UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA and SOUTH CAROLINA CHAMBER OF COMMERCE, Plaintiffs, vs. NATIONAL LABOR RELATIONS BOARD, and MARK PEARCE, in his official capacity as Chairman of the National Labor Relations Board, and CRAIG BECKER, in his official capacity as member of the National Labor Relations Board, and BRIAN HAYES, in his official capacity as member of the National Labor Relations Board, and LAFE SOLOMON, in his official capacity as General Counsel, Defendants.	CIVIL ACTION NO: 2:11-cv-02516-DCN

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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Plaintiffs Chamber of Commerce of the United States of America ("COCUS") and South Carolina Chamber of Commerce ("SCCC") (collectively "Plaintiffs") file this Memorandum in Support of Motion for Summary Judgment. Plaintiffs respectfully request that the Court find that the National Labor Relations Board and its leadership ("Board," or "NLRB") far exceeded its statutory authority under the National Labor Relations Act ("NLRA") by promulgating a final rule regarding Notification of Employee Rights ("Rule"), which is scheduled to take effect on January 31, 2012. The Rule would force virtually all six million U.S. employers to post a notice informing employees of selected rights under the NLRA, and penalize employers who fail to comply.

The Board lacked statutory authority to issue the Rule. Congress included an express authorization for a notice for posting in the otherwise virtually identical Railway Labor Act, yet Congress chose not to include such a requirement in the NLRA. Congress's omission in the NLRA demonstrates Congress's intent ***not*** to delegate such authority to the Board. Moreover, the Board further exceeded its statutory authority by penalizing employers who fail to comply with the Rule. The Rule creates a new unfair labor practice ("ULP") for failure to post its notice, even though Congress and the Supreme Court repeatedly have made clear that Congress has not authorized the Board to create new ULPs. The Board further exceeded its statutory authority by creating a categorical extension of the applicable statutes of limitations for filing other, unrelated ULPs as a remedy for failing to post this Notice – even though the NLRA explicitly provides only one blanket exception to the statutory six-month statute of limitations (military service).

The Rule also violates other aspects of federal law. The Rule is arbitrary and capricious under the Administrative Procedures Act ("APA") because it was promulgated without empirical support and fails to notify employees about statutory rights such as those under state Right to Work laws. The Rule violates employers' First Amendment rights, and rights guaranteed to employers

under Section 8(c) of the NLRA, by compelling them to post a biased, misleading notice that promotes unionization. *See, e.g.*, U.S. Const. amend. I; 29 U.S.C. § 158(c). Finally, the Board violated the Regulatory Flexibility Act ("RFA") because it failed to conduct a regulatory flexibility analysis of the costs on small businesses, which could range from an estimated $5 to $13 billion.

All of the evidence before the Court, including the record of the rulemaking process and the pleadings and attached declarations, show that there is no genuine issue as to any material fact, and that Plaintiffs are entitled to judgment as a matter of law.

I. STATEMENT OF UNDISPUTED FACTS

A. Congress Omitted a Notice Provision from the NLRA.

In 1935, Congress enacted the Wagner Act (the precursor to the modern NLRA), and created the NLRB, to govern labor relations. Congress did not, as it did with many similar labor or employment statutes, expressly authorize the Board to require employers to post notices about employees' rights under the statute. For the next seventy-six years, the NLRB enforced the NLRA without attempting to impose any such requirement. During these seven-plus decades, Congress amended the NLRA numerous times (including extensive amendments in 1947, 1959, and 1974), but never required employers to post notices, and never expressly gave the NLRB authority to impose such a posting requirement.

In 2010, a divided NLRB unilaterally sought to assert this authority for the first time. On December 22, 2010, the NLRB published a Notice of Proposed Rulemaking ("NPRM") that would require employers to post a notice describing certain selected rights, including the right to form a union ("Notice"). *See* 75 Fed. Reg. 80,410 (Dec. 22, 2010) (to be codified at 29 C.F.R. pt. 104); V. Compl. ¶ 11. The NPRM also sought to penalize employers who failed to post the Notice. 75 Fed. Reg. 80,410. In submitting the NPRM, the Board did not perform an Initial Regulatory Flexibility

Analysis. The Board determined that the Rule would not impose a "significant economic impact on a substantial number of small entities." V. Compl. at ¶¶ 12, 54. In response to the NPRM, the Board received more than 7,000 comments, most opposing the proposed rule. *Id.* at ¶ 13.

Notwithstanding the opposition, on August 30, 2011, a divided NLRB promulgated the Rule, with only minor changes to the NPRM. *See* 76 Fed. Reg. 54,006 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104); V. Compl. at ¶ 14. Member Hayes dissented. V. Compl. at ¶ 16. The NLRB did not conduct the requisite Final Regulatory Flexibility Analysis for the Rule, instead certifying that the Rule would not impose a substantial economic impact. *Id.* at ¶ 17. The Rule constitutes final agency action. *Id.* at ¶ 15.

B. The NLRB's General Counsel Has Conceded That the NLRA Provided the Board with Limited Authority To Punish Employers for Failing to Post the Notice.

Although the Rule punishes employers for failing to post the Notice, the General Counsel for the NLRB recently conceded:

> The NLRB's processes can be invoked *only* by the filing of an unfair labor practice charge or a representation petition by a member of the public. The Agency has no authority to initiate proceedings on its own.

Lafe E. Solomon, Office of Gen. Counsel, NLRB, Mem. GC 11-03 at 2 (Jan. 10, 2011) (emphasis added) (hereinafter "NLRB Gen. Counsel Mem. GC 11-03") (Exhibit A).

The NLRA sets forth five specific ULPs that can be lodged against an employer. 29 U.S.C. § 158(a).[1] None of these five specifically delineated ULPs included a failure to post a notice about

[1] The five employer ULPs are: (1) Interfering with, restraining or coercing employees in their rights under Section 7 (i.e. to self-organization; to form, join, or assist labor organizations; to bargain collectively through representatives of their own choosing, and to engage in other protected concerted activities for the purpose of collective bargaining or other mutual aid or protection, **as well as** the right to refrain from any or all of such activities); (2) "Dominating" or interfering with the formation or administration of any labor organization; (3) Discriminating against employees to encourage or discourage acts of support for a labor organization; (4) Discriminating against employees who file charges or testify in proceedings under the NLRA; and (5) Refusing to bargain

union rights. And the NLRA sets forth the statute of limitations for ULPs (six months), as well as the possible remedies for a ULP violation–but none of these specified remedies includes a blanket disregard for the statute of limitations in unrelated ULPs. *Id.* § 160(b).

C. The Rule Compels the Viewpoint, Method, and Manner of Speech

The Rule compels each employer, on its private property, to communicate a precise message about union rights. The Rule contains no exception for employers who would choose not to communicate a message or who would deliver a different, but entirely lawful message. The Rule compels that the Notice must contain specific language describing employees' rights to join a union and the purported benefits thereof. Indeed, the Notice's first six bullet points trumpet the rights of employees to: (1) "[o]rganize a union," (2) "assist a union," (3) "[b]argain collectively," (4) "[d]iscuss…union organizing with your co-workers," (5) seek "help from a union," and (6) "[s]trike and picket." 76 Fed. Reg. at 54,048. Only in bullet point seven does the Notice mention, in passing, that employees can "[c]hoose not to do any of these activities." *Id.*

The Rule also dictates how to communicate the message. The Notice must be posted indefinitely and "in conspicuous places where they are readily seen by employees." *Id.* at 54,046-47. The Rule dictates various manners in which the Notice must be posted, including the (1) size (at least 11 inches by 17 inches); (2) type and style ("as the Board shall prescribe"); (3) language (e.g., "[w]here 20 percent or more of an employer's workforce is not proficient in English and speaks a language other than English, the employer must post the notice in the language employees speak"); and (4) format ("on an intranet or internet site if the employer customarily communicates with its employees about personnel rules or policies by such means"). *Id.*

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collectively with the representative of the employer's employees when required under Section 9. 29 U.S.C. § 158(a)-(e).

