (see notes 14-15, *supra*); during a period spanning more than 75 years the NLRB did not deem a broad notice obligation "necessary" to the Act's administration; and Congress amended the NLRA in 1947, 1959 and 1974 without adding a notice obligation. *See* 856 F. Supp 2d at 794-95 (noting the Board "went seventy-five years without promulgating a notice-posting rule" and despite the "explicit inclusion of notice-posting obligations in . . . numerous statutes . . . Congress made extensive revisions to the NLRA in 1947, 1959, and 1974, yet never found the need to include a notice-posting provision").[28]

These considerations demonstrate the intent of Congress has remained consistent: there is no employer notice obligation under the NLRA. The district court properly held that, "based on the statutory scheme, legislative history, history of evolving congressional regulation in the area, and a consideration of

[28] *See also Railway Labor Executives*, 29 F.3d at 669 (court rejects NMB's claimed authority to initiate representation disputes because, among other things, such a right was invoked "only in the last five years of its sixty-year history"); *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 274-75 (1974) ("a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration").

other federal labor statutes, . . . *Congress did not intend to impose a notice-posting obligation on employers, nor did it explicitly or implicitly delegate authority to the Board to regulate employers in this manner*." *Id*. at 795 (emphasis added). *Cf*. *Local 357, Teamsters Local v. NLRB*, 365 U.S. 667, 671-72, 676 (1961) (NLRB exceeded its authority by creating general notice-posting regarding hiring hall agreements; "where Congress has adopted a selective system for dealing with evils, the Board is confined to that system . . . [and] the Board cannot go farther and establish a broader, more pervasive regulatory scheme.").

CONCLUSION

For the above reasons, this Court should affirm the district court's decision that the Board lacked the authority to promulgate the notice-posting rule and finding the rule unlawful under the APA.

Respectfully submitted,

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The undersigned counsel certifies this 5th day of December 2012 to the following statements:

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