II. PARTIES

Plaintiff COCUS is the world's largest federation of businesses and associations. V. Compl. at ¶ 4. COCUS represents 300,000 direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every industry sector and geographic region throughout the country, as well as several hundred state and local Chambers of Commerce. *Id.* More than 96% of COCUS members are small businesses with 100 employees or fewer. *Id.* Plaintiff SCCC is a membership organization that represents businesses, industries, professions, associations, and employers of all sizes and types, throughout the State of South Carolina. *Id.* at ¶ 5.

Defendant NLRB is an independent agency established to administer the NLRA. *Id.* at ¶ 6. The NLRB serves a quasi-judicial function. The NLRB currently consists of Chairman Mark Pearce and Members Craig Becker and Brian Hayes. *Id.* at ¶¶ 7-9. Lafe Solomon is the Acting General Counsel. *Id.* at ¶ 10.

III. LEGAL ARGUMENT

The Court should hold unlawful and set aside the Rule because the evidence establishes that Board has violated the Administrative Procedures Act ("APA"), 5 U.S.C. § 706, and the Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 603 and 604, as well as Plaintiffs' First Amendment rights in contravention of the U.S. Constitution, the APA, 5 U.S.C. § 706(2)(A), (B), and (C), and Section 8(c) of the NLRA, 29 U.S.C. § 158(c). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The APA and RFA allow extra-record affidavits to test the government's rule-making process. *S. Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411, 1436 n.34 (M.D. Fla. 1998) (*S. Offshore* I). Here, all material facts are contained in the administrative

record, and in the declarations of three small businesses explaining how the Rule would affect them. *See* Exs. B, C.[2]

A. The Board Has Exceeded Its Statutory Authority In Promulgating the Rule.

This Court must set aside any rule that exceeds an agency's statutory authority. *See* 5 U.S.C. § 706(2)(C). Courts consider the following traditional canons of statutory interpretation to determine whether an agency has exceeded its statutory authority: (1) the language of the statute; (2) the specific context in which the language is used; (3) the broader context of the statute as a whole; (4) the statute's overall purpose; and (5) the statute's legislative history. *See, e.g.*, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Additionally, the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand. *See United States v. Estate of Romani*, 523 U.S. 517, 530–31 (1998).

Here, the NLRB's Rule exceeds the Board's statutory authority because it (1) imposes a posting requirement that Congress clearly did not intend to impose on employers; (2) creates a new ULP even though Congress expressly retained for itself the authority to identify such ULPs; (3) changes the statutes of limitations applicable to ULPs even though Congress did not provide the Board such authority; and (4) violates employers' Section 8(c) rights to speak (or not) as they wish about labor-management relations without reprisal.

1. Congress Did Not Grant the Board the Authority to Promulgate a Posting Rule.

The Board concedes that the NLRA does not specifically authorize it to promulgate a posting rule, and it cannot point to any implicit authority for the Rule. 76 Fed. Reg. 54,012.

[2] The small business declarations are attached as Exhibit B. Any cited public comments to the NPRM are attached as Exhibit C.

a. Congress's Failure to Include an Explicit Provision Requiring a Posting Rule Shows Congress's Clear Intent Not To Grant the Board Such Authority.

The Board admits that Congress excluded an express posting requirement from the NLRA:

> The NLRA is almost unique among major Federal labor laws in not including an express statutory provision requiring employers routinely to post notices at their workplaces informing employees of their statutory rights. Such postings are required under the Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Occupational Safety and Health Act, the Americans with Disabilities Act, the Family and Medical Leave Act, the Uniformed Service Employment and Reemployment Rights Act, the Railway Labor Act, the Employee Polygraph Protection Act, the Migrant and Seasonal Agricultural Workers Protection Act, and other Federal statutes.

75 Fed. Reg. 80,411 (internal citations omitted).[3] Incredibly, the Board views this fact as an indication that, by not including an explicit posting provision in the NLRA, Congress intended to leave that decision to the discretion of the Board. This assumption stands accepted rules of statutory construction on their heads.

Because Congress included posting language in most other labor or employment statutes, a court must conclude the omission in the NLRA was intentional. *See Estate of Romani*, 523 U.S. at 530–31. In 1934—just one year before the Wagner Act was enacted—Congress amended the Railway Labor Act ***to include an express notice-posting requirement***. Pub. L. No 73-442, 48 Stat. 1185, 1188 (1934) (codified as amended at 45 U.S.C. § 152). Yet the 1935 Wagner Act did not include an express notice-posting requirement.[4] Moreover, Congress did not add a notice-posting

[3] None of the referenced agencies have made the failure to post a notice unlawful or subject to sanctions ***unless*** such penalties existed in the governing statutes. *See, e.g.*, 29 U.S.C. § 2619(b) ("[a]ny employer that willfully violates [the posting requirement of the FMLA] may be assessed a civil money penalty not to exceed $100 for each separate offense"); 42 U.S.C. § 2000e-10(b) ("[a] willful violation of [the posting requirement of Title VII] shall be punishable by a fine of not more than $100 for each separate offense").

[4] In fact, Congress amended the RLA in 1951 to add RLA Section 2 (Eleventh) with the explicit intent to make the RLA identical to NLRA Section 8(a)(3) (passed in 1947) with respect to union shops. *See, e.g., Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 746 (1988) (explaining that RLA Section 2 (Eleventh) was modeled after NLRA Section 8(a)(3) to ensure that railroad labor received the "same rights and privileges of the union shop that are contained in the Taft-Hartley

provision in the extensive amendments to the NLRA in 1947, 1959, or 1974—even though Congress included a posting provision in Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act in 1990, and in the Family and Medical Leave Act in 1991 (just to name a few). *See, e.g.*, 29 U.S.C. § 2619(a); 42 U.S.C. § 2000e-10; 42 U.S.C. § 12115.

It is therefore clear that Congress intended to **withhold** from the Board the regulatory authority to compel such a posting. *See Estate of Romani*, 523 U.S. at 530–31.

b. Other Statutory Interpretation Canons Make Clear Congress's Intent That the NLRB Does Not Have Authority to Promulgate a Posting Rule.

Independent of the express absence of a posting provision, the NLRA as a whole illustrates that the Board does not have the broad authority it seeks. *See Chevron, U.S.A, Inc. v. Natural Res. Defs. Council, Inc.*, 467 U.S. 837, 861–62 (1984).

The Board points to Section 6 of the NLRA as implicit authority for the Rule, but Section 6 grants the Board only the authority "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 [NLRA]***." 29 U.S.C § 156 (emphasis added). As dissenting Member Hayes explained, "the exercise of rulemaking authority under Section 6 is not self-effectuating; it must be shown to relate reasonably to some other provision as part of the overall statutory scheme contemplated by Congress." 76 Fed. Reg. 54,039 (citation omitted); *see also Global Van Lines, Inc. v. Interstate Commerce Comm'n*, 714 F.2d 1290, 1294–95 (5th Cir. 1983) ("the Commission is authorized to issue only 'such rules and regulations…as may be necessary to carry out [the other] provisions' of the … [Act]. The section has no independent existence; without those other provisions, it means virtually nothing").

Act") (internal citation omitted). This further emphasizes that, if Congress intended for the NLRA to have the posting requirement of the RLA, Congress would have expressly included it.

The Board's reliance on Sections 1, 7, 8, 9 and 10 of the NLRA likewise fails. *See* 76 Fed. Reg. 54,011. Section 1 simply recites the NLRA's purposes and does not provide any authority to act. *See* 29 U.S.C. § 151. Section 9 dictates the Board's role in union elections and the disputes that arise out of union rights; the Board has conceded that its authority to administer Section 9 begins only once a representation petition has been filed. *See id.* § 159(c) ("[w]henever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board…"); NLRB Gen. Couns. Mem. GC 11-03 at 2 ("[t]he NLRB's processes can be invoked only by the filing of [a ULP] charge or a representation petition by a member of the public. The Agency has no authority to initiate proceedings on its own"). Further, the Board has no independent mechanism to enforce an employee's Section 7 rights unless a ULP charge is filed under Section 8. *See* NLRB Gen. Couns. Mem. GC 11-03 at 2; *see also* 29 U.S.C. § 160(b) ("[w]henever it is charged that any person has engaged in or is engaging in any such unfair labor practice…").[5]

In terms of Section 10, dissenting Member Hayes accurately explained that "Section 10(a) limits the Board's powers to preventing only the unfair labor practices listed in Section 8…." 76 Fed. Reg. 54,039. However, Section 8(a)(1) (the only arguably applicable provision within Section 8) applies to employers who "***interfere with, restrain or coerce***" the exercise of a Section 7 right. *See* 29 U.S.C. § 158(a)(1). The Board wishes to extend Section 8(a)(1), by placing a burden on employers to ***affirmatively*** educate employees about certain Section 7 rights. *See, e.g.*, 76 Fed. Reg. 54,031. There is no authority in the NLRA to support burdening employers with such an affirmative duty to educate. *See* 29 U.S.C. § 158(a); *see also* 76 Fed. Reg. 54,039. In fact, in all

[5] The Board is a quasi-judicial agency. Accordingly, the Board's previous rulemaking has been limited to topics such as appropriate bargaining units in the health care industry—topics that explain how the Board will handle issues after a petition or charge is filed and thus *after* the Board's Section 8 or 9 authority is triggered. *See Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 609-13 (1991). Here, in contrast, the Board seeks to dictate employer conduct that would occur ***prior*** to the filing of a petition or charge, i.e., prior to the Board's authority going in to effect.

other contexts, a union or employer is not obliged to provide notice of employee rights ***until after the union or employer has decided to take action***, such as when a union decides to oblige an employee to pay union fees under a union-security clause. *See, e.g.*, *Beck*, 487 U.S. at 759; *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 744-45 (1963).

To accept the Board's argument that Section 6 provides implicit authority to promulgate the Rule, this Court "would have to conclude that Congress not only had hidden a rather large elephant in a rather obscure mousehole, but had buried the ambiguity in which the pachyderm lurks beneath an incredibly deep mound of specificity, none of which bears the footprints of the beast or any indication that Congress even suspected its presence." *Am. Bar Ass'n, v. F.T.C.*, 430 F.3d 457, 465 (D.C. Cir. 2005) (citations omitted). Such a conclusion is impossible to reach here—particularly given that when Congress wanted the posting elephant to be present in other statutes, it expressly provided for such authority.

2. The Board's Attempt to Establish a New ULP Exceeds Its Statutory Authority.

The Board cannot create a new ULP where, as here, Congress explicitly enumerated the five possible employer ULPs in Section 8(a) of the NLRA. 29 U.S.C. § 158(a). "Where…Congress has aimed its sanctions only at specific discriminatory practices, the Board cannot go farther and establish a broader, more pervasive regulatory scheme." *Local 357, Int'l Bhd. of Teamsters v. NLRB*, 365 U.S. 667, 676 (1961).[6] In *Local 357*, the Board created a ULP for employers and unions to refrain from posting a notice of non-discrimination when they entered into hiring hall arrangements. As here, the Court expressly rejected the Board's attempt to create a new ULP for

[6] Indeed, the Senate report on the Wagner bill stressed that ULPs are "strictly limited to those enumerated in Section 8….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." S. Rep. No. 573, at 8 (1935), *reprinted in* 2 NLRB, *Legislative History of the National Labor Relations Act of 1935* at 2308 (1949).

failure to post a notice. *Id.*; *see also Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984) (holding that Section 10(c) empowers the Board to sanction an employer "when it finds that an unfair labor practice has been committed"); *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 220-21 (1938) (holding that the Board could not sanction an entity absent a violation of the labor laws).

The Board concedes that none of the NLRA's five enumerated ULPs requires an employer to post a notice, or educate employees about labor-management relations. The Board instead argues that the posting requirement somehow is subsumed by the prohibition set forth in Section 8(a)(1). *See, e.g.*, 76 Fed. Reg. 54,032. Section 8(a)(1) precludes employers from interfering with an employee's Section 7 rights: "It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under [29 U.S.C. §157]…." 29 U.S.C. § 158(a)(1). Tellingly, however, the Board does not point to a single Section 7 right with which the employer would interfere by failing to post a notice, let alone how a failure to post would interfere with, restrain or coerce those rights. The Board simply seeks to improperly create a new, broader regulatory scheme on employers.

The Board points to the Family and Medical Leave Act ("FMLA") to justify imposing a new ULP, but even the Board concedes the FMLA has a statutory posting requirement, and thus is different. *See* 76 Fed. Reg. 54,006-07; 54,032. When courts conclude that a failure to post an FMLA poster may "interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under" the FMLA, ***that is because the posting is an explicit statutory requirement***. *See, e.g.*, 29 U.S.C. § 2619(a) ("[e]ach employer shall post and keep posted…a notice"). In contrast, the Board lacks statutory authority to prepare or require posting of a notice regarding NLRA rights. This Board's overreaching provides another basis for invalidating its actions.

3. The Board's Attempts to Establish Its Own Tolling Provisions Exceed the Board's Statutory Authority.

The Board inexplicably attempts to amend Congress's statute of limitations by proclaiming:

> When an employee files an unfair labor practice charge, the Board may find it appropriate to *excuse the employee from the requirement that charges be filed within six months* . . . if the employer has failed to post the required employee notice . . . .

76 Fed. Reg. 54,049 (emphasis added).

Congress clearly did not intend to give the Board any authority to make a blanket modification to the mandated filing period. Rather, Congress expressly and unambiguously set the statute of limitations for filing a ULP at six months. 29 U.S.C. § 160(b). Congress then went on to identify service in the military as the one (and only) categorical exception to this statute of limitations. *Id.* "Congress, in the judgment that a six-month limitations period did not seem unreasonable, …barred the Board from dealing with past conduct after that period had run, even at the expense of the vindication of statutory rights….That policy cannot be defeated by the Board's policy." *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 429 (1960) (internal citations omitted).

In seeking to extend the statute of limitations, the Board argues that a charging party would not know his or her statutory rights without the notice. The Board previously has made individualized exceptions to the limitations period under the doctrine of equitable tolling. 76 Fed. Reg. 54,033 (citing numerous Board decisions). However, each of these cases involved a charging party who did not have actual or constructive knowledge about the alleged *conduct* that would violate the law, not a charging party who did not know the law. *See, e.g.*, *John Morrell & Co.*¸ 304 N.L.R.B. 896, 899 (1991) ("[t]he parties agree that the 10(b) period does not begin to run until the charging party receives clear and unequivocal notice—either actual or constructive—of the acts that constitute the alleged unfair labor practice"); *Burgess Constr. Corp.*, 227 N.L.R.B. 765, 766 (1977) ("[t]he period of limitations prescribed by Section 10(b) does not begin to run on an alleged

unfair labor practice until the person adversely affected is put on notice of the act constituting it"), *enforced sub nom NLRB v. Don Burgess Const. Corp.*, 596 F.2d 378, 382 (9th Cir. 1979).[7]

Similarly, the Board relies on appellate decisions applying equitable tolling where employers failed to post notices. Those cases, however, involve ***statutorily mandated*** postings and do not support a per se application of equitable tolling in all circumstances. *See, e.g.*, *Mercado v. Ritz-Carlton San Juan Hotel, Spa & Casino*, 410 F.3d 41, 46 (1st Cir. 2005) (addressing Title VII's posting requirement). The *Mercado* court explained that an employer's failure to post does not automatically necessitate equitable tolling, but rather, that such tolling would occur only if the plaintiffs demonstrate that they lacked actual or constructive knowledge of their statutory rights. *See id.* at 48–50. The Rule provides the opposite: that lack of actual or constructive knowledge of the statutory rights will be presumed unless proven otherwise—a presumption that fundamentally misconstrues the equitable tolling doctrine. For this reason alone, the Rule must be invalidated.

4. The Rule Impermissibly Exceeds the Board's Statutory Authority by Violating Employers' NLRA Section 8(c) Free Speech Rights.

In Section 8(c) of the NLRA, Congress expressly mandated employers could express their views, arguments or opinions on labor-management relations without fear of a ULP being filed against them. 29 U.S.C. § 158(c). It is well settled that "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (citing 29 U.S.C. § 158(c)).

[7] The other cases cited by the Board also involve fraudulent concealment of the acts constituting the ULP, not lack of knowledge about the applicable legal parameters. *See, e.g.*, *Univ. Moving & Storage Co.*, 350 N.L.R.B. 2, 7 (2007) ("[t]he 10(b)(6) period . . . did not begin until . . . the date of Peterson's letter announcing . . . that employees had no right to paid leave"); *Broadway Volkswagen*, 342 N.L.R.B. 1244, 1246 (2004) ("[s]uch knowledge may be imputed when the conduct in question was sufficiently 'open and obvious' to provide clear notice") (internal citation omitted). And although the Board attempts to differentiate equitable tolling principles from the fraudulent concealment doctrine, they are the same doctrine. *See, e.g.*, *Mercado*, 410 F.3d at 46.

Yet, the Board's Rule would dictate what and the manner in which the employer must tell employees about labor-management relations, even without a threat of reprisal or force or promise of benefit. As described more fully in Section II.C.3 below, this mandatory posting is biased heavily in favor of promoting unionization. Accordingly, the Rule impermissibly forces employers either to engage in speech that they otherwise would not make, or face a ULP.

5. The NLRB's Interpretation of the NLRA in Implementing the Rule Is Not Entitled to *Chevron* Deference.

The Board's interpretation of the NLRA is not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* directs a court to engage in a two-step process to determine whether an agency is entitled to deference: under step one ("*Chevron* One"), the court must determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. "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." *Id*. at 842–43. If the agency's statutory interpretation is "contrary to clear congressional intent," the court must set aside the regulation. *See id*. at 843 n.9. If the statute is not clear (and only if the statute is not clear), the court proceeds to *Chevron* Step Two. "[T]he second step of *Chevron* ["*Chevron* Two"]…asks whether the Department's rule is a 'reasonable interpretation' of the enacted text." *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 714 (2011) (internal quotation omitted). Thus, a court should defer to an agency's interpretation *only* if the statute is ambiguous, and if the agency's interpretation is reasonable.

Here, the Board's interpretation of the NLRA is not entitled to deference. For the reasons set forth in Section II.B, *supra*, the Board clearly exceeded its statutory authority under the NLRA– Congress's silence evidences Congress's intent that no posting requirement be placed on employers. Moreover, the Board egregiously overreached by adding to the ULPs enumerated by

Congress and modifying Congress's statute of limitations. *See, e.g., Civil Serv. Employees Ass'n, Local 1000, AFSCME v. NLRB*, 569 F.3d 88, 91 (2d Cir. 2009) (holding that the NLRB is not entitled to deference where it moves into a new area of regulation which Congress has not committed to it). Indeed, courts routinely reject agencies' attempts to circumvent statutory limits. *See e.g., Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655 (D.C. Cir. 1994) (en banc). In this case, the National Mediation Board ("NMB") provided that, in the case of a consolidation of carriers, the NMB, a carrier, or a carrier's employees could initiate representation proceedings. The court held that the NMB had exceeded its statutory powers because the Railway Labor Act explicitly provided that the NMB's representation process is to be initiated "upon the request of either party to the dispute [i.e., employee groups]." *Id.* at 665.

For these reasons, the Board's interpretation is not entitled to deference.[8]

B. <u>Even if the Board Had Authority to Promulgate the Rule, the Rule Violates the APA and the Constitution.</u>

Even if the Court determines Congress intended to provide the Board the authority to issue some sort of posting rule (which it did not), *this* Rule is both arbitrary and capricious pursuant to the APA, and in violation of the First Amendment of the Constitution. 5 U.S.C. § 706(A), (B); *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983). The Rule violates the APA and must be invalidated because it (1) is arbitrary and capricious because there is no relevant data or an adequate basis for the Rule; (2) is arbitrary and capricious because it selectively ignores critical statutory rights (like right-to-work and free speech rights) that

[8] Plaintiffs respectfully submit that because Congress made clear its intent that the NLRB lacks the authority to implement a Posting Rule, there is no need to conduct the *Chevron* Two analysis. However, even at *Chevron* Two, the Board's Rule is not based on a permissible construction of the NLRA for the reasons set forth in Section II.B, *supra*. *See Chevron*, 467 U.S. at 843.

employees and employers have under the NLRA; and (3) violates the Constitution by infringing on employers' First Amendment rights. 5 U.S.C. § 706(2)(A)-(B).

1. The Rule is Arbitrary and Capricious Under the APA Because the NLRB Did Not Rely Upon Relevant Data or Adequately Explain the Rule.

The Rule violates the standards set forth in the APA. Section 706 of the APA requires the Court to "'hold unlawful and set aside agency action, findings, and conclusions found to be…arbitrary, capricious, an abuse of discretion, [or] otherwise not in accordance with the law." *Nw. Mining Ass'n v. Babbitt*, 5 F.Supp.2d 9, 13 (D.D.C. 1998). "Therefore, [the] Court [should] review the [Board's] actions in accordance with these standards." *N.C. Fisheries Ass'n v. Daley*, 16 F.Supp.2d 647, 651 (E.D. Va. 1997).

The Board has not pointed to any relevant data to support its decision that the Rule is necessary to carry out its purported mandate to educate employees as to their NLRA rights. An agency determination is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicles Mfrs.*, 463 U.S. at 43; *see also aaiPharma Inc. v. Thompson*, 296 F.3d 227, 242 (4th Cir. 2002) (recognizing the court's duty to "ensure that the agency [has] examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made") (internal quotations omitted).

The Board explained its rationale for promulgating the Rule as follows: "For employees to exercise their NLRA rights, however, they must know that those rights exist. There is reason to think that most do not." 75 Fed. Reg. 80,410-11. But rather than collect and rely on valid statistical analysis or representative sampling of employees, the Board relies extensively on three

law review articles that it summarizes in a parenthetical. 76 Fed. Reg. 54,006 n.3; 54,016. These articles—from 1995, 1993 and 1989—are hopelessly outdated, published long before the widespread use of social media. Even worse, only one of the three articles provides any support for the proposition that workers do not know their rights. *See* Peter D. DeCiara, *The Right to Know: An Argument for Informing Employees of Their Rights Under the NLRA*, 32 Harv. J. on Legis. 431, 467 nn.27–33 (1995). That article, in turn, relies on surveys of dubious value from the 1980s, such as a 1985–86 study of high school students in southern Florida finding that "students have very little knowledge of collective bargaining rights." *Id.* at 436 n.28. Another article views labor relations through the prism of the Cold War: "Although we live in a politically democratic society, American employment relationships are typically authoritarian and militaristic in structure." Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. Pa. L. Rev. 1673, 1753 (1989). Professor Morris advocates that American companies emulate their counterparts in "West Germany." *Id.* "West German" workers, and Reagan-era teenagers, simply cannot justify a Rule scheduled to take effect in the United States of America in 2012.

This is not a case where relevant data is "unobtainable." If "American workers are largely ignorant of their rights under the NLRA," the Board should be able to quantify such ignorance with studies, surveys, and other statistics. *F.C.C. v. Fox Tel. Stations*, 129 S. Ct. 1800, 1813 (2009) (citation omitted). The Board's failure to provide such "readily…obtain[able]" data is arbitrary, capricious, and fatal to its attempts to implement the Rule. *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973) ("[i]t is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data").

To the contrary, the data indicate that employees can easily get information about their rights under the NLRA. According to the NLRB's Public Information Program, in 2010, the NLRB's website attracted 2.8 million visitors, and the NLRB has received more than 120,000 telephonic "public inquiries" during the last two fiscal years. Comments of Fisher & Phillips at 2; *see also* Comments of Epstein Becker & Green at 3 ("the [Google] search 'starting a union' yields 48,000 search results, with the…AFL-CIO page [entitled "How to Form a Union Where You Work"] coming up first"); Ass'n of Corporate Counsel at 8 (noting that 77.3% of the U.S. population has internet access).

Ignoring such data, the Board inexplicably ***flips its burden onto the public*** in contravention of its APA obligations: "the Board has been presented with no evidence persuasively demonstrating that knowledge of NLRA rights is widespread among employees." 76 Fed. Reg. 54,015. The Board shifted its rulemaking burden to the public to demonstrate why a rule is *not* needed. It seems hypocritical to rely on three law review articles lacking statistical evidence, yet dismiss the majority of comments because they lack the statistics that the APA requires ***the Board*** to provide.

The Board's promulgation of the Rule, without sufficient evidence to demonstrate the need for it, is arbitrary and capricious under the APA, and must be invalidated. *Motor Vehicles Mfrs.*, 463 U.S. at 52 ("[t]he agency must explain the evidence which is available, and must offer a 'rational connection between the facts found and the choice made'") (citation omitted).

2. The Rule is Arbitrary and Capricious Because It Fails to Take Into Account Employees' Right-to-Work Rights Under State Law.

The Rule is arbitrary and capricious under the APA because the Notice omits employees' statutory rights to abstain from paying union dues or joining unions in the twenty-two states (including South Carolina) that have adopted right-to-work laws under Section 14(b) of the NLRA.

Section 14(b) mandates that "[n]othing in [the NLRA] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State…in which such execution or application is prohibited by State…law." 29 U.S.C. § 164(b). This section permits states like South Carolina to enact laws that grant employees the right to work without having to join a union or to pay union dues as a condition of employment. *See* S.C. Code Ann. § 41-7-30; *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 373 U.S. 746, 750–51 (1963).

The mandated Notice does not identify the employee's right to abstain from union membership in "right-to-work" states. 76 Fed. Reg. 54,019. Aside from two cursory references to right-to-work laws in the preamble, the Board failed to explain why it omitted these ***statutorily mandated*** employee rights. *Id.* Rather, the Board hastily concluded "that the inclusion of these additional items is unnecessary" and stated, "[e]mployees who desire more information regarding the right not to participate can contact the Board." *Id.*

The Board's statement demonstrates how arbitrary and capricious the Rule is. By dismissively advising employees to contact the Board if they desire more information regarding their right to work, the Board omits crucial statutory employee rights from the Notice, thereby potentially misleading employees. *See, e.g.*, Decl. of Jeanie McPherson, Chief Financial Officer of Ludlum Measurements, Inc. ¶¶ 11-14. The Board's cavalier explanation proves too much: if employees can ask the Board about one aspect of their rights under the NLRA, a Rule is not ***necessary*** because employees simply could contact the Board to ask questions about all rights.

Several comments contend that the Board's true motivation is to encourage unionization of employees in South Carolina. *See, e.g.*, Comments of NRWLDF at 10–11; Comments of CDW at 11 n.23. Any picking of sides in the labor-management relationship, at the expense of the full

rights of employees and the stated public policy of the State of South Carolina, is inherently arbitrary and capricious. *See, e.g., Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009) ("[i]n determining whether agency action was arbitrary or capricious, the court must consider whether the agency considered the relevant factors") (citation omitted).

Because the Board failed to consider the fundamental rights of workers in right-to-work states like South Carolina, the Rule is arbitrary and capricious within the meaning of the APA.

3. The Rule Violates Employers' First Amendment Rights.

The Rule violates employers' free speech rights by compelling them to communicate biased, subjective speech on their property in the absence of a compelling state interest.

The First Amendment "prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 61 (2006). Where the government mandates speech that a speaker "would not otherwise make," the government "necessarily alters the content of the speech." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795 (1988). "Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views…." *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001). Like individuals, businesses have free speech rights to speak, or not to speak, as they see fit. *Pac. Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 8 (1986).

a. The Notice constitutes subjective speech that favors unions.

There can be no serious suggestion that the Notice is a purely factual and noncontroversial commercial message. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). Whatever can be said of Congress's ability to compel companies to display purely factual warning and nutrition labels, or notices regarding occupational safety or employment discrimination, the NLRB's Notice is different. *Cf.* 29 U.S.C. § 657(c)(1); 42 U.S.C. § 2000e-10(a).

The Notice qualifies as subjective, controversial political speech. The Notice sends a biased message on the subject of unionization. 76 Fed. Reg. 54,048-49. The Notice's first six bullet points trumpet the rights of employees to (1) "[o]rganize a union," (2) "assist a union," (3) "[b]argain collectively," (4) "[d]iscuss…union organizing with your co-workers," (5) seek "help from a union," and (6) "[s]trike and picket." *Id.* at 54,048. Only in bullet point seven does the Notice mention, in passing, that employees can "[c]hoose not to do any of these activities." *Id.* Taken as a whole, as the message has been shaped by NLRB and is required to be delivered, the Notice clearly expresses an overall message that favors unions and unionization.

In contrast, the Notice virtually ignores employees' rights not to join a union, the risks of joining a union, and employees' rights with respect to unions. The lone bullet point "does not give appropriate emphasis to employees who do not wish to exercise any of the enumerated rights." Comments of COCUS at 8. As a result, the Notice "does not provide fair disclosure of an employee's right to refrain from union activity." Decl. of Neil Whitman, Owner of Dunhill Staffing Systems ¶ 10. In right-to-work states, such as South Carolina, this distortion is affirmatively misleading. *Id*. at ¶ 11. Furthermore, the Notice never mentions "the important rights that employees give up" by joining a union, such as the right to speak directly with the employer about wages. Comments of COCUS at 9. Finally, the Notice ignores numerous rights that employees have with respect to unions, such as their rights to decertify a union and to refuse to pay dues to support a union's political agency.[9] *Id.*

[9] In fact, the Board omitted "*Beck* rights" on the ground that *Beck* rights only apply to employees represented by unions under collective bargaining agreements containing union-security provisions. 76 Fed. Reg. 54,023. (established in *Communication Workers v. Beck*, 487 U.S. 735 (1988), "*Beck* rights" include the right of certain non-union members to pay only those dues and fees necessary for the union to perform its duties as a collective bargaining representative). However, unionized employees are employees, too. The only reason to exclude notice of the rights of represented

For these reasons, the record contains numerous comments complaining that the Rule requires employers to post a biased and distorted Notice. A few examples include the following:

- "the notice reads more like a union manifesto than an unbiased explanation" (Joint Poultry Ind. Human Res. Council at 4);
- the notice suffers from "glaring omissions" and paints a "distorted" picture (Int'l Foodservice Distribs. Ass'n at 4);
- "to inform employees of only certain specific rights, and thereafter to 'advise' them how to exercise those select rights, goes far beyond a simple posting of rights" (Food Mktg. Inst. at 11);
- "the Notice makes no pretense about the poster's primary purpose—the promotion of union organizing" (Employers Ass'n of N.J. at 4).

The declarants concur that the Notice violates their free speech rights. As one summarizes, "Requiring me to post such biased, incomplete, and politically-based information forces me to post information that I believe could be inaccurate and misleading to the company's employees and could be in violation of the company's First Amendment rights." Whitman Decl. ¶ 14. Indeed, the Board itself tacitly recognizes that the Notice presents a biased message by proclaiming that an employer's refusal to post the Notice constitutes an expression of anti-union animus. 76 Fed. Reg. at 54,036-37.

b. The Notice neither serves a compelling state interest nor is narrowly tailored.

Because the Rule requires businesses to present a subjective and controversial viewpoint on their private property, the Rule is subject to strict scrutiny. *See Wooley v. Maynard*, 430 U.S. 705, 715 (1977). Under a strict scrutiny analysis, the government must demonstrate that it has a compelling state interest and narrowly tailored the compulsion to serve that interest. *Citizens United v. FEC*, 130 S. Ct. 876, 892 (2010); *Pac. Gas*, 475 U.S. at 19; *Entm't Software Ass'n v.*

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employees would be to focus the Notice on topics related to unionizing: organizing, forming or joining unions; bargaining; and taking concerted action, such as picketing and strikes.

Blagojevich, 469 F.3d 641, 652 (7th Cir. 2006). The First Amendment "stands against attempts to disfavor certain subjects or viewpoints," and thus, prohibits content-based restrictions on speech. *Citizens United*, 130 S. Ct. at 898-99. In *Entertainment Software*, for example, the court applied strict scrutiny to invalidate warning labels on video games because the labels conveyed the government's subjective judgment. 469 F.3d at 652; *see also R.J. Reynolds Tobacco Co. v. FDA*, No. 11-1482, 2011 WL 5307391, at *7 (D. D.C. Nov. 7, 2011) (enjoining graphic cigarette package labels where the labels "are *not* the type of purely factual and uncontroversial disclosures that are reviewable," thus demonstrating that "the Government's *actual* purpose is not to inform, but rather to advocate a change in consumer behavior").[10]

The government cannot compel subjective, political speech on private property. In *Wooley*, New Hampshire enacted a law that required all license plates to bear the state motto, "Live Free or Die." 430 U.S. at 706-07. The Supreme Court struck down the requirement because the state "forces an individual, as part of his daily life…to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Id.* at 715. The Court stressed that the compelled speech would occur on private property: "New Hampshire's statute in effect requires that appellees use their private property as a 'mobile billboard' for the State's ideological message – or suffer a penalty." *Id.*; *see also Pac. Gas*, 475 U.S. at 20-21 (holding it unconstitutional to require that utility company include a third-party newsletter in its billing envelope).

Likewise, here, the Rule neither serves a compelling state interest nor is narrowly tailored. The government's interest necessarily falls short of "compelling" because Congress, for the past 76 years, has not expressly required posting of union rights. *See* Section I.A, *supra*; *cf. Lake Butler Apparel Co. v. Sec. of Labor*, 519 F.2d 84, 89 (5th Cir. 1975) (upholding OSHA posting requirement that

[10] A copy of this unpublished opinion is attached hereto as Exhibit D.

"Congress thought to be essential"). Moreover, the Board failed to identify any relevant evidence that employees lack knowledge of their rights under the NLRA. *See* Section III.B.1, *supra*; *cf. Zauderer*, 471 U.S. at 648 (striking speech restrictions where the "State's arguments amount to little more than unsupported assertions: nowhere does the State cite any evidence or authority of any kind…"). Finally, the Rule is vastly over-inclusive. The Rule applies to virtually every employer in the country, regardless of whether the employer has ever violated the NLRA. If the Board truly wanted to disseminate this information, it could launch a publicity campaign on its own. *Cf. Riley*, 487 U.S. at 800 (noting that the State could publish information itself).

c. The Notice does not qualify as government speech.

Finally, the Board cannot defend the Notice on the ground that it constitutes government speech, because the Notice must be posted on private property, not government property. *See, e.g.*, *Wooley*, 430 U.S. at 715. In *Wooley*, the Supreme Court rejected the dissent's argument that the license plate's government logo transformed the message into government speech, because such speech was on private property (a car). *See id.* at 719-22 (Rehnquist, J., dissenting). As in *Wooley*, the Rule impermissibly requires employers to post an ideological message on private property.

C. Even If the Board Had Authority to Promulgate the Rule, the Board Violated the Regulatory Flexibility Act by Failing to Perform a Final Regulatory Flexibility Analysis.

The Board violated the RFA by failing to conduct an Initial Regulatory Flexibility Analysis ("IRFA") and a Final Regulatory Flexibility Analysis ("FRFA") before promulgating the Rule. 5 U.S.C. §§ 603, 604. Although the Board certified that the Rule will not have a "significant economic impact," the certification has no factual basis in the administrative record. The Board arbitrarily ignored entire categories of compliance costs, such as training time and legal fees—estimates that place the Rule's true costs in the billions. As explained in detail below, based on

declarations of small entities and numerous comments of the business community, the Rule's true costs likely exceed five billion dollars, and could approach thirteen billion dollars. By any measure, this potential economic impact qualifies as "significant." Accordingly, this Court should, at a minimum, remand the Rule to the Board with instructions to conduct an IFRA and a FRFA.

1. The RFA required the Board to conduct an IRFA and FRFA.

The RFA required the Board to complete an IRFA and FRFA that contains an initial and final regulatory economic analysis of the Rule's impact on small business, and describes, among other things, the reasons for the rule and any significant alternatives. 5 U.S.C. §§ 603, 604. The IRFA would have given the public an opportunity to comment on the proposal's economic impacts, and to suggest less burdensome alternatives. *S. Offshore* I, 995 F.Supp. at 1436. The Board should then have conducted a FRFA to explain the steps it took "to minimize the significant economic impact on small entities," and its reasons for rejecting alternatives. 5 U.S.C. § 604. Rather than take the necessary steps, the Board certified to the Small Business Administration ("SBA") that the Rule will not have a "significant economic impact on a substantial number of small entities." 76 Fed. Reg. 54,042.

The Board's certification is subject to judicial review. *See, e.g.*, 5 U.S.C. § 611; *Nat'l Ass'n of Home Bldrs. v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1285–86 (D.C. Cir. 2005); *Nw. Mining*, 5 F.Supp.2d at 13. A reviewing court must ensure that the agency made a "reasonable, good-faith effort, prior to issuance of a final rule, to inform the public about the potential effects of [the] proposals and about less harmful alternatives." *S. Offshore* I, 995 F.Supp. at 1437 (citations omitted). If an agency violates the RFA, the court can remand the rule and defer enforcement:

> The RFA affords considerable discretion in formulating an appropriate remedy for the [agency's] failure to comply with the statute. In granting relief for a violation, a court may take corrective action which includes remanding the rule to the agency and deferring enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest.

Id. (citing 5 U.S.C. § 611(a)(4)).

2. The Rule Imposes a Significant Economic Impact.

By any measure grounded in fact, the Rule would impose a "significant economic impact" on small businesses and the economy as a whole. The RFA does not define "significant economic impact," but the House Report states that the meaning of significant "will vary from case to case." *See* 5 U.S.C. § 601; 126 Cong. Rec. H24,589 (daily ed. Sept. 8, 1980). The Senate Report advises that "Agencies should not give a narrow reading to what constitutes a 'significant economic impact'….The effect need not be significant on every business subject to the regulation for the total effect of a rule to be significant." 126 Cong. Rec. S21,458 (daily ed. Aug. 6, 1980). Examples of "significant" costs include a company that paid a $500 fine (in 1980 dollars), 126 Cong. Rec. H24,578;[11] a small business that had to spend $1,270 annually to fill out paperwork, *id*. at S21,454; and a business that had to spend 175 staff hours annually on recordkeeping. *Id.* at S10,938.

Congress also considered the total costs of regulations on the economy as a whole. As one congressman explained, "[t]he overregulation of small business is not just a parochial problem; it is a public problem as well…[C]onsumers, to a large extent, must pay the costs of regulation in the form of higher prices." 126 Cong. Rec. H24,585 (statement of Rep. Ireland); *see also* 126 Cong. Rec. S21,456.[12]

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[11] Based on the consumer price index, in 2011 dollars, this cost would be equal to $1,376.75. *See* CPI Calculator of the Bureau of Labor Statistics, *available at* http://data.bls.gov/cgi-bin/cpicalc.pl (last visited Nov. 6, 2011).

[12] In evaluating the term "significant economic impact," the NLRB cites to statements from the SBA to justify a narrow use of that term. 76 Fed. Reg. 54,043. The SBA, in turn, states that a rule causes a significant impact if it causes long-term insolvency, short-term insolvency, places small entities at a competitive disadvantage, or if the costs to small entities outweigh the social benefits. *See id*. The RFA's legislative history indicates that Congress intended the term to have a much broader scope than that afforded by the SBA. In any event, as discussed in the text, the Rule causes substantial inefficiencies and disadvantages small businesses, who are less able to absorb the Rule's costs. Moreover, Mr. Whitman attests that the Rule is likely to eliminate 10% or more of his

In both the NPRM and final rule, the Board certified that the Rule would not impose a "significant economic impact." 75 Fed. Reg. 80,415-16; 76 Fed. Reg. 54,042. The Board concedes that the Rule would affect a "substantial number" of small entities, i.e., almost all of the six million businesses subject to its jurisdiction. 76 Fed. Reg. 54,042–43. The Board's certification hinges on its estimate that businesses would spend only two hours to comply with the Rule: "30 minutes for the employer to learn where and how to post the required notices, 30 minutes to acquire the notices from the Board or its Web site, and 60 minutes to post them physically and electronically." *Id.* at 54,042. Based on this estimate, and an average wage of $32.20 per hour, the Board calculates the costs at $64.40 per employer during the Rule's first year.

a. The Board's cost estimate lacks a factual basis in the record.

The Board's analysis falls short in several regards. First, the Board's compliance cost estimate lacks the factual basis required by the RFA. *See, e.g.*, *Am. Fed'n of Labor v. Chertoff*, 552 F.Supp.2d 999, 1012-13 (N.D. Cal. 2007) ("*AFL*"). In *AFL*, for example, the court enjoined an agency rule regarding safe-harbor provisions for employers hiring unauthorized workers because the employers' declarations created "serious questions whether [the agency] violated the RFA by refusing to conduct a final flexibility analysis." *Id.* at 1013. "Plaintiffs have raised serious doubts about the veracity of [the agency's] prediction that the [final] rule will 'not impose any new or additional costs' on employers. Plaintiffs' declarations establish that small businesses can expect to incur significant costs associated [with] complying with the [final] rule." *Id.* These costs included "dedicating human resources staff" to compliance, hiring "legal and consultancy services," and "paying for the training of in-house counsel and human resources staff." *Id.*

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company's annual profits, Whitman Decl. ¶ 29, a figure that is consistent with the SBA's definition of "significant." *See* SBA, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* at 18 (June 2010), *available at* http://www.sba.gov [hereinafter "SBA Guide"].

Courts routinely reject agency certifications that, like the Board's, lacked factual support in the record. *See, e.g.*, *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 643 (1986) ("[e]ven according the greatest respect to the Secretary's action, however, deference cannot fill the lack of an evidentiary foundation on which the Final Rules must rest"); *Nat'l Truck Equip. Ass'n v. Nat'l Highway Traffic Safety Admin.*, 919 F.2d 1148, 1157 (6th Cir. 1990) ("although the Administration has at least said that the standard would not have a great impact on small business, such a conclusory statement with no evidentiary support in the record does not prove compliance with the [RFA]"); *Harlan Land Co. v. USDA*, 186 F.Supp.2d 1076, 1097 (E.D. Cal. 2001) (remanding final rule after concluding that the agency had ignored certain risks in calculating the rule's economic costs); *N.C. Fisheries*, 16 F.Supp.2d at 651 (rejecting certification because the agency's conclusory "'statement'…does not provide a factual basis").

Here, the Board's two-hour compliance estimate provides the foundation for its entire cost analysis. That estimate, however, is conjured out of thin air. The Board cites no studies, surveys, articles, anecdotes, or anything in the administrative record for this estimate. The Board acknowledges that some employers, particularly those with multiple facilities, may have to spend more than two hours of employee time to comply with the Rule, but simply asserts that its estimate is an accurate average for all employers. 76 Fed. Reg. 54,042 n.191. For this reason alone, the Rule must be remanded. *See S. Offshore* I, 995 F.Supp.at 1435 (finding the "record fails to contain an adequate explanation of the agency's calculation, if any, leaving no possibility to gauge its rationality, which is manifestly suspect").

Moreover, both the administrative record, and multiple small business declarations, refute the Board's estimate. Neil Whitman, Stephen Snipes, and Jeanie McPherson are, respectively, the owner, general manager, and Chief Financial Officer of three small businesses that conduct

business in South Carolina and are members of SCCC and/or COCUS.[13] All three submitted declarations stating that the Rule will impose other substantial costs upon their companies, including costs associated with implementing the posting requirement and training employees. Whitman Decl. ¶¶ 17-28; Snipes Decl. ¶¶ 15-24; McPherson Decl. ¶¶ 17-28. Mr. Whitman estimates that the Rule could force his company to spend up to 40.5 hours of employee time, and incur costs of up to $631.80, to learn about the requirements, educate human resources personnel, acquire the posters, and physically post the posters at multiple locations. Whitman Decl. ¶¶ 20-21. Similarly, Ms. McPherson estimates that her company could spend up to $983.01 on these tasks. McPherson Decl. ¶¶ 17-21. Contrary to the Board's unsupported estimate, Mr. Whitman attests that his company would have to spend eight hours of employee time (rather than thirty minutes) to understand the Rule. Whitman Decl. ¶¶ 16-17. Several comments agree that these tasks will take more time than estimated by the Board.[14]

b. The Board's estimate arbitrarily ignores training costs.

Second, the Board's estimate arbitrarily ignores training costs. The Board improperly refuses to consider training costs because it believes these "will be incurred entirely at the employers' own volition; they are not a cost of complying with the rule." 76 Fed. Reg. 54,045. The Board is simply incorrect—agencies must include training in calculating costs. *AFL*, 552 F.Supp.2d at 1013; *see also* SBA Guide at 30 ("[c]osts might include…*employee skill and training*, administrative practices…productivity, and promotion.") (emphasis added).

[13] All three companies qualify as "small businesses" under the regulations set forth by the SBA. *See, e.g.*, 5 U.S.C. § 601(3); 13 C.F.R. § 121.201; SBA Guide at 11–12; Whitman Decl. ¶ 6; Snipes Decl. ¶ 21; McPherson Decl. ¶ 5.

[14] *See* Comments of the Retail Indus. Leaders Ass'n at 3 ("[d]eciphering and complying with the Board's requirements would impose significant legal and administrative costs"); Int'l Foodservice Distribs. Ass'n at 6-7 (unclear requirements will increase compliance time).

Training is integral to compliance. All three declarants estimate that their companies would have to spend time to train employees, answer questions, and maintain the posters. For Mr. Whitman, these additional costs bring his company's compliance costs for the first year up to a total of $2,644.95 *See* Whitman Decl. ¶¶ 16-26. Ms. McPherson's costs are even higher. She estimates that her larger company would have to spend approximately $14,104 to train 432 employees and managers. McPherson Decl. ¶¶ 22-23. Mr. Snipes also estimates additional compliance costs to train new employees on an ongoing basis. Snipes Decl. ¶¶ 20-21. In fact, numerous comments agreed that training is *sine qua non* of compliance:

- "most employers will have to explain the proposed Board posting, especially if it is unbalanced or incomplete. It is a common experience that employees ask questions about workplace postings" (Baker & McKenzie at 5);

- "Posting a notice is not as simple as placing a piece of paper on a bulletin board…..Employers must train managers….A new notice posting requirement will require millions of man-hours to comply" (Ass'n of Corporate Counsel at 2).

This training time imposes significant economic costs on small entities. In terms of the economy as a whole, both Mr. Whitman and Mr. Snipes estimate that employees will spend at least 60 minutes in training; Ms. McPherson, whose company has regional facilities, estimates that employees will spend two hours in training, including travel time. Using a conservative figure of 60 minutes, an average pay rate of $32.20 per hour for the nation's 140 million private sector employees, the Rule's true cost, in employee time, approximates $4.5 billion.

c. The Board's estimate arbitrarily ignores legal costs.

Third, the Board's estimate arbitrarily ignores legal costs of compliance. The Board asserts that "[t]he choice to retain counsel is not a requirement for complying with the rule" because, in the Board's view, the Rule is not "complicated or nuanced." 76 Fed. Reg. 54,044. The Board, however, is required to consider legal costs when calculating compliance costs. *AFL*, 552

F.Supp.2d at 1013; SBA Guide at 34. Congress is particularly sensitive to the legal costs of compliance on small businesses: "Small businesses cannot cope with the maze of Federal regulations and they cannot afford the hiring of lawyers…which are employed by large companies." 126 Cong. Rec. H24,578; *see also id*. at 24,587 ("[w]hereas large firms typically have a managerial structure and/or legal section that can absorb these costs…small firms must either add increments…or seek consulting services which are expensive…").

The Rule contains numerous ambiguities that likely will require small businesses to incur significant legal costs. For example, Mr. Whitman is unsure whether the Rule requires his staffing company to post the notice at all of his clients' sites. Whitman Decl. ¶ 8. Other ambiguities include the requirements that employers post notices in "conspicuous places," in foreign languages for employees "not proficient in English," and electronically if the employer "customarily communicates" about personnel rules by such means. 76 Fed. Reg. 54.046-47. Several comments noted that ambiguities will force some companies to obtain legal counsel.[15]

These legal costs could prove significant. If just one in five of the six million covered employers (about 1.2 million) hires a lawyer for just two hours, at a rate of $250/hour, the total legal costs on small business would approximate $600 million. If a few hundred of these companies have to hire a lawyer for more than a few hours, the economic impact on them would qualify as "significant" by any measure. *See* Comments of Fisher & Phillips at 5.

d. The Board's estimate ignores the negative impact on labor relations.

In addition to these quantifiable costs, the Board arbitrarily ignores the costs on labor relations. The Board was obliged to consider intangible costs in its analysis. "[A] determination of

[15] *See* Comments of COCUS at 9-10 ("any electronic posting requirement will impose significant costs" and "raises numerous questions"); Baker & McKenzie at 5; Retail Ind. Leaders Ass'n at 3; Int'l Foodservice Distribs. Ass'n at 6 (electronic posting requirement "lacks the clarity employers need to understand their compliance obligations" and "leaves important questions unanswered").

significant economic effect is not limited to easily quantifiable costs." 126 Cong. Rec. S21,458. Here, the declarants and numerous commenters believe that the Rule would damage employee relations. Mr. Whitman attests that the Notice's "misinformation could be potentially harmful to employer-employee relations and infringe upon normal business activities…." Whitman Decl. ¶ 13. For these reasons, the Rule "has the very real potential for needlessly disrupting the workplace. Selective, incomplete, and even misleading advice for employees goes far beyond a notice informing employees of their Section 7 rights." Comments of Food Mktg. Inst at 8.[16]

As a result, the Rule could harm small business operations. The Board's own authority predicts that the Notice could cause "some minor, short-term disruption to production." DeCiara, *supra* at 467 (cited by the Board at 76 Fed. Reg. 54,006 n.3). Any disruption to production, no matter how "minor" or "short-term," would impose very real costs.

e. The Board ignores the Rule's total economic impact.

Finally, the Board impermissibly ignores the Rule's total economic costs. The Board was required to consider the total impact of a rule on industry and the economy in its analysis. *See* 126 Cong. Rec. S21,456; *Nw. Mining Ass'n*, 5 F.Supp.2d at 16 ("[e]ffects on small businesses and industry-wide changes in regulatory expenses, however, are precisely what the procedural safeguards of the RFA and APA are set in place to address").

Setting aside the Rule's impact on any particular small business or group of businesses, the RFA requires the NLRB to conduct a FRFA because of the Rule's significant costs to the economy as a whole. By the Board's own calculation, the Rule costs employers approximately $372 million,

[16] *See also* Comments of Int'l Foodservice Distribs. Ass'n at 7 ("these estimates ignore the more indirect and deleterious impact on employee relations of widely distributing a biased and incomplete picture of employee rights"); Motor & Equip. Mfg. Ass'n at 2 ("[t]he natural reaction in the workplace will be to assume that the appearance of the NLRB poster means that their employer has violated the law").

which "has a significant impact on employers in the present recession." Comments of Ctr. on Nat'l Labor Policy at 15. A more accurate estimate of compliance, including training time and legal fees, places the Rule's quantifiable costs at more than $5 billion. Actual costs could be even higher. Mr. Whitman estimates that the Rule will force his company to incur costs of $2,176.95 to $2,644.95 in the first year; for her larger company, Ms. McPherson estimates those costs at $27,532.85 to $27,659.69. Multiplying Mr. Whitman's conservative figure by the nation's six million private employers yields first-year compliance costs in excess of $13 billion. Based on the RFA's text, legislative history, and animating purpose, the Rule should, at a minimum, be remanded to the NLRB to perform an FRFA prior to imposing these costs on American businesses and consumers.

2. The Board Failed to Consider Significant Alternatives.

Finally, the Board also violated the RFA by failing to consider any significant alternatives. *See Nat'l Ass'n of Psychiatric Health Sys. v. Shalala*, 120 F.Supp.2d 33, 43–44 (D.D.C. 2000). There, the Court remanded an agency rule regarding hospital evaluations because the rule "did not obtain data or analyze available data on the impact of the final rule on small entities," and did not discuss "what, if any, steps the agency took to minimize the significant economic impact." *Id.* The court emphasized "the Secretary's analysis is severely lacking, and the Court cannot find that she has made a 'reasonable, good-faith effort to canvass major options and weigh their probable effects.'" *Id.* at 43 (citation omitted); *see also Aeronautical Repair Station Ass'n v. FAA*, 494 F.3d 161, 177-78 (D.C. Cir. 2007) (remanding final rule where agency failed to consider alternatives); *S. Offshore Fishing Ass'n v. Daley*, 55 F.Supp.2d 1336, 1340 (M.D. Fla. 1999) (*S. Offshore* II) ("[m]ost distressing is the agency's apparently superficial analys[i]s of less restrictive alternatives…..[It] devotes only four of fifty pages to considering potential alternatives"), *vacated after settlement*, 2000 WL 33171005 (M.D. Fla. Dec. 7, 2000).

Here, the Board considered only one alternative, namely, exempting very small businesses from the Rule. The Board's failure to consider other significant alternatives stems from its failure to perform an IRFA, which denied the public the opportunity to suggest meaningful alternatives. *See S. Offshore* I, 995 F.Supp. at 1436-37; SBA Guide at 71 ("a proper IRFA is necessary to provide the foundation for a good FRFA"). The Board has a legal obligation to solicit and consider a range of alternatives. *See* SBA Guide at 36 ("the IRFA is designed to explore less burdensome alternatives and not simply those alternatives it is legally permitted to implement").

Despite the lack of an IRFA, several entities offered constructive, feasible alternatives. For example, two comments encouraged the NLRB to educate employees through public service announcements. *See* Comments of Mich. Chamber at 2; Ctr. on Nat'l Labor Policy at 15. Other possible alternatives include obtaining express authority from Congress, or the creation of a simple, unbiased, and unambiguous notice that would not force employers to incur training and legal costs. *See* Comments of COCUS at 7 (describing alternative language for notice).

Because the NLRB failed to conduct a FRFA, its Rule is invalid and, at a minimum, must be remanded for the completion of a compliant FRFA.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit they are entitled to summary judgment on all of their claims against the Board. Plaintiffs request that this Court hold the Rule unlawful and set it aside or, in the alternative, remand the Rule to the Board to conduct an IRFA and FRFA.

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Respectfully submitted,

